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**D E C I S I O N**  
**of 23 April 1999**

**Case Number:** J 0019/96 - 3.1.1

**Application Number:** 95200811.8

**Publication Number:** 0882756

**IPC:** C08H 5/04

**Language of the proceedings:** EN

**Title of invention:**

Thermosetting resin material and composite products from  
lignocellulose

**Applicant:**

K.C. Shen Technology International Ltd.

**Opponent:**

-

**Headword:**

no designation in divisional of a designation deemed withdrawn  
in parent at the filing date of divisional

**Relevant legal provisions:**

EPC Art. 67, 76, 79, 91(4), 123(2)

EPC R. 51(4), 85(2)

RRF Art. 7(2), 9(2)

**Keyword:**

"No designation in divisional of a designation deemed withdrawn  
in parent at the filing date of divisional"

"Under Article 7(2), 9(2) RRF, no allocation of designation  
fees contrary to expressed will of applicant"

**Decisions cited:**

G 0005/83, G 0004/98 (pending), J 0023/82, J 0015/85,

J 0010/86, J 0022/95

**Catchword:**

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Boards of Appeal

Chambres de recours

Case Number: J 0019/96 - 3.1.1

**D E C I S I O N**  
of the Legal Board of Appeal 3.1.1  
of 23 April 1999

**Appellant:** K.C. Shen Technology International Ltd.  
2118 Radford Court  
Ottawa  
Ontario K1J 8K1 (CA)

**Representative:** Seaborn, George Stephen  
c/o Edward Evans & Co.  
Chancery House  
53-64 Chancery Lane  
London WC2A 1SD (GB)

**Decision under appeal:** Decision of the Receiving Section of the European  
Patent Office on designations, dated 17 May 1996,  
concerning European patent application  
No. 95 200 811.8.

**Composition of the Board:**

**Chairman:** J.-C. Saisset  
**Members:** M. B. Günzel  
M. K. S. Aúz Castro

### Summary of Facts and Submissions

- I. European patent application No. 95 200 811.8 was filed on 31 March 1995 as a divisional application of the parent application, European patent application No. 90 314 424.4, filed on 28 December 1990. In the parent application the following states were designated: AT, DE, FR, GB, IT, NL and SE, for which the corresponding fees were paid.
- II. In the divisional application the following states were expressly designated: BE, CH/LI, DK, ES, GR and LU. On 10 April 1995 six designation fees were paid for these states.
- III. In two communications issued on 23 June and 14 December 1995 respectively the Receiving Section pointed out that these states could not be validly designated in the divisional application. This was because at the filing date of the divisional application these states were not validly designated in the parent application as the designation fees for these states had not been paid. Pursuant to Article 91(4) EPC all designations in respect of which no fees had been paid were deemed withdrawn. It followed that these States were considered as never having been validly designated in the parent application. They could not therefore be considered as States designated in the earlier application within the meaning of Article 76(2) EPC. According to Article 67(4) EPC withdrawal or deemed withdrawal of a designation during the grant procedure had the retroactive effect of the designation being deemed never to have been made and a patent application in the State concerned never to have been filed. It followed that the possibility of obtaining patent protection for that State had definitely been surrendered and could not be revived by filing a

divisional application. As the divisional application stemmed directly from the pre-existing parent application it benefited from the parent application's priority and filing date but it had also to have identical territorial scope.

The Appellant was further invited under Article 7(2) RRF to indicate to which states other than the ones expressly designated by the Appellant in the divisional application the fees paid should be allocated, or to request that the application should not be treated as a divisional application. Failing that, by analogy to Article 9(2), second sentence, RRF, the fees should be deemed to have been paid for as many designations as were covered by the amount paid, in the order in which the contracting states that could be validly designated in the divisional application were mentioned in the precautionary designations box of the request form (AT, DE, FR, GB, IT, NL).

