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**Datasheet for the decision  
of 27 May 2019**

**Case Number:** J 0003/18 - 3.1.01  
**Application Number:** 14722800.1  
**Publication Number:** 2964685  
**IPC:** C08G18/75, C08G18/76,  
C09D167/08, C09D175/14,  
C08G18/36, C08L75/14  
**Language of the proceedings:** EN

**Title of invention:**

COBALT AND MANGANESE BASED URETHANIZED POLYMERS FOR AIR DRYING  
POLYMER-BASED COATINGS, PAINTS AND INKS

**Applicant:**

Ege Kimya Sanayi ve Ticaret A.S.

Respondent/Third Party in accordance to Rule 14 EPC:  
Umicore Speciality Materials Brugge NV

**Headword:**

Resumption of proceedings after stay

**Relevant legal provisions:**

EPC Art. 6(1), 108, 125  
EPC R. 14(1), 14(3), 99

**Keyword:**

**Decisions cited:**

G 0003/92, J 0009/17, J 0010/12, J 0007/93, J 0015/13,  
J 0004/10

**Catchword:**



**Juristische Beschwerdekammer**  
**Legal Board of Appeal**  
**Chambre de recours juridique**

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Case Number: J 0003/18 - 3.1.01

**D E C I S I O N**  
**of the Legal Board of Appeal 3.1.01**  
**of 27 May 2019**

**Appellant:** Ege Kimya Sanayi ve Ticaret A.S.  
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**Respondent/Third party:** Umicore Speciality Materials Brugge NV  
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**Decision under appeal:** **Decision of the Legal Division of the European Patent Office of 12 January 2018 not to set a date for resumption of the proceedings pursuant to Rule 14(3) EPC.**

**Composition of the Board:**

<b>Chairman</b>	W. Sekretaruk
<b>Members:</b>	O. Loizou
	D. Prietzel-Funk

## **Summary of Facts and Submissions**

- I. This appeal lies against the decision of the Legal Division of 12 January 2018 not to set a date for resumption of the grant proceedings pursuant to Rule 14(3) EPC.
- II. The appellant and applicant had applied for the grant of a patent whose inventor according to the application no 14722800.1 is Eddy Clauwaert, resident of Bruges, a former employee until 2011 of the respondent/third party.
- III. The respondent/third party in accordance to Rule 14 EPC requested with letter dated 8 July 2016 the stay of the proceedings for grant, having, as alleged inter alia, entitlement claims regarding the patent it had initiated on 30 June 2016 legal proceedings against its former employee, its company EL Research & Consultancy BVBA and the applicant, before the Dutch speaking Commercial Court in Brussels.
- IV. The Legal Division, with a communication dated 19 July 2016 requested from the respondent/third party evidence regarding the service of said writ of summons to the applicant. Meanwhile the Examining Division with a decision dated 6 July 2017 decided to grant the European patent. The mention of the grant was to be published in the European Patent Bulletin 17/31 of 2 August 2017.  
With its letter dated 14 July 2017 the respondent/third party furnished the EPO with various documents. Following this, as the Legal Division was satisfied that the respondent had provided evidence that it had instituted proceedings against the applicant seeking a decision within the meaning of Article 61(1) EPC, with

a communication dated 28 July 2017 stayed the proceedings regarding the application no 14722800.1 as from 14 July 2017 pursuant to Rule 14(1) EPC.

V. The appellant with letter dated 27 November 2017 requested that the Legal Division set a date for the continuation of the grant proceedings and as an auxiliary request to issue an appealable decision. The Legal Division with the decision under appeal refused to set a date for resumption of the proceedings pursuant to Rule 14(3) EPC.

