



Beschwerdekammer in Disziplinarangelegenheiten

Disciplinary Board of Appeal

Chambre de recours statuant en matière disciplinaire

Boards of Appeal of the
European Patent Office
Richard-Reitzner-Allee 8
85540 Haar
GERMANY
Tel. +49 (0)89 2399-0
Fax +49 (0)89 2399-3014

Case Number: D 0037/22

D E C I S I O N
of the Disciplinary Board of Appeal
of 24 February 2023

Appellant: N.N.

Decision under appeal: **Decision of the Examination Board dated 6 July 2022 concerning the European Qualifying Examination 2022.**

Composition of the Board:

Chairman: W. Sekretaruk

Members: T. Karamanli

S. Colombo

Summary of Facts and Submissions

- I. This appeal is against the decision of the Examination Board that the requirements of Article 14(1) of the Regulation of the European qualifying examination for professional representatives (REE, current version published in OJ EPO 2019, Supplementary publication 2, 2) had not been fulfilled such that the appellant did not pass the European qualifying examination (EQE) 2022.
- II. The appellant sat the main examination in the EQE 2022 for Papers B and C.
- III. By letter from the Examination Secretariat dated 6 July 2022, the Chairman of the Examination Board informed the appellant that the appellant's answer paper to Paper B in the EQE 2022 had been awarded 37 marks and her answer paper to Paper C in the EQE 2022 had been awarded 40 marks and that, on the basis of these marks, the Examination Board had decided that the requirements of Article 14(1) REE had not been fulfilled such that the appellant had not passed the EQE 2022.

The letter contained, *inter alia*, as an attachment, the details of the marking of Paper C, according to which Examination Committee II agreed on 40 points for the appellant's answer on Paper C and recommended the FAIL grade.
- IV. With her letter dated 27 July 2022, received at the EPO on 28 July 2022, the appellant filed notice of appeal including her statement of grounds for appeal to challenge the decision of the Examination Board dated

6 July 2022. She paid the prescribed appeal fee on 26 July 2022.

By that letter, a copy of the following documents was filed:

E1: US 2003/045382 A1

E2: Wikipedia, "Football (ball)"

E3: Wonderopolis, "Are Footballs Really Made of Pigskin?"

E4: T. Pearson, "Soccer Ball Design", 18 December 2019

The appellant's submissions in her statement of grounds of appeal were directed only against the marking of her answers to Paper C. She submitted that the provisions of the REE and the Implementing provisions to the Regulation of the European qualifying examination (IPREE, current version published in OJ EPO 2019, Supplementary publication 2, 18) had been infringed by *"the decision that the requirements of Article 14(1) REE have not been fulfilled by the appellant"*. Her arguments were directed essentially against the evaluation and marking of her answers to Paper C.

- V. The Examination Board remitted the appeal to the Disciplinary Board of Appeal of the EPO (DBA) without rectifying its decision.
- VI. By letter of 15 September 2022, the Examination Secretariat informed the appellant that her appeal had not been allowed by the Examination Board and that, consequently, her appeal had been forwarded to the DBA.
- VII. In accordance with Article 24(4), first sentence, REE in conjunction with Article 12, second sentence, of the Regulation on discipline for professional

representatives (RDR, Supplementary publication 1, OJ EPO 2023, 146), the DBA consulted both the President of the EPO and the President of the Council of the Institute of Professional Representatives before the EPO (epi), neither of whom presented any comment in writing on the merits of the appeal.

VIII. On 16 January 2023, a summons to oral proceedings before the DBA in the current case (the board) was issued. In a communication in accordance with Articles 13(2) and 14 of the Additional Rules of Procedure of the Disciplinary Board of Appeal (Supplementary Publication 1, OJ EPO 2023, 72), the board informed the appellant of its preliminary opinion.

IX. The non-public oral proceedings before the board were held on 24 February 2023 by videoconference.

The appellant was accompanied by the professional representative Mr Preston Richard pursuant to Article 24(4), first sentence, REE in combination with Article 17 RDR. Neither the President of the EPO nor the President of epi was represented (Article 24(4), first sentence, REE in conjunction with Article 14, second sentence, RDR).

