

proceedings, including its decision, by reason only of the absence at the oral proceedings of a party duly summoned who may then be treated as relying only on its written case." The preparatory documents to this Article (initially in the RPBA 2003) state that this provision does not contradict the principle of the right to be heard pursuant to Art. 113(1) EPC since that Article only affords the opportunity to be heard and, by absenting itself from the oral proceedings, a party gives up that opportunity (CA/133/02 dated 12 November 2002). This RPBA provision superseded the findings of G 4/92 with regard to the non-attendance at the oral proceedings before the boards (T 706/00). To the extent that G 4/92 supports the general admissibility of new arguments in appeal proceedings, it was also modified by the amendments to the RPBA introduced with effect from 1 May 2003 (the RPBA 2020 are applicable since 1 January 2020), which made the introduction of new arguments subject to the discretion of the boards (T 1621/09, summarising previous case law). G 4/92 still applies for the departments of first instance (see Guidelines E-III, 8.3.3.2 – March 2022 version). With regard to proceedings before the examining divisions, see also the notice published in OJ 2020, A124.

In T 2138/14 (ex parte) the board stated that it was established case law that a non-attending party's right to be heard under Art. 113(1) EPC must not be ignored (see in this chapter III.B.2.7). This view was confirmed by analogy to Opinion G 4/92. Although G 4/92 explicitly only concerned inter partes proceedings, the same principle has been applied in ex parte proceedings (see in this chapter III.B.2.6.1).

2.7.2 Non-attendance at oral proceedings before the boards – case law on G 4/92

In T 341/92 (OJ 1995, 373) the board held that it was possible to base a decision on a ground discussed for the first time during oral proceedings, at least if the stage reached in the case was such that the absent – albeit duly summoned – patent proprietors could have expected the question to be discussed and were aware of the actual basis on which it would be judged. The board did not consider itself prevented by reasons of procedural law from rendering a decision on the basis of Art. 123(3) EPC, on an issue brought up by the board for the first time at the oral proceedings. It argued that the situation differed from G 4/92 in that the extension of the protection conferred, to which objection had been made, arose solely from a comparison of the wordings of the claims, and therefore not from facts that had only been introduced during oral proceedings.

In T 802/12 the board likewise dismissed the appeal on the basis of Art. 123(3) EPC, which had been discussed for the first time at the oral proceedings. The board referred to T 341/92 and found that the appellant could have expected the amendments it had made to be examined at the oral proceedings as to their conformity with the requirements of the EPC (G 9/91, OJ 1993, 408). A party duly summoned to oral proceedings could not rely on the proceedings being continued in writing or the case being remitted to the department of first instance simply because he had not attended the oral proceedings (Art. 15(3) and (6) RPBA 2020; see in this chapter III.B.2.7.3 "Non-attendance at oral proceedings before the boards – Article 15(3) RPBA 2020").

In T 133/92 the board concluded that considering and deciding in substance on the maintenance of the patent on the basis of claims as amended during oral proceedings in