VI. Various legal proceedings between the parties, Eddy Clauwaert and his company EL Research & Consultancy BVBA were initiated at courts in Belgium. These can be summarised as follows and are undisputed, in particular that:

- (a) On 23 December 2014, upon an ex parte request of the respondent/third party the Commercial Court of Bruges ordered an expert examination to be performed at the premises of Eddy Clauwaert.
- (b) On 30 January 2015 the respondent/third party filed an action before the Commercial Court of Bruges claiming that the former employee had unlawfully used and revealed its trade secrets to the applicant.
- (c) On 5 August 2015, the Commercial Court of Bruges dismissed the motion to intervene of the former employee.
- (d) On 04 April 2016 the Ghent Court of Appeal granted the subsequent appeal of the former employee against the order dated 23 December 2014. This judgment became final on 22 May 2017 upon the Belgian Supreme Court's decision to dismiss the respondent's/third party's case.

- (e) On 30 June 2016 the respondent/third party filed an entitlement action against the appellant before the Dutch speaking Commercial Court of Brussels claiming an alleged breach of contractual obligations of its former employee and requested to order the transfer of the application filed irrespective to legal and contractual obligations. At the hearing on 7 October 2016 the case was introduced and placed on the docket of the court and the parties agreed to stay the entitlement case before the Dutch speaking Commercial Court in Brussels and wait for the outcome of the other pending action between the parties.
- (f) On 23 May 2017, the Commercial Court of Bruges dismissed all claims in the first action on the grounds that the respondent/third party did not provide proof that the former employee passed secret corporate information to the applicant.
- (g) On 18 July 2017, the respondent/third party lodged an appeal against the decision of the Commercial Court of Bruges at the Ghent Court of Appeal that was dismissed with judgment dated 7 January 2019. On 27 May 2019, the date when the oral proceedings before the Board were held, this judgement was not final because within three months of service of this decision the respondent/third party had the option until 19 June 2019 to lodge a cassation appeal before the Belgian Supreme Court of Cassation.

VII. With its statement of grounds of appeal the appellant requested that the decision of the Legal Division dated 12 January 2018 "be reversed and that proceedings for the grant of European patent application 14722800.1 be resumed without further delay".

The respondent/third party requested that the appeal be dismissed.

VIII. The arguments of the appellant can be summarised as follows:

The respondent/third party did not have a legitimate interest for a further stay of the proceedings. Because the decision to grant and the mention of the patent in the European Bulletin had been set, the applicant, having approved the text, could no longer influence the scope of the patent. The respondent/third party was unfairly blocking the grant proceedings in terms of use during and until the court proceedings before the Belgian court become final. Between the two legal actions and the filing of the patent application one and a half years passed. Due to the stay of the proceedings before the Dutch speaking Commercial Court in Brussels and the appeal before the Ghent Court of Appeal, no decision is to be rendered in the foreseeable future. The appellant argued further that the outcome of the court proceedings in the first instance were to be taken into consideration. The subject matter of the cases pending before the courts in Bruges and Brussels should be examined since the outcome of the case before the court in Bruges would inevitably affect as to whether the entitlement action before the court in Brussels would even be continued by the respondent/third party or not. The court in Bruges had already determined that there was no unlawful behaviour by the appellant or the inventor.

IX. The respondent/third party contested that the courts will finally find in favour of the appellant and that when the judgment of the Ghent Court of Appeal is rendered either party may choose to reactivate the stayed entitlement action before the Commercial Court



in Brussels, regardless a possible action before the Supreme Court.

X. During oral proceeding before the Board held on 27 May 2019 the appellant argued, *inter alia*, that further actions of the respondent/third party could last on for at least further 6 years. It argued also that the judgment from the Ghent Court of Appeals dated 7 January 2019 regarding the cease and desist action was *res judicata* for the stayed entitlement proceedings before the Commercial Court of Brussels. The appellant did not contest that the period for the filing of a cassation case before the Supreme Court of Belgium against the decision of the Ghent Court of Appeal did not lapse before 19 June 2019 and accepted that the entitlement case at the Commercial Court of Brussels was still pending.

XI. The respondent/third party argued that the possibility of a lengthy court process in Belgium could not be used to the detriment of the respondent, that there was no abuse of procedure, and that it was impossible to anticipate a possible outcome of the pending entitlement proceedings before the Commercial Court in Brussels. It contested that the judgment the Ghent Court of Appeal was *res judicata* for the entitlement action.