The appellant confirmed her following requests, which she had made in writing:

"Requests:

PAPER C

Main Request:

The appellant herewith requests that the decision under appeal be set aside and that her answer to Paper C part

of the examination of the European qualifying examination 2022 be awarded a PASS grade.

1st Auxiliary Request:

The appellant herewith requests that the decision under appeal be set aside and that her answer to Paper C part of the examination of the European qualifying examination 2022 be awarded a COMPENSABLE FAIL grade.

2nd Auxiliary Request:

Re-evaluation and re-marking by the Examining Board.

The reimbursement of the appeal fee is also requested for any of the outcomes of the pervious requests."

During the oral proceedings, the appellant filed the following documents by email:

- a copy of Figures 1 and 2 of A1 of Paper C with her handwritten notes
- a copy of her curriculum vitae (CV)

At the end of the oral proceedings, the Chairman announced the board's decision.

X. The appellant's arguments can be summarised as follows.

(a) General part

The only possible mistake she was aware of was that she had indicated in the "opponent" section both Ms Artha, who had signed the client's letter, and the company. She considered a deduction of 3 points for this mistake, which amounted to almost a quarter of all possible marks, far too harsh and unjustified.

(b) Claim 2

Apart from using the inverted sequence of combining A4 and A5 as an alternative inventive-step attack, she had properly adopted the problem-solution approach in her answer, and thus the awarding of only 2 out of 13 possible marks for her argument for claim 2 was not justified. The marking of her answer for claim 2 should be reconsidered, and the marks for her arguments should be increased. No re-assessment of her paper was required for this.

(c) Claim 4

The appellant's answer on claim 4 contained only an attack of lack of inventive step. The novelty of claim 4 could not have been attacked using document A6. Therefore, at least the awarding of 11 marks erroneously assigned for the novelty attack in the Examiners' Report should be "neutralized" for owing to the following reasons.

- (i) Contrary to the statement in the Examiners' Report that paragraph [0011] of A6 disclosed a ball, A6 did not disclose a ball. There was no single instance in paragraph [0011] of A6, nor in any other part of A6, which disclosed a ball, let alone a ball which had an outer covering with panels or segments stitched together with the composite yarn of A6. A6 only disclosed the possibility of using the composite yarn in applications, such as stitching together the panels of a traditional football. The expression "can

even be used for" referred to an intended use. This expression clearly did not indicate that in this passage the yarn was actually used for the indicated use. If the disclosure of these passages were considered a patent claim, such a claim should be formulated as "*a composite yarn suitable for stitching together the panels of a traditional football*". In this case, the passages of the Guidelines for Examination in the EPO (the Guidelines), F-IV, 4.13.1 (especially the second paragraph) would be pertinent, and there would not be any doubt that the scope of such a claim was limited only to the yarn without disclosing any ball. At best, A6 disclosed that the composite yarn of A6 (see Figure 1) was "suitable for" stitching together the panels of a traditional football.

A6 did not implicitly disclose a ball comprising a "rubber bladder". In determining novelty, A6, which was a prior-art document under Article 54(3) EPC, had to be read as it would have been read by a person skilled in the art at its date of filing, or priority where appropriate (see the Guidelines, G-VI, 3). The gold standard established in decision G 2/10 as a uniform concept of disclosure had to be applied. The knowledge of the skilled person should not be supplemented by knowledge which might have been obtained between the date of the deemed assessment of the prior art and the filing or priority date of the

