

In T.160/13 the board confirmed that the opposition division had rightly examined the transfer of the priority right on the basis of German law, which called for a bilateral declaration of transfer by both applicants (§§ 398 and 413 in conjunction with §§ 145 ff. of the German Civil Code (BGB)). Such declarations were not subject to any particular formal requirements under German law, and no other requirements of a formal nature could be inferred from the decisions cited by the appellant, T.1056/01 and T.62/05. In the board's view the correspondence on file provided ample proof of the transfer.

The board in T.205/14 pointed out that neither Art. 87 EPC 1973 and Art. 88 EPC nor R. 52 and 53 EPC set out any requirement for determining the law governing transfer of the priority right. It disagreed with the reasoning of T.62/05 (see above) that the transfer had to be proven in a formal way, applying an equally high standard of proof as that required by Art. 72 EPC 1973. Art. 72 EPC 1973 set out formal requirements for a valid assignment of a European patent application and thereby limited the means of giving or obtaining evidence for determining such a transfer. Having regard to Art. 117 EPC and the principle of free evaluation of evidence, the rule should not be extended beyond its scope of application. Art. 72 EPC 1973 constituted harmonised law with respect to the formal requirements for a transfer of a validly filed European patent application, and no reason was apparent for applying it by analogy in the context of a transfer of the priority right preceding a subsequent filing. To do so in view of a subsequent European patent application would, in the case of a European first filing, ignore the fact that the priority right is a right independent of the right to the first application and, in the case of a non-European first filing, that Art. 72 EPC 1973 does not govern the relationship between the applicant of a European patent application and a different applicant of a distinct first application. Art. 72 EPC 1973 and R. 20 EPC 1973, and the related provisions (Art. 60(3) EPC 1973 and Art. 61 EPC), rather defined the conditions under which the EPO may take into account questions of substantive law and procedural acts by a person other than the registered applicant (J. 2/01, OJ 2005, 88, point 3 of the Reasons). The board came to the same conclusion as the German Federal Supreme Court in its decision of 16 April 2013 that Art. 87 EPC does not require a formal and separate assignment as provided by Art. 72 EPC.

Furthermore, since the provisions of the EPC did not lend themselves to an autonomous determination of the requirements for transfer of the priority right, the validity of such transfer was a matter of national law (cf. T.1008/96; cf. also approach in T.160/13, J. 19/87, T.493/06). In the circumstances of those cases, however, the **choice of applicable national law** did not seem to be an issue. In none was the law of the state for which protection was sought by the subsequent filing considered to be relevant, nor did they provide guidance on whether the law applicable to the legal relationship between the transferor and the transferee (e.g. corporate agreement, employment contract, or universal succession) should apply, or the law of the state of filing of the first application. This point of law was, however, relevant to the decision in hand. Accordingly, the board considered both the law applicable to the legal relationship between the transferor and the transferee of the priority right and the law of the state of filing of the first application and concluded that the former – in this case the law of the state of the employment relationship between the applicants (inventors) of the US provisional applications from which priority was claimed and the patent proprietor (here the law of Israel) – determined the transfer.