XII. Final requests

The appellant requested finally that the decision under appeal be set aside and that a date for resumption of the proceedings pursuant to Rule 14(3) EPC be set. The respondent/third party requested that the appeal be dismissed.

## Reasons for the Decision

1. The appeal is admissible as it fulfils the requirements of Article 108 EPC and Rule 99(1) EPC.
2. Pursuant to Rule 14(3) EPC the EPO may, upon staying the proceedings for grant under Rule 14(1) EPC or thereafter, set a date on which it intends to resume the proceedings for grant, and, in particular, do so regardless of the stage reached in the national proceedings instituted under paragraph 1.

The Board agrees with the decision of the Legal Division for the following reasons:

3. It is established case law of the Boards of Appeal that Rule 14(3) EPC is to be interpreted as a discretionary provision giving the deciding body of the EPO the power to exercise it. The Board has therefore to decide whether the department of first instance exercised its discretion properly.
4. The decision of the first-instance department is to be overturned if the Board finds that the department did not exercise its discretion according to the correct criteria or exercised it in an inappropriate way (**J0007/93, OJ EPO 1994, 775, point 2.6 of the reasons; J0015/13, point 2.2 of the reasons**), or if changes have occurred in the facts of the situation between the decision of the first-instance department and the decision of the board of appeal (**J0004/17**).
5. Undisputedly the EPO has no power though to determine the merits of the parties' cases in national entitlement proceedings, nor to evaluate the possible

outcome of such proceedings after the parties have used all their available procedural rights (**G0003/92, OJ EPO 1994, 607, point 3 of the reasons, J0009/17**).

6. The Board finds that the Legal Division, at the time when the decision under appeal was taken, exercised its discretion correctly in due consideration of the facts of the case and the context of the entitlement proceedings before the Dutch speaking Commercial Court in Brussels.
7. The Board further notes that the appellant agreed with the respondent/third party since 7 October 2016 to the stay of the entitlement case before the Dutch speaking Commercial Court in Brussels, taking into account the delay which is definitely a contributing factor for the duration of the proceedings on the whole between the parties.
8. The appellant, however, claims that the respondent/third party is unfairly blocking the grant proceedings before the court proceedings before the Belgian court become final. This argument is not convincing as both parties agreed to stay the case before the Dutch speaking Commercial Court in Brussels. For the Board no abuse can be seen here either.
9. The time lapsed since 28 July 2016 and the request of the appellant dated 27 November 2017 to set a date for the continuation of the grant proceedings and the oral proceedings before the Board of Appeal is not disproportionate and would not set the balance unfairly in favour of the respondent/third party.
10. The fact, as accepted by both parties, that litigation in the Belgian legal system is extremely long until the

final decision is reached, cannot influence the outcome of these appeal proceedings, because it is unclear how long these proceedings will actually take and which consequences this will have for the parties.

11. The Board was also requested to decide in favour of the appellant because, as alleged by the appellant, a resumption of the proceedings was now possible since the decision of the Dutch speaking Commercial Court of Brussels could not be any different than the one of the Ghent Court of Appeal dated 7 January 2019 as the court in Brussels was bound by *res judicata* for the entitlement action. This assertion was contested by the respondent/third party.

Pursuant to Article 125 EPC in the absence of procedural provisions in the EPC regarding the *res judicata* the reference to this, as a general principle of procedural law in the Contracting States, is to be taken into account by the Board.

Since the judgment of the Ghent Court of Appeal dated 7 January 2019 is not yet final, it cannot have a *res judicata* effect regarding the entitlement case before the Dutch speaking Commercial Court of Brussels. For this reason alone the argumentation of the appellant does not hold.

12. The Board finds therefore that in the absence of a final decision of a national court regarding the entitlement to the grant of a European patent in the meaning of Article 61(1) EPC no new facts and circumstances distinguish the current situation from the situation when the impugned decision was taken.

13. Hence the appealed decision cannot be set aside and a date for resumption of the proceedings cannot, for the time being, be set.

## Order

### **For these reasons it is decided that:**

The appeal is dismissed.

The Registrar:

The Chairman:



C. Eickhoff

W. Sekretaruk

Decision electronically authenticated