patent at issue. This meant that what was disclosed in A1, i.e. the opposed patent, could not be used to define the knowledge of the skilled person assessing document A6, i.e. to define the implicit features of A6, which had been filed before A1. When considering novelty, it was not correct to interpret the teaching of a document as embracing well-known equivalents not disclosed in the documents; this was a matter of obviousness (see the Guidelines, G-VI, 2). The Examiners' Report alleged that paragraph [0011] of A6 disclosed a ball made from panels stitched together, and this was equivalent to the implicit disclosure of a ball comprising a rubber bladder provided to guarantee airtightness (see page 14, lines 3-5: "*and A1[0018] specifies that balls which are sewn from segments or panels **must have** a rubber bladder, **thus a rubber bladder is implicitly disclosed by A6***") [emphasis added by the appellant]. This assumption was made in light of paragraph [0018] of A1, i.e. the patent to be opposed, comprising claim 4. Paragraph [0018] of A1 (English version) taught that all balls sewn from segments or panels comprised a rubber bladder. In this paragraph, the inventors referred in general to all (unspecified) balls that they were aware of. However, even if the inventors had specified the disclosure supporting their view on balls comprising a rubber bladder, their own application could not be prejudicial. Moreover, the statement in

paragraph [0018] of A1 could not simply be interpreted as common general knowledge that each and every ball of this type in any prior art had to have a bladder made of rubber. On the contrary, documents E1, E2, E3 and E4, which were non-exhaustive examples, proved that there were indeed balls sewn from segments or panels that had a bladder not made of rubber.

As a consequence, the reasoning adopted in the Examiners' Report to conclude that A6 implicitly disclosed a ball comprising a rubber bladder in view of paragraph [0018] of document A1 was a serious and obvious mistake since A1 could not be used to derive what was considered to be implicitly disclosed in A6.

- (ii) In addition, there was a language difference in the English and German versions in paragraph [0011] of document A6 and paragraph [0018] of document A1.

The German version of paragraph [0011] of document A6 did not include the translation of the expression "*such as*" appearing in the English version. This would require the incorporation of the term "*zum Beispiel*" between the expression "*wie das*" in the first sentence of this paragraph in the German version. If the German version was used for interpretation of the corresponding passages of the English version, this omission made such an interpretation even more difficult since

the different language versions gave rise to even more interpretations of the passages. This omission thus even amounted to an unequal treatment of one or more candidates due to an error in translation. Candidates who had used the German version only or, as the appellant did, had used it additionally to clarify the ambiguous language of the English version, would have been disadvantaged. These disadvantageous circumstances should have been taken into account in the marking.

Also, the German version of paragraph [0018] of document A1 was ambiguous and could lead to different interpretations. The position of "*zum Beispiel*" in the German version of paragraph [0018] of A1 made the disclosure ambiguous. Therefore, when using the German version of A1, a candidate would not have considered the rubber bladder as implicitly disclosed in A6 and would have not considered A6 novelty-destroying for claim 4. The English wording of paragraph [0018] was less ambiguous. This meant that candidates using the German version had been disadvantaged, and this should have been taken into account in the marking. The appellant, who was fluent in German as could be seen from her CV, had also read the German version of Paper C in the examination, although she had answered it in English. The marking had to treat all candidates equally unless there was a good reason for distinguishing, and this was not the case here. It was the

duty of the Examination Board to provide a marking scheme that did not disadvantage anyone who used the German text. Different language versions were provided for the examination and were available to all candidates. More than one version was sometimes used in case of doubt about the meaning of words or phrases, especially by candidates whose mother tongue was not one of the EPO official languages. In other cases, candidates only used one version of the examination paper, in German, English or French. Both approaches were permitted. Therefore, the marking scheme could not disadvantage anyone who did not consider A6 novelty-destroying for claim 4. By awarding 11 marks for an attack that a large group of candidates were less likely to identify, the marking scheme was inherently flawed. Compensation marks should have been awarded. Attention was drawn to the case law of the DBA, for instance, decision D 8/21.

- (iii) The appellant lost time due to the confusion caused by the fact that A6 could not be used for a novelty attack under Article 54(3) EPC in the question paper. From her answer, it was evident that she had started to attack claim 6 before claim 4. This was because the unsuitability of A6 for an attack under Article 54(3) EPC created severe confusion when trying to find the proper claim to attack. This also meant that she did not have sufficient time to re-read her previous attacks and, more

importantly, to come to a proper conclusion on an attack against claim 5, which was at the very end of her answer. Thus, the decision of the Examination Board to include in Paper C the incompatible document A6 for an attack under Article 54(3) EPC was a mistake which had severe consequences on the overall results of her answer to Paper C.

