

3.3.3 Parties' responsibilities

In R 6/12 (case T 928/10) the Enlarged Board considered unfounded the assertion made by the petitioner (opponent) that it had been surprised by the board's failure to order that expert witnesses be heard. The petitioner could and should have taken an **active part in the proceedings** and, in particular, it was up to it to inform the board during the debate of any need to hear witness to support its line of argument. The petitioner's claim to have been denied its right to be heard was not established. The board was **not obliged to address in detail each and every argument** presented by the party. The Enlarged Board had already found in R 21/09 that, on the pretext of an alleged infringement of the right to be heard, it was actually being asked to review the substance of the decision. This clearly fell outside the ambit of review proceedings, it being solely a matter for the board to decide whether to take a piece of evidence into account and, if so, to determine its probative value. See also T 361/00, in which the board found that the opposition division had not (as alleged) committed any substantial procedural violation in disregarding an offer of evidence, since the minutes showed that no request that a witness be heard had been made.

The appellant in T 1028/11 alleged that the opposition division had infringed its right to be heard, and so committed a procedural violation, by refusing to hear the witness it had offered. According to the board, a witness's function was simply to corroborate the alleged facts on which they were heard and not to fill in gaps in those facts. Parties therefore had to specify what legally relevant facts the witness's testimony was intended to prove. Based on the evidence available, the opposition division had taken the view that the public prior use was not prejudicial to patentability. The board found that there would have been little point in hearing the witness at that stage. Cited in T 444/09. See also above chapter III.G.2.4.1.a) "Role of witnesses and wording of request".

3.3.4 Improper reasons for rejection of evidence offered

If a **disputed point** is **highly relevant** to the validity of the contested patent, it is, as a rule, not in keeping with good procedural practice for an opposition division not to take up an opportunity to hear a witness or party in evidence and instead to require written statements and make do with their typically lower probative value. The board in T 329/02 could not identify any extraordinary circumstances that might have justified an exception to this rule in the case in point.

In T 1363/14 the board pointed out that no EPC provision required that the facts adduced in support of alleged prior use actually be proven within the opposition period in order to substantiate the allegation; rather the requirement was for opponents to submit all the relevant facts and, should the other party **dispute** them, as a precaution offer suitable evidence. It was in the nature of offering witnesses to state that they would corroborate the facts (already) alleged. It was not permitted to speculate about what a witness would be able to remember and what not, thereby pre-empting the evidence's evaluation. The principle of unfettered consideration of the evidence did not apply until after it had been taken and could not be used to justify not taking evidence offered. Thus the opposition division's refusal to summon the witnesses had arbitrarily ruled out the possibility that they