

them, provided that the party had given all the necessary and proper instructions to the carrier.

In T 777/98 (OJ 2001, 509) the board held (see headnote) that if a party to proceedings requested re-establishment of rights on the basis that a document missed an EPO time limit because it did not arrive within the **standard delivery time**, that party would have to prove that the form of postage used would normally have ensured that the document would reach the EPO on time. The board left open the question whether a party who relies on the usual delivery time has exercised all due care with regard to the time limit.

## **6. Procedural treatment of requests for re-establishment**

### **6.1. Department competent to decide upon the request**

The department competent to decide on the omitted act shall decide upon the application (R. 136(4) EPC, Art. 122(4) EPC 1973).

The boards of appeal are competent to decide on the request for re-establishment in respect of the **time limit for filing a notice of appeal** (Art. 108 EPC), since the department competent to decide whether the appeal was inadmissible for non-compliance with Art. 108 EPC is, under R. 101(1) EPC, the board of appeal (T 1973/09; T 808/03 of 12 February 2004; T 949/94 of 24 March 1995; T 473/91, OJ 1993, 630). The boards of appeal are also competent to decide on the request for re-establishment in respect of the time limit for filing the written **statement setting out the grounds of appeal** (T 624/96).

While this competence in relation to admissibility of an appeal is subject to the exception of Art. 109(1) EPC (interlocutory revision), this provision confers only the limited power to set aside the department's own decision if the appeal was considered admissible **and** well founded (T 808/03, T 1973/09). The admissibility of an appeal under Art. 109 EPC only falls under the jurisdiction of the department of first instance when this question can be decided immediately on the basis of the appeal submissions themselves (notice of appeal and statement of grounds, date of payment of the appeal fee). The boards of appeal have exclusive jurisdiction over a request for restitutio in respect of a time limit relating to the appeal itself (T 473/91, T 949/94, T 65/11).

In W 3/93 (OJ 1994, 931) the board held that as the board had to decide on the protest, it was also competent to examine the request for re-establishment of rights (Art. 122(4) EPC 1973).

In T 555/08 loss of rights (deemed withdrawal of the application due to **non-payment of a renewal fee**) occurred **while appeal proceedings were pending**. When appeal proceedings start, responsibility for the case passes from the department of first instance to the boards of appeal (the devolutive effect, see T 473/91, OJ 1993, 630). Hence in the case in point jurisdiction to decide on the request for re-establishment lay with the board hearing the pending appeal (see T 191/82, OJ 1985, 189; T 936/90 of 22 July 1993; T 708/08; T 1935/08; T 1426/14).