



**Europäisches
Patentamt**

Große
Beschwerdekammer

**European
Patent Office**

Enlarged
Board of Appeal

**Office européen
des brevets**

Grande
Chambre de recours

Internal distribution code:

- (A) [] Publication in OJ
(B) [X] To Chairmen and Members
(C) [] To Chairmen
(D) [] No distribution

**Datasheet for the Interlocutory Decision
of the Enlarged Board of Appeal
of 26 September 2012**

Case Number: R 0002/12

Appeal Number: T 1022/09 - 3.2.07

Application Number: 02732216.3

Publication Number: 1429968

IPC: B65D 1/12, B65D 25/14,
B65D 85/72, B65D 79/00,
B65B 31/02, B32B 15/08,
B21D 51/26, B67C 3/02,
B67C 3/00, C12G 1/00

Language of the proceedings: EN

Title of invention:
Process for packaging wine in aluminium cans

Patent proprietor:
Barokes Pty Ltd.

Opponents:
Sektellerei Schloss Wachenheim AG/Vintalia Weinhandels GmbH &
Co. KG
Rexam Beverage Can Company
CROWN Packaging UK PLC
Prinz Max Emmanuel von Thurn & Taxis
Gargantas De Lata S.R.L.
Hermann Pfanner Getränke GmbH
Aloys, Günther
Sektellerei Peter Herres GmbH

Headword:
-

Relevant legal provisions:

EPC Art. 24, 112a

RPEBA Art. 4, 13, 14(2)

Keyword:

"Objection to a member of the Enlarged Board of Appeal,
suspicion of partiality"

Decisions cited:

G 0001/05, G 0002/08

Catchword:

-



Case Number: R 0002/12

INTERLOCUTORY DECISION
of the Enlarged Board of Appeal
of 26 September 2012

Petitioner: Barokes Pty Ltd.
(Patent Proprietor) 75 Cecil Street
South Melbourne 3205
Victoria (AU)

Representatives: Augenstein Christof
Preu Bohlig & Partner
Georg-Glock-Straße 14
D-40474 Düsseldorf (DE)

Andrae, Steffen
Andrae Flach Haug
Balanstrasse 55
D-81541 München (DE)

Other Party: Sektkellerei Schloss Wachenheim AG/Vintalia
(Opponent 01) Weinhandels GmbH & Co. KG
Kommerzienrat-Wagner-Str./Wamslerstr. 1/4
D-67157 Wachenheim/München (DE)

Representative: Steinecke, Peter
Müller Fottner Steinecke
Postfach 31 01 40
D-80102 München (DE)

Other Party: Rexam Beverage Can Company
(Opponent 02) 8770 West Bryn Mawr Avenue
Chicago
Illinois 60631, USA (US)

Representative: Dunlop, Brian Kenneth Charles
Wynne-Jones, Iainé & James LLP
Essex Place
22 Rodney Road
Cheltenham
Gloucestershire GL50 1JJ (GB)

Other Party: CROWN Packaging UK PLC
(Opponent 03) Downsvew Road, Wantage
Oxfordshire OX12 9BP (GB)

Representative: HOFFMANN - EITLÉ
Patent- und Rechtsanwälte
Arabellastrasse 4
D-81925 München (DE)

Other Party: Prinz Max Emmanuel von Thurn & Taxis
(Opponent 04) Weidlichgasse 19/2/4
A-1130 Wien (AT)

Representative: Bittner, Bernhard
Hannke Bittner & Partner
Patent- und Rechtsanwälte
Agidienplatz 7
D-93047 Regensburg (DE)

Other Party: Gargantas De Lata S.R.L.
(Opponent 05) Tucuman 1538
Piso 1 - Dto D
CP: 1050 Capital Federal (AR)

Other Party: Hermann Pfanner Getränke Gesellschaft mbH
(Opponent 06) Alte Landstrasse 10
A-6923 Lauterach (AT)

Representative: Puchberger, Peter
Puchberger Berger & Partner
Patentanwälte
Reichsratsstrasse 13
A-1010 Wien (AT)

Other Party: Aloys Günther
(Opponent 08) Nr. 144
A-6561 Ischgl (AT)

Other Party: Sektkellerei Peter Herres GmbH
(Opponent 09) Rudolf-Diesel-Str. 7-9
D-54292 Trier (DE)

Representative: Köllner, Malte
Köllner & Partner
Patentanwälte
Vogelweidstrasse 8
D-60596 Frankfurt am Main (DE)

Decision under review: **Decision of the Technical Board of Appeal
3.2.07 of the European Patent Office of
27 October 2011.**

Composition of the Board:

Chairman: W. van der Eijk
Members: R. Menapace
U. Oswald

Summary of Facts and Submissions

- I. On 10 February 2012 the respondent (patent proprietor, henceforth: the petitioner) in the appeal case T 1022/09 filed a petition for review pursuant to Article 112a EPC (case no. R 02/12) concerning the decision dated 27 October 2011.
- II. With the communication in accordance with Articles 13 and 14(2) RPEBA dated 20 July 2012 and dispatched together with the summons to oral proceedings, the Enlarged Board of Appeal in the composition pursuant to Rule 109(2) (a) EPC informed the petitioner of the Board's preliminary view on the issues raised in the petition and of its provisional conclusion that the petition is clearly inadmissible and also clearly unallowable. The communication was signed by the rapporteur on behalf of the Board, as prescribed by Article 5(3), last sentence RPEBA.
- III. With letter dated and received on 30 August 2012, the petitioner objected to the rapporteur as a member of the Enlarged Board of Appeal on the ground of suspected partiality according to Article 24(3) EPC. The petitioner requested the Enlarged Board of Appeal to exclude the rapporteur from the Enlarged Board of Appeal in these proceedings.
- IV. In the reasons for the objection it was submitted that the preliminary view expressed and drafted by the rapporteur raised serious concerns about her impartiality. As she ignored essential arguments and took disputed assessments of the Board of Appeal as granted, it seemed that she had already made up her

mind to dismiss the request without even waiting for the result of the scheduled oral proceedings. Crucial arguments in support of the petition were either ignored or rejected without giving any reasoning that would allow the petitioner to counter the preliminary view of the Enlarged Board of Appeal. Moreover, the rapporteur indicated that the proceedings could be expected as only being "very close" to a fair trial, this being an indication that she does not guarantee a fair trial to the petitioner.

In support, a detailed analysis of several passages and sections of the communication was presented.

- V. After due deliberation of the Board in the absence of the member concerned, the Chairman of the Enlarged Board of Appeal by order dated 13 September 2011 appointed Mr. R. Menapace as alternate member for the purpose of the proceedings under Article 4 RPEBA and Article 24(4) EPC.

- VI. In her comments under Article 4(3) the member concerned assured that she had and still has no personal interest whatsoever in the case, nor any personal resentment against the petitioner or its representative(s). The preliminary study was based on facts and only on the facts of the case. She also asserted that the communication had been drafted, in compliance with Article 5(3) RPBA, under the direction of the chairman of the Board.

Reasons for the decision

1. The objection of suspected impartiality (*iudex suspectus*) is derived exclusively from the text of the communication by which the petitioner was informed, in preparation of the oral proceedings, of the Board's preliminary view on the petition. The petition does not rely on any other circumstances or evidence and there is no indication of any in the comments of the member concerned or elsewhere. There is then no reason for further investigations or considerations in view of Article 4(1) RPEBA (see decision G 0002/08, dated 15 June 2009, reasons, 2.1) and no facts exist, which as such would allow a neutral and informed person to conclude that it might have good reasons to suspect the partiality of the member concerned ("objective test *in abstracto*" - see decision cited above, reasons, 4).

2. It remains then to be examined, whether or not the preliminary opinion in question, because of its substance or by the way it was expressed, allows such a conclusion *in concreto*, i.e. the presence of a factual impartiality of which the member concerned itself might be unaware and the cause of which need not be known.
 - 2.1 The suspicion of a subjective impartiality must be justified on an objective basis, i.e. it must be established based on objective indications, a duly established judge being deemed to act in good faith and therefore presumed impartial until proven otherwise (see decisions of the ECHR referred to in the above cited decision G 0002/08, reasons, 3.2). Purely subjective impressions or vague suspicions are not enough. The question is whether a reasonable, objective

and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case. It is thus necessary that a reasonable onlooker considering the circumstances of the case would conclude that the party might have good reasons to doubt the impartiality of the member objected to (G 0001/05, Reasons, point 20 with reference to further case law).

- 2.2 Applying these criteria, the Board in the present composition cannot identify in the communication in question any reason justifying a suspicion of partiality or a preconceived mind of the member concerned, more specifically any objective indication that this member would vote against the petitioner, irrespective of the further written and oral submissions of the latter. The conclusions on admissibility and allowability of the petition as drawn in the communication are as provisional as the underlying comments which were not intended to be complete nor final; rather they have been communicated pursuant to Article 13 (as "*a possible appreciation of substantive or legal matters*") and 14(2) RPEBA which stipulates: "*The Board's communication under Article 13 may draw attention to matters which seem to be of special significance, ... or may contain other observations that may help concentration on essentials during oral proceedings*". The provisional character of the Board's preliminary view of the case, in particular that the Board is not in any way bound by it (Article 13 RPEBA), is expressly stated at the beginning of the communication which itself does not contain any bold contention, nor has been substantiated

in "such outspoken, extreme or unbalanced terms" that it would preclude the capacity of the member concerned from dealing with the pending petition with an open mind and without preconceived thoughts.

3. The Board notes in this context - without dealing in any way with the merits of the communication or of the petitioner's comments on it - that the latter put forward an interpretation of selected parts of the text of the communication which, to say the least, is not the only possible or reasonable one.

The Board observes further that it would be incompatible with an objective assessment of a case and with the principle of fair trial in *inter partes* proceedings, if members of the Boards of Appeal could be "deposed" on the ground that they did not opine in favour of a particular party right from the beginning of the proceedings. In effect, the present request, if allowed, would amount to just that.

4. There is thus nothing in the communication in accordance with Articles 13 and 14(2) RPEBA dated 20 July 2012 and nothing else has come to light which could justify any suspicion of partiality against the member who drafted that communication as the then rapporteur, who thus has to remain a member of the Enlarged Board of Appeal in the case under consideration.

Order

For these reasons it is decided that:

The petitioner's request under Article 24(3) EPC is rejected.

The Registrar:

The Chairman:

P. Martorana

W. van der Eijk