- IV. In response ~~the~~ The Appellant submitted that there was no suggestion in the EPC that no rights forfeited in the parent application might be claimed for the divisional application. Article 76(1) EPC, in conjunction with Rule 51(4) EPC, showed that a divisional application could be filed in respect of subject-matter which was within the content of the earlier application as filed but which was withdrawn before the filing of the divisional application. The statement in the Guidelines for Examination, A-IV, 1.3.4, cited by the Receiving Section, that the designated states in a divisional application must still be effectively designated in the parent application when the divisional application was filed, was wrong. The statement of the Receiving Section in its communication that for a valid designation of a contracting state, two acts were necessary, namely the designation as such and the payment of the required designation fee, was also

wrong. It was imparting to Article 79(1) EPC a requirement which was not in it, said provision only stating that the request for grant of a European patent should contain the designation of the contracting states and not that such indication was a designation only subject to the payment of a corresponding designation fee. In turn, Article 79(2) EPC did not state that the designation of a contracting state should be deemed to be invalid ab initio if the designation fee was not paid, but merely that it was withdrawn. In the absence of any provision to the contrary that withdrawal took effect on the expiry of the term for payment of the designation fee. The act of designating a contracting State was a separate act from the payment of the fee. The filing of a divisional application was also allowed in respect of a divisional for which no fees had yet fallen due. Article 67(4) EPC was concerned with the rights conferred by publication of a European patent application only and not with the question of which states could be designated in a divisional application. The Appellant requested the withdrawal of the communications or, failing this, an appealable decision.

- V. On 17 May 1996 the Receiving Section issued a decision stating that the designation fees paid on 10 April 1995 were deemed to have been paid for the states AT, DE, FR, GB, IT and NL. These were those states which were, on the filing date of the divisional application, still validly designated in the parent application. They had been chosen by the Receiving Section from the pre-crossed box for the precautionary designations in the request for grant form of the divisional application, following the order in which the EPC contracting states are indicated therein. In the Reasons for the decision the Receiving Section maintained its position that in a divisional application only those states could be designated which were effectively designated in the

parent application at the filing date of the divisional application. An effective designation required the designation as such and the payment of the due designation fee, (Article 79(1) and (2), first sentence, EPC). If no designation fee was paid for a particular state, the designation was deemed to be withdrawn, (Article 91(4) EPC). In the parent application designation fees were paid only for some of the contracting states originally designated (AT, DE; FR, GB; IT, NL and SE). All other States could not be regarded as States designated in the earlier application within the meaning of Article 76(2) EPC. Reference was again made to Article 67(4) EPC, from which it followed that the possibility of obtaining patent protection of a State had been irretrievably surrendered after withdrawal or deemed withdrawal of a designation during the grant procedure. This possibility could not be revived by filing a divisional application. A divisional application was confined to the substantive disclosure and territorial scope of the parent application.

- VI. On 14 June 1996 the Appellant appealed against the decision of the Receiving Section and requested that the decision be set aside in its entirety. The Statement of Grounds of Appeal was received on 22 July 1996. The appeal fee was paid on 30 July 1996. On 31 July 1996 the Appellant requested re-establishment of rights into the time limit for paying the appeal fee. A fee for re-establishment was paid on the same day. Reasons were given as to why the appeal fee had not been paid in time. It was also pointed out that there had been a dislocation in the delivery of mail in the United Kingdom recently.

In the Grounds of Appeal the Appellant essentially further developed the arguments submitted before the Receiving Section. In particular, it emphasised again that the act of designating a State and the payment of the required fee were separate acts and the term "designation" in Article 79(1) EPC only referred to the former. Payment of the designation fee within the time-limit was a necessary factual requirement, which had to be performed for a designation to take effect, but according to Article 91(4) EPC failure to do so only resulted in the designation being deemed withdrawn, which meant that it must previously have had effect. Articles 66 and 67(4) EPC, also cited by the Receiving Section, had nothing to do with divisional applications in any way. However, Article 66 EPC showed that when a European patent application had been filed it became equivalent to a regular national filing in the designated states immediately it had been accorded the date of filing and before the designation fees had been paid or the time limit for their payment had expired. The Receiving Section's reference to Article 76(1) EPC and the fact that a divisional application's subject-matter might not extend beyond the content of the earlier application as filed and might not have a wider territorial scope than the parent application were not valid arguments either. Firstly, in the present case the Appellants did not ask for the divisional application to have a wider territorial scope than the parent application as filed. Moreover, there was no suggestion in the EPC that rights relinquished in the parent application might not be claimed for the divisional application. On the contrary Article 76(1) EPC stated that a divisional application might be filed only in respect of subject-matter which did not extend beyond the content of the earlier application as filed. This clearly suggested that a divisional application might be filed in respect of subject-matter which was within the content of the

earlier application as filed but which was withdrawn before the filing of the divisional application. This interpretation of Article 76(1) EPC was supported by Rule 51(4) EPC allowing the applicant to excise subject-matter from the application prior to approval of the text by filing a divisional, even though the rights in respect of protecting that subject-matter had been relinquished in the parent application.