Reasons for the Decision

Admissibility of the appeal

1. The notice of appeal and the statement setting out the grounds of appeal were duly filed within the one-month time limit under Article 24(2) REE. The appeal fee was also paid on time. The appeal is therefore admissible.

Shorter notice period

2. According to Article 24(4), first sentence, REE and, mutatis mutandis, Article 13(2) RDR, Rule 115(1) EPC applies mutatis mutandis to the oral proceedings in the case at hand. Rule 115(1), second sentence, EPC provides that at least two months' notice of the summons must be given, unless the appellant agrees to a shorter period.

The summons to attend oral proceedings specified a shorter notice period and therefore did not fulfil the requirement of an at least two-month period of notice. However, the appellant agreed to a shorter notice.

Extent of power of investigation and decision of the DBA

3. In accordance with Article 24(4) REE and the consistent case law of the DBA, which followed decision D 1/92 (OJ EPO 1993, 357) and D 6/92 (OJ EPO 1993, 361), decisions of the Examination Board may, as a rule, only be reviewed for the purposes of establishing that they do not infringe the REE, the provisions relating to its application or higher-ranking law. It is not the function of the DBA to reconsider the entire examination procedure on the merits. This is because the Examination Committee and the Examination Board have some latitude of evaluation subject to only limited judicial review by the DBA. Accordingly, the Examination Board's value judgement on the number of marks that an examination paper deserves is not subject to review by the DBA. As held in decision D 6/13 (points 8 and 9 of the Reasons), the Examination Board not "perfectly" fulfilling its implied obligation to draw up an impeccable examination paper and corresponding impeccable marking scheme does not automatically qualify as an infringement of a provision of the REE or IPREE. Thus, a finding in the given case would require a value judgement, which is normally beyond the powers of the DBA. The marking of an examination paper in terms of how many marks an answer deserves is not subject to review by the DBA, and nor are the Examination Board's criteria for determining the weighting of the expected answers (see D 20/96, point 9 of the Reasons) to the examination questions (D 13/02, point 5 of the Reasons). Only if the appellant can show that the contested decision is based on serious and obvious mistakes can the board take this into account. The alleged mistake must be so obvious that it can be established without re-opening the entire marking procedure (see e.g. decision D 7/05, OJ EPO 2007, 378). This is, for instance, the case if an

examiner is found to have based their evaluation on a technically or legally incorrect premise upon which the contested decision rests (D 2/14). Another example of an obvious mistake would be a question whose wording is ambiguous, inconsistent or incomprehensible (D 13/02). All other claims to the effect that the papers have been marked incorrectly are not the responsibility of the DBA. Value judgements are not, as a rule, subject to judicial review (see e.g. D 1/92, cited above, points 3 to 5 of the Reasons and D 11/07, point 3 of the Reasons; Case Law of the Boards of Appeal, 10th edition 2022, (Case Law), V.C.2.6.3, with further references).

The statement of grounds of appeal is primarily concerned with whether the appellant's solution is an equivalent or even better solution than the solution expected by the Examination Board. To answer this question, however, a factual review of the examination procedure by the board would be necessary. This would have to include both an in-depth analysis of (examination) Paper C and an evaluation of the solutions of the appellant and the Examination Board. This would, however, be tantamount to re-opening the entire marking procedure and to an evaluative reconsideration of the answer paper, which, in accordance with the principles set out above, is not the task of the board.

Nor is it the task of the board to review the discretion applied by the Examination Board in assessing the appellant's answer paper as to whether Examination Committee II or the Examination Board deducted too many marks or did not award enough marks for the answers in the respective parts of the appellant's answer paper. If the board were to follow

the appellant's approach, it would ultimately have to reassess the answer paper by awarding its own marks. However, under the established case law of the DBA, the value judgement of the competent Examination Board or Examination Committee on the number of marks to be awarded for an answer to an examination question in an examination paper is not subject to review by the DBA (D 13/02, point 5 of the Reasons; D 7/05, cited above, point 20 of the Reasons). This must also apply to the criteria on the basis of which the Examination Board determines the value of the expected answers to the questions of the examination paper.

