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**Datasheet for the decision  
of the Enlarged Board of Appeal  
of 17 October 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,  
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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:**

Sektkellerei 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  
Sektkellerei Peter Herres GmbH

**Headword:**

**Relevant legal provisions:**

EPC Art. 112a, 113  
EPC R. 106, 104

**Keyword:**

"Petition clearly unallowable[yes]:  
- First ground of the petition for review: violation of the right to be heard because of the automatic dismissal of auxiliary requests- objection under Rule 106 EPC raised [no]; exception to this rule [no]- clearly inadmissible[yes]"

"-Second and third grounds of the petition: violation of the right to be heard, no opportunity to discuss the Article 123(2) EPC objection regarding Auxiliary Request III; no sufficient time given to the petitioner due to the cancellation of the second day of oral proceedings - clearly inadmissible [no]- clearly unallowable [yes]"

**Decisions cited**

R 0004/08; R 0010/08; R 0018/09; R 0001/10; R 0017/10;  
R 0021/10; R 0003/11

**Catchword:**

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Case Number: R 0002/12

**DECISION**  
of the Enlarged Board of Appeal  
of 17 October 2012

**Petitioner:**  
(Patent Proprietor)

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**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:** M.-B. Tardo-Dino  
U. Oswald

## Summary of Facts and Submissions

- I. The petition for review concerns decision T 1022/09 of Board of Appeal 3.2.07 to set aside the decision of the opposition division rejecting the oppositions, and to revoke European patent No. 1 429 968. This decision was announced at the end of oral proceedings on 27 November 2011 and the parties were notified of the decision in writing on 2 December 2011.
- II. The petitioner (patent proprietor) filed the petition for review by fax and paid the relevant fee on 10 February 2012.
- III. The previous proceedings, to the extent that they are relevant for the purpose of the present petition proceedings, can be summarised as follows.
- Ten oppositions were filed against European patent No. 1 429 968: "Process for packaging wine in aluminium cans". Opponents 02, 03, 06 and 09 filed an appeal against the opposition division's decision.
  - Oral proceedings before the Board of Appeal were scheduled for two days. The Board took its decision at the end of the first day of oral proceedings. According to the minutes of the oral proceedings the petitioner's requests then on file were the following:
    - The main request: that the appeal be dismissed (maintenance of the patent as granted).
    - Auxiliary request II filed with letter dated 27 September 2011;

- Auxiliary request III filed at 19:15 during the oral proceedings (called IIIa in the petition);
- Auxiliary request IV filed at 19:15 during the oral proceedings (called IVa in the petition);
- Auxiliary requests V and VI filed during the oral proceedings;
- Auxiliary request VII filed at 19:15 during the oral proceedings (called VIIa in the petition);  
and
- Auxiliary request III filed at 9:15 and re-filed at 20:55.

*The decision under review*

The main request (see above) was refused for lack of inventive step of claim 1 over D29/29a.

Auxiliary request II filed one month before oral proceedings was admitted but refused for lack of inventive step.

Auxiliary request III, filed at the beginning of oral proceedings (9:15), then replaced by an auxiliary request III filed at 19:15 but then filed again at 20:55, after auxiliary request III of 19:15 had been found inadmissible, was not admitted because it was held not clearly allowable for formal reasons (point 8.3 of the reasons). The Board accepted the appellants/opponents' arguments that the amendment incorporating the temperature range alone and taken out of context with the material to which it applied was not clearly allowable under Article 123(2) EPC because the skilled person would understand that the disclosure of the temperature range and the baking time "is

unbreakably linked to the specification of the material to be baked".

Auxiliary request III, filed at 19:15, was an attempt to make the preceding request III clearly allowable by defining the thermoset coating as an epoxy resin combined with a formaldehyde-based crosslinking agent. According to the Board of Appeal a further search was necessary, something which would require adjournment of the oral proceedings, thus bringing into play Article 13(3) RPBA. A further search was necessary because the composition of the thermoset coating was known per se but not in the context of linings for cans (point 9 of the reasons of the decision). Therefore this request was also not admitted.

Auxiliary requests IV and VII, filed during the oral proceedings at 19:15, were not admitted because the claims included the same feature which had led to the non-admission of the auxiliary request III (version filed at 19:15) (point 10 of the reasons of the decision).

Auxiliary request V, filed at 9.15 during the oral proceedings, and auxiliary request VI, filed at the start of the oral proceedings, were not admitted because each of them contained an extra feature, taken from the description of the patent as well as from "product of the process" type (inverted coma in the decision under review) claims