VII. In a communication the Board inter alia drew the Appellant's attention to decision J 22/95 dated 4 July 1997 (OJ EPO 1998, 569), in which the Legal Board of Appeal had decided that there was no right to designate in a divisional application a Contracting State which was originally designated in the parent application at the time of filing, unless the original designation was subsequently validated by payment of the respective fee. The Board further explained in more detail its position with regard to the case under appeal, thereby specifically responding to the arguments raised by the present Appellant. The Board also expressed doubts as to whether it was justified for the EPO to proceed according to Article 9(2), second sentence, RRF, in a case like the one under appeal, where the applicant had individually indicated states it wished to designate and paid a corresponding amount of fees therefore, and where, upon invitation, it had clearly indicated its wish to maintain its original express designations.

VIII. The Appellant replied that decision J 22/95 was wrong in that it precluded the designation in a divisional application of a state for which no designation fee had been paid in the parent application. The reference in said decision to the Vienna Convention for interpretation of the EPC was incorrect because the EPC was not a treaty in that sense, and it was ultra vires, because the Vienna Convention entered into force after the entry into force of the EPC. Therefore,



Article 76(2) EPC, which was totally clear in meaning, had to be interpreted without reference to other provisions of the EPC. The Appellant requested the Board to reconsider its view that a divisional application cannot validly designate a state which was designated in the parent application but in respect of which the designation fee was not paid, or alternatively to refer the matter to the Enlarged Board of Appeal.

### **Reasons for the Decision**

#### *1. Admissibility of the Appeal*

The appeal fee was paid on 30 July 1996. The time limit for filing the appeal against the decision of the Receiving Section dated 17 May 1996 and for paying the appeal fee would normally have expired on 29 July 1996. However, according to the Notice of the President of the European Patent Office dated 14 January 1997 concerning the extension of time limits according to Rule 85 EPC, published in OJ 1997, 32, there was at that time a general interruption in the delivery of mail in the United Kingdom within the meaning of Rule 85(2) EPC. The interruption and subsequent dislocation lasted from 21 June 1996 until 28 September 1996. In accordance with Rule 85(2) EPC time limits expiring in this period were extended to Monday 30 September 1996. The appeal fee has thus been paid within the time limit for the appeal as extended according to the Notice of the President.

2. *Designation of contracting states by the Appellant*

2.1 In decision J 22/95 (OJ 1998, 569) the Legal Board of Appeal held that in a divisional application only such States can be designated which are still effectively designated in the parent application when the divisional application is filed. The designation must not have been withdrawn or deemed to have been withdrawn before the filing of the divisional application (2.6 of the Reasons, referring to Singer/Lunzer, and 3., at the end, of the Reasons). In said decision the Legal Board of Appeal explained in detail why there is no right to designate in a divisional application a Contracting State which was originally designated in the parent application but for which no designation fee was paid in the parent application.

2.1.1 The Board in particular extensively dealt with the argument, which as to its substance was also raised by the Appellant in the present appeal, that the term "designation" used in Article 76(2) EPC had to be construed to mean designation simpliciter, and that, the acts of designation and of payment of the designation fee being distinct and separate acts, the abandonment of a designation in a parent application prior to division left unimpaired the right to include that designation in any divisional application.

Decision J 22/95 emphasised that the mere literally possible meaning of a provision of the EPC is not decisive on its own for its proper interpretation. Instead it is first necessary to consider the meaning of the provision in the context of the EPC as a whole (2.1 and 5. of the Reasons). In accordance with the

principles of the Vienna Convention the terms of the EPC should be given their ordinary meaning in their context and in the light of the object and purpose of the EPC (5. of the Reasons).