As explained above, the justification for this limited judicial review is to be seen in the discretionary power which the Examination Committees and the Examination Board are entitled to in the EQE.

4. The board understands from the appellant's submissions and arguments that she believes that an objective evaluation of her answer paper to Paper C should have led to her answer paper to Paper C being awarded a higher grade (at least a COMPENSABLE FAIL). The appellant's requests and submissions with regard to Paper C have to be evaluated and judged against the above principles and case law.

General part of Paper C 2022

5. The general part of the appellant's answer paper was awarded 8 out of 11 possible points. The appellant argues that the only possible mistake she was aware of was that she had indicated in the "opponent" section both Ms Artha, who had signed the client's letter, and the company. She considered a deduction of 3 points for that mistake far too harsh and unjustified.

6. The board does not find the appellant's arguments convincing that it can be established without re-opening the entire marking procedure that a serious and obvious mistake was made. In the board's view, the appellant's entire argument is essentially directed at the fact that, in her opinion, the examiners deducted too many marks for a mistake she admits she made in her answer paper concerning the indication of who was filing the opposition. The board notes that, according to point 4 of the Examiners' Report - Paper C 2022 (Examiners' Report), a maximum of 11 marks could be awarded for answers concerning the "Effective dates of the claims and prior art". It is therefore not immediately apparent that 3 marks were deducted only for the mistake acknowledged by the appellant. It is possible that some of these 3 marks were deducted because of the appellant's answers regarding the effective dates of the claims and prior art.

However, as explained above, the value judgement of the competent Examination Board or Examination Committee on the number of points to be awarded to an answer to an examination question in an examination paper is not subject to review by the board. If the board were to follow the appellant's approach, it would ultimately have to reassess the whole general part of the appellant's answer paper by awarding its own marks. Deciding on the issues raised by the appellant would therefore result in an exercise which is well beyond the powers of the board.

In view of the above, the board fails to see any infringement of law or an unreasonable exercise of discretion in the marking of the general part of Paper C.

Claim 2 of Paper C 2022

7. The part of the appellant's answer paper on claim 2 was awarded 2 out of 13 possible marks (see point 5.2 of the Examiners' Report). The appellant essentially argues that apart from using the inverted sequence of combining A4 and A5 as an alternative inventive-step attack, she had properly adopted the problem-solution approach in her answer, and thus the awarding of only 2 out of 13 possible marks for her arguments on claim 2 was not justified.

8. The board does not find the appellant's arguments convincing that it can be established without re-opening the entire marking procedure that a serious and obvious mistake was made. In the board's view, the appellant's entire argument is essentially directed at the fact that, in her opinion, the examiners did not award enough marks for the alternative inventive-step attack against claim 2, starting from A4 in combination with A5. However, the case law does not rule out the possibility that an individual answer to a part of Paper C may be awarded less or even no marks if, for instance, an objection of lack of inventive step is based on a document which cannot reasonably be regarded as the closest prior art or a suitable starting point for the problem-solution approach or if the reasoning, while structured according to the problem-solution approach, cannot be regarded as a logical and justified ground, in a notice of opposition, prejudicial to the maintenance of a European patent (see D 14/17, point 2.4 of the Reasons and D 20/17, point 3.4 of the Reasons). Furthermore, as explained above, the value judgement of the competent Examination Board or

Examination Committee on the number of marks to be awarded for an answer to an examination question in an examination paper is not subject to review by the board. If the board were to follow the appellant's approach, it would have to reassess the appellant's answer on the attack of lack of inventive step against claim 2 by awarding its own marks. However, the appellant's arguments raise the question of whether her solutions, such as her choice of prior art, are equivalent or even better solutions than the solutions expected by the Examination Board. To answer this question, a substantive review of the examination procedure by the board would be necessary. This would have to include an in-depth analysis of Paper C and an assessment of the solutions of the appellant and the Examination Board. This would amount to re-opening the entire evaluation procedure and an evaluative reconsideration of the examination work, this not being the task of the board under the principles set out above. Deciding on the issues raised by the appellant would therefore result in an exercise which is well beyond the powers of the board.

