

the patent, using common general knowledge, would be unable to carry out the invention. If the opponent has discharged its burden of proof and so conclusively established the facts, the patent proprietor then bears the burden of proving the alleged facts.

Indeed, a successful objection of a lack of sufficiency of disclosure presupposes that there are serious doubts, substantiated by verifiable facts (see e.g. decision T.19/90, OJ 1990, 476 and decision T.890/02, OJ 2005, 497). In order to establish insufficiency of disclosure in **inter partes proceedings**, the burden of proof is upon an opponent to establish, on the balance of probabilities, that a skilled person reading the patent, using his common general knowledge, would be unable to carry out the invention (see decision T.182/89, OJ 1991, 391).

A mere statement that one of several examples in a patent has been repeated once "exactly as described" without obtaining exactly the results claimed in the patent is in principle inadequate to discharge that burden (see also T.406/91, T.418/91, T.548/91, T.588/93, T.465/97, T.998/97, T.499/00, T.751/00 and T.967/09). Where the parties make contradictory but unsubstantiated assertions concerning facts relevant for establishing patentability and the EPO is not in a position to establish the facts of its own motion, the benefit of the doubt is given to the patent proprietor (T.72/04). If the patent contains only an example with a hypothetical experimental protocol, and this example is to be relied on for showing sufficiency, then the burden of proof lies on the patentee to show that in practice this protocol works as stated. Evidence that a variation of this protocol works is unlikely to be enough (T.792/00). However, the patent at issue in T.397/02 disclosed a specific humanised version of a mouse antibody and also many specific alternatives thereof. The case was therefore not comparable to T.792/00 (or T.984/00) where not a single specific example of the claimed subject-matter was disclosed. Thus the appellant-opponent bore the burden of proving that the invention could not be carried out.

9.1. Consequences of a strong or weak presumption for sufficiency of disclosure

The board in T.63/06 (see "headnote") agreed that the opponent generally bears the burden of proving insufficiency of disclosure. When the patent does not give any information as to how a feature of the invention can be put into practice, only a weak presumption exists that the invention is sufficiently disclosed. In such a case, the opponent can discharge his burden by plausibly arguing that common general knowledge would not enable the skilled person to put this feature into practice. It is then up to the patent proprietor to prove the contrary, i.e. that the skilled person's common general knowledge would enable him to carry out the invention (for a more recent example, see T.338/10, in which the board found that the opponent's reasoned arguments had shifted the **burden of proof**, and, to the same effect, T.518/10; compare also with T.792/00, point 9 ff of the Reasons (burden of proof in case of a hypothetical experimental protocol)).

In T.491/08 the board, referring to T.63/06 held that a presumption exists that, in general, a patent application relates to an invention which is disclosed in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art. The weight of arguments and evidence required to rebut this presumption depends on its strength. A strong presumption requires more substantial arguments and evidence than a weak one. If a