The present Appellant's criticism that the Vienna Convention was not applicable to the EPC, that applying its principles was therefore ultra vires, and that the EPO having been established by the EPC, it had no power to make a declaration as to how the EPC was to be interpreted, cannot be accepted by the Board. In decision J 22/95, as in decision G 5/83 (OJ 1985, 64, 4. and 5. of the Reasons), referred to in J 22/95, it has expressly been acknowledged that the Vienna Convention is not directly applicable to the EPC. It is then said that its principles can be referred to as they embody recognised international practice. This view is correct, as a rule. (See e.g. Wetzel/Rauschnig, The Vienna Convention on the Law of treaties, Travaux Préparatoires, Frankfurt 1978, page 12). Nothing to the contrary having been submitted by the Appellant here, there is no need to pursue this issue further. As regards the power of the Boards of Appeal to interpret the EPC the Board observes that it is the statutory function of the Boards of Appeal, attributed to them by the EPC, to interpret the EPC when the question of how a provision is to be applied on the case under consideration in the appeal is at issue.

- 2.1.2 In examining the context of the right to file divisional applications under Article 76(2) and (3) EPC in decision J 22/95, the Legal Board of Appeal did not only consider Articles 79(2) and 91(4) EPC. It concluded that it would be inconsistent with interpretation in good faith and in the light of the context of Article 76(2) EPC that the mere filing of a divisional application should resurrect rights in

Contracting States, in relation to which all rights under the parent application had been long since lost (5. of the Reasons). This conclusion is essentially based on the argument that under Article 67(4) EPC the European patent application shall be deemed never to have conferred upon the applicant any protection under Article 67(1) or (2) EPC against competitors in a Contracting State the designation of which is withdrawn or deemed to be withdrawn (2.3 of the Reasons).

The Appellant has objected that Article 67(4) EPC is not concerned with the application procedure. This is correct. It does not mean, however, that Article 67(4) EPC has nothing to do with the question of which states can be designated in a divisional application. On the contrary, as was pointed out by the Board in J 22/95, there is a clear link between the designation system of the application procedure and the rights conferred upon the applicant pursuant to Article 67 EPC, the sole purpose of the designation of contracting states being to obtain the protection provided for in Articles 64 and 67 EPC in those States (2.3 of the Reasons).

When it is asked whether the designation of states deemed withdrawn in the parent application at the filing date of the divisional application should be allowed in the divisional application, it is therefore entirely justified and even necessary to consider what would be the consequences of a positive answer to that question. These consequences would be that even a considerable time after the abandonment of a designation in the parent application third parties could suddenly see themselves confronted again with protection rights for an invention for which they had, when inspecting the file or the patent register of the parent application, been entitled to assume that protection by the European patent application had been abandoned for the designated state concerned, for which

no designation fee had been paid within the applicable time limit. The Board therefore maintains the view expressed in decision J 22/95 under 4. of the Reasons that third parties should be entitled to rely on such status of the parent application as a basis on which to take commercial decisions and to assume that no more far reaching rights could be achieved in future by the applicant by filing a divisional application (2.4 and 4. of the Reasons).

- 2.1.3 This view of designations is no more than the application to designations of the general principle applied in interpreting Article 76 EPC, that a divisional cannot give rise to rights which no longer existed in the parent application at the filing date of the divisional application. The Appellant has asserted the contrary, pointing out that pursuant to Article 76(1) EPC, the applicant could, up to approval of the text under Rule 51(4) EPC file a divisional application in respect of subject-matter relinquished in the parent application.

The Board cannot follow this line of argumentation. On the contrary, the fact that Article 76(1) EPC provides for a divisional application to be filed only in respect of subject-matter which does not extend beyond the content of the earlier application as filed makes it clear that the filing of a divisional application cannot confer more rights than existed in the parent application. The reason why the date of reference in this context is the filing date of the parent application is that this is also the date of reference relevant for the allowability of any amendments made by the applicant in the parent application under Article 123(2) EPC. When the applicant has amended the application in the course of proceedings, according to this provision he is in principle entitled to return to subject-matter originally disclosed. Because and to the

extent that the applicant can take up subject-matter from the original disclosure in the parent application under Article 123(2) EPC, he shall also have the right to file a divisional application on such subject-matter, such divisional then not claiming rights which did not exist in the parent application at the time of filing the divisional application. By contrast, in the rare cases where subject matter has been unequivocally and definitively abandoned in the parent application there is neither a right to claim such subject-matter again in the parent application nor the right to file a divisional on it (for the latter see J 15/85, OJ 1986, 395, 4. and 5. of the Reasons). Thus, as regards the allowable contents of a divisional application it is also clearly limited to the rights existing in the parent application at the time of filing the divisional application.