In view of the above, the board fails to see any infringement of law or an unreasonable exercise of discretion in the marking of the appellant's answer for claim 2.

Claim 4 of Paper C 2022

9. The part of the appellant's answer paper on claim 4 was awarded 6 out of 27 possible marks (a maximum of 11 marks for a novelty attack based on A6 and a maximum of 16 marks for an attack of lack of inventive step starting from A3 in combination with Annex A2 could be

awarded; see point 5.4 of the Examiners' Report). The appellant admits that her answer for claim 4 contained only an attack of lack of inventive step, but she submits that novelty of claim 4 could not have been attacked using document A6. Therefore, at least the marking of 11 marks erroneously assigned to such an attack in the Examiners' Report should be "neutralized". The appellant based her objection on three lines of argument.

10. According to the appellant's first line of argument (see point X(c)(i) above), contrary to the statement in the Examiners' Report that paragraph [0011] of A6 discloses a ball, A6 did not disclose a ball and did not implicitly disclose a ball comprising a "rubber bladder". The statement in paragraph [0018] of A1 could not simply be interpreted as common general knowledge that each and every ball of this type in any prior art had to have a bladder made of rubber. On the contrary, documents E1, E2, E3 and E4, which were non-exhaustive examples, proved that there were indeed balls sewn from segments or panels that had a bladder not made of rubber. As a consequence, the reasoning adopted in the Examiners' Report to conclude that A6 implicitly disclosed a ball comprising a rubber bladder in view of paragraph [0018] of document A1 was a serious and obvious mistake since A1 could not be used to derive what was considered implicitly disclosed in A6.
11. The board does not find the appellant's first line of argument convincing for the following reasons.

Paragraph [0011] of A6 reads: "*The composite yarn (1) of the embodiment of the figure 1 comprises stainless steel wires (2). It can thereby resist bending stresses quite well and is 25 remarkably durable, such that it*

can even be used for applications such as stitching together the panels of a traditional football. The yarn forms a long-life structural component of the ball's outer covering."

The question that arises on the novelty of the subject-matter of claim 4 is which features can be derived directly and unambiguously from paragraph [0011] of A6, including features which for the skilled person are implicit in what is explicitly disclosed (see e.g. T 511/92, point 2.2 of the Reasons; see also the Guidelines, G-VI, 2). The appellant's argument that if the disclosure of these passages were to be considered a patent claim, such a claim would have to be formulated as *"a composite yarn suitable for stitching together the panels of a traditional football"* is therefore not relevant.

It is stated in paragraph [0011] of A6 that the composite yarn (1) of the embodiment of Figure 1 can even be used for applications such as stitching together the panels of a traditional football and that the yarn forms a long-life structural component of the ball's outer covering. From this wording, a ball sewn from panels can be derived directly and unambiguously (see also Possible Solution - Paper C 2022, section *"Claim 4 - Lack of novelty (A6)"*).

According to point 5.4 of the Examiners' Report, A1 provided a basis for supporting the argument of the implicit disclosure of the rubber bladder by the ball of A6 being sewn from panels. In section *"Claim 4 - Lack of novelty (A6)"* of the Possible Solution - Paper C 2022, it is stated that *"A1[0018] specifies that balls which are sewn from segments or panels must have*

a rubber bladder, thus a rubber bladder is implicitly disclosed by A6".

An acknowledgement of prior art under Article 54(2) EPC by a patent proprietor may be accepted at face value unless the patent proprietor resiled from the acknowledgement or it is clearly not prior art for other reasons (see Case Law, I.C.2.7 and e.g. T 413/08, point 2 of the Reasons). The prior art under Article 54(2) EPC also comprises the common general knowledge of a person skilled in the art.