- 2.1.4 The Board, therefore, sees no reason to deviate from the view expressed in decision J 22/95 under 5. of the reasons that the filing of a divisional application cannot resurrect rights in Contracting States, in relation to which all rights under the parent application had been lost at the filing date of the divisional application, because at that date the designation of such State was already withdrawn or deemed to be withdrawn in the parent application.

This was clearly the case in the parent application to the present divisional application. The parent application having been filed on 28 December 1990 under Article 79(2) EPC, applicable at that time, the time limit for paying the designation fees had expired years

earlier and the sanction that all designations for which no designation fees had been paid were deemed to be withdrawn had already taken effect years before the filing date of the divisional application.

2.1.5 Therefore, the argument submitted by the Appellant that contrary to what had been said by the Receiving Section and later in decision J 22/95, deemed withdrawal of a designation did not have the effect that the designation was invalid ab initio (ex tunc) but only that it was deemed withdrawn on expiry of the term for payment (ex nunc), is not relevant to the decision on the present appeal. Said issue has recently been referred to the Enlarged Board of Appeal by the President of the EPO (G 4/98, Points of law referred to the Enlarged Board of Appeal published in OJ 1998, 567). There is however, no doubt that also in the case where the designation of a Contracting State for which no designation fee has been paid, is, in accordance with Article 91(4) EPC, as such, i.e. as a procedural declaration, ~~only~~ deemed to be withdrawn with effect ex nunc on expiry of the term for payment, the effect of deemed withdrawal for the protection derivable from the application, according to Article 67(4) EPC, is that the protection for that state has never come into existence. Thus, the core of the reasoning given by the Board in J 22/95 that it would be unjustifiable that rights which had already been lost in the parent application at the filing date of the divisional application could be resurrected by filing a divisional application, remains valid for cases such as the present one, where the designation was undoubtedly deemed withdrawn at the filing date of the divisional application. For these cases said reasoning is not called into question by the Referral of the President of the EPO.

2.1.6 Consequently, taking into account the Appellant's arguments, as regards the case under appeal the Legal Board of Appeal sees no reason to deviate from the conclusions arrived at in cited decision J 22/95.

2.2 In the present case it is, therefore, also not required under Article 112 EPC to accede to the Appellant's request to refer to the Enlarged Board of Appeal the question as to whether a divisional application can validly designate a state which was designated in the parent application but in respect of which the designation fee was not paid.

2.3 The Board concludes from the above that as a result the Receiving Section was right in finding that the States expressly designated by the Appellant in the present divisional application could not be designated in this application.

3. *Allocation of the designation fees to other designations*

This does not mean, however, that the finding of the Receiving Section is correct that the designation fees are deemed to have been paid for the states AT, DE, FR, GB, IT and NL. These are states that were still validly designated in the parent application at the filing date of the divisional application. They were chosen by the Receiving Section from the precautionary designation field of the divisional application's request form, in the alphabetical order in which the contracting states are listed there.

3.1 Before issuing its decision and after expiry of the time limit for paying the designation fees in the divisional application the Receiving Section invited the Appellant under Article 7(2) RRF to indicate to