Paragraph [0018] of A1, which is the patent to be opposed, reads: "*As with all balls which are sewn from segments or panels (7), a rubber bladder (6), made from e.g. vulcanized natural caoutchouc, is provided to guarantee airtightness.*"

This passage clearly acknowledges that it was already common general knowledge of the skilled person that balls sewn from segments or panels must have a rubber bladder. There is nothing in Paper C 2022 which suggests that the patent proprietor had resiled from the acknowledgement of this prior art or that it is clearly not prior art for other reasons. Nor can the appellant's reference to documents E1 to E4, which she submitted with her notice of appeal, call this recognised common general knowledge into question. Candidates must accept the facts stated in the examination paper and must limit themselves to those facts (Rule 22(3), first sentence, IPREE). They must also not use any special knowledge they may have in the technical field of the invention (Rule 22(3), third sentence, IPREE).

In the absence of any indication to the contrary in Paper C 2022, candidates should have accepted the statement in [0018] of A1 that balls sewn from segments or panels must have a rubber bladder as common general knowledge and taken it into account when considering the disclosure of implicit features in paragraph [0011] of A6. This approach would have led to the conclusion that a rubber bladder is implicitly disclosed by A6.

12. According to the appellant's second line of argument (see point X(c)(ii) above), there is a language difference in the English and German versions in paragraph [0011] of document A6 and paragraph [0018] of document A1.

The German version of paragraph [0011] of document A6 reads as follows:

"Das Verbundgarn (1) der Ausführungsform in der Fig. 1 umfasst 25 Edelstahldrähte (2). Dadurch kann es Biegespannungen ziemlich gut standhalten und ist bemerkenswert haltbar, sodass es selbst für solche Anwendungszwecke wie das Zusammennähen der einzelnen Teilstücke eines herkömmlichen Fußballs verwendet werden kann. Das Garn bildet eine langlebige Strukturkomponente der äußeren Ummantelung des Balls."

The English version of this paragraph is reproduced above in point 11.

The German version of the relevant passage in paragraph [0018] of document A1 reads as follows:

"Wie bei allen Bällen, die aus Segmenten oder Teilstücken (7) zusammengenäht werden, wird eine z.B. aus vulkanisiertem Naturkautschuk hergestellte

Gummiblase (6) bereitgestellt, die die Luftdichtheit gewährleistet."

The English version of the corresponding passage is reproduced above in point 11.

13. With respect to paragraph [0011] of document A6, the appellant argues as follows.

The German version did not include a translation of the expression "such as" appearing in the English version. This would require the incorporation of the term "zum Beispiel" between the expression "wie das" in the first sentence of this paragraph in the German version. If the German version was used for interpretation of the corresponding passages of the English version, this omission made such an interpretation even more difficult since the different language versions gave rise to even more interpretations of the passages. This omission thus even amounted to an unequal treatment of one or more candidates due to an error in translation. Candidates who had used the German version only or, like the appellant, had used it in addition to clarify the ambiguous language of the English version, would have been disadvantaged, and these disadvantageous circumstances should have been taken into account in the marking.

With respect to paragraph [0018] of document A1, the appellant submits that the position of "zum Beispiel" in the German version of paragraph [0018] of A1 made the disclosure ambiguous and could lead to different interpretations. Therefore, when using the German version of A1, a candidate would not have considered the rubber bladder as implicitly disclosed in A6 and would have not considered A6 as novelty-destroying for

claim 4. The English wording of paragraph [0018] was less ambiguous. Different language versions were provided for the examination and were available to all candidates; more than one version was sometimes used in case of doubt about the meaning of words or phrases, especially by candidates whose mother tongue was not one of the EPO official languages. In other cases, candidates only used one version of the examination paper, in German, English or French. Both approaches were permitted. Therefore, the marking scheme could not disadvantage anyone who did not consider A6 novelty-destroying for claim 4. By awarding 11 marks for an attack that a large group of candidates were less likely to identify, the marking scheme was inherently flawed. Compensation marks should have been awarded. Attention was drawn to the case law, for instance, decision D 8/21.