which states other than the ones expressly designated in the divisional application the designation fees should be allocated. Thus it apparently assumed that Article 7(2) RRF can be extended by analogy to apply where the purpose of payment has been clearly indicated, but where the indicated purpose cannot be successfully achieved for other reasons. The applicant would thus be allowed to allocate the money for a different purpose than the one originally indicated by submitting a later declaration, even if such declaration were filed after the expiry of the time limit for performing the act, which still had to be confirmed by the allocation of the payment made. In decision J 23/82, OJ 1983, 127, 6. of the Reasons, referring to a situation under Article 9(2), first sentence, RRF - and in this respect differing from the present one - where the amount paid was not sufficient to cover all the designations in respect of which the applicant declared it had paid the fees, the Legal Board of Appeal stated that Article 7(2) RRF was applicable and took precedence over Article 9(2) RRF. In this context the Legal Board of Appeal expressed the view that the indication of the purpose of a payment within the time limit for the payment was not a mandatory requirement for payment to have been made in due time and according to Article 7(2) RRF could thus still be given later. It may, however, be doubted whether these statements, made for a situation where there was no clear indication of the purpose of payment because of the insufficiency of the overall sum paid for the indicated purpose, can be understood to mean that it is generally possible to change the purpose of a payment after expiry of the relevant time limit with retroactive effect to the date on which the payment was made.

3.2 In the present case this may remain undecided. Upon invitation the Appellant did not indicate that it agreed to the money being allocated to the states mentioned in the invitation of the Receiving Section. It clearly derives from the Appellant's response to said invitation that it wished to maintain the designation of the states expressly designated in the divisional application only. It did not even request as an auxiliary request that the money should be allocated to the states indicated by the Receiving Section. On the contrary, in the event that the Receiving Section did not withdraw its communication, the Appellant requested an appealable decision.

The Board takes the view that it is not justified for the EPO to proceed according to Article 9(2), second sentence, RRF in a case like the one under appeal, where the applicant has individually indicated the states he designates, for which he has paid the corresponding amount in designation fees, and where upon invitation according to Article 7 RRF it does not indicate other states for which the payment should be used but on the contrary confirms its will to maintain the original individual designations. In such a case the amount paid does not seem insufficient nor does there seem to be a lack of specification by the applicant at the time of payment within the meaning of Article 9(2) RRF. On the contrary, as has been acknowledged in unpublished decision J 10/86 (4. and 4.1 of the Reasons), in such a case it is clear that the amount of designation fees paid is for the designations individually made and not for any of the states contained in the precautionary designation field. Article 9(2), second sentence, RRF is a safety clause having the function of both maintaining as much of the application as possible on the basis of the presumed interest of the applicant derivable from the indications contained in the application and of

allowing the EPO to proceed further with the application where there is no specification by the applicant. The fact that the designation of the states expressly indicated by the applicant is not possible for legal reasons is not equivalent to the situation where the applicant has not specified how to apply an insufficient overall amount, as referred to in the first sentence of Article 9(2) RRF. Even where an express designation of a state made by the applicant is not possible for legal reasons such designation is, nevertheless, a clear and unequivocal declaration of the procedural will of the applicant which is binding on the EPO. Such procedural declaration can not be negated by the EPO by allocating, against the applicant's will, the money to other states designated under the system of precautionary designations, which the applicant could have but has not confirmed by the payment of designation fees. Thus, the fact that the contracting states of the EPC mentioned in the pre-crossed precautionary designation field also can be regarded as designated by the applicant for as long as such designations can still be confirmed by the payment of the respective designation fees, does not justify allocating the money to such states when the applicant wishes to maintain the individually indicated designations.

3.3 The decision of the Receiving Section has therefore to be set aside. For the reasons mentioned under 2.1 above, the states expressly designated by the Appellant in the divisional application have also not been validly designated, so the divisional application is deemed to have been withdrawn, as all designations are deemed to have been withdrawn (Article 79(3) EPC).

4. As the designation of the states made by the Appellant was not possible for legal reasons said designations are invalid. The payment of the designation fees is

therefore without legal basis. The money is to be refunded.

5. The same applies to the fee for re-establishment paid. The appeal fee has been paid in time. No time limit was missed. The request for re-establishment is therefore without object and the fee for re-establishment paid has to be refunded.

### **Order**

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

1. The request to refer to the Enlarged Board of Appeal the question as to whether a divisional application can validly designate a state which was designated in the parent application but in respect of which the designation fee was not paid in the parent application, is rejected.
2. The decision of the Receiving Section is set aside.
3. Application No. 95 200 811.8 is deemed to be withdrawn.
4. The designation fees paid on 10 April 1995 and the fee for re-establishment paid on 31 July 1996 are to be refunded.

The Registrar:

The Chairman:

M. Beer

J.-C. Saisset