14. The board does not find the appellant's second line of argument convincing for the following reasons.

It is established case law of the DBA that equal treatment of candidates is an issue which may be the subject of appeals under Article 24(1) REE (see D 8/21, point 10.2 of the Reasons and the cases cited). The principle of equal treatment requires that candidates should take part in the examination under equal conditions. It follows from this principle of equal treatment that unequal conditions which may cause unjustified disadvantages for candidates should be compensated for, to the extent feasible (see also D 29/21, point 7 of the Reasons). However, only candidates who have in fact been treated unequally to their disadvantage in comparison to other candidates can invoke unequal treatment.

Consequently, only candidates using the German version of Paper C might have been disadvantaged by the alleged ambiguities of the cited paragraphs. This is also acknowledged by the appellant. Therefore, in the case at hand, the appellant could only claim unequal treatment if she could convince the board that she had waived an attack on novelty against claim 4 due to the allegedly unclear statements in paragraph [0011] of document A6 and paragraph [0018] of document A1 in the German version.

The appellant provided her answer to examination Paper C in English. Rule 22(2) IPREE reads: "*It will be assumed that candidates have read the examination paper in the language in which they give their answer.*" The board sees no reason to depart from this legal assumption. Nor has the appellant submitted that she did not read the English version of Paper C. The board therefore assumes that the appellant read examination Paper C in the English version. Candidates reading Paper C in the English version were at no disadvantage because of the alleged ambiguities in the German version of Paper C. The board notes that the appellant submitted that she had read the German version of Paper C in the examination, although she had answered it in English. However, even if this had been the case, the appellant did not allege in her appeal that she had not attacked the novelty of claim 4 because of the ambiguities in the German version of Paper C. Moreover, such an assertion is also not verifiable if no evidence for it can be found in her answer paper. The mere allegation that the German version of Paper C differed from the English version is therefore not sufficient in the circumstances to support the appellant's assertion that there was a breach of the principle of equal treatment in her case. It can therefore be left open

whether there are ambiguities in paragraph [0011] of document A6 and paragraph [0018] of document A1 in the German version of Paper C which amount to a serious and obvious mistake to be considered by the board.

15. According to the appellant's third line of argument (see point X(c)(iii) above), because of the confusion caused by the fact that A6 could not be used for a novelty attack under Article 54(3) EPC against claim 4, she lost time and could not reach a correct conclusion for an attack against claim 5. Thus, the inclusion of the incompatible document A6 in Paper C for an attack under Article 54(3) EPC was an error which had a serious impact on the overall result of her answer for Paper C.

16. The board does not find the appellant's third line of argument convincing for the following reasons.

As explained above, the appellant's arguments in support of her position that A6 did not disclose certain features of claim 4 and was therefore not a novelty-destroying document under Article 54(3) EPC for claim 4 are not valid. Therefore, the serious consequences for the overall result of her answer to Paper C mentioned by the appellant seem to be instead due to an erroneous assessment of the disclosure of A6 on her part.

17. In view of the above considerations, the board fails to see any infringement of law or an unreasonable exercise of discretion in the marking of the part of the answer paper on claim 4.

Conclusion

18. In light of the above considerations, the board does not see that the decision of the Examination Board infringes any applicable provision of the REE, the IPREE or any higher-ranking law. Therefore, neither the main request nor the first or second auxiliary request of the appellant is allowable. Consequently, the appeal must be dismissed.

Request for reimbursement of the appeal fee

19. With respect to the appellant's request for reimbursement of the appeal fee, reference is made to Article 24(4), third sentence, REE, which reads:

"If the Board of Appeal allows the appeal, or the appeal is withdrawn, it shall order reimbursement in full or in part of the fee appeal if this is equitable in the circumstances of the case."

Since the appeal is unsuccessful, the appeal fee cannot be reimbursed in full or in part.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



N. Michaleczek

W. Sekretaruk

Decision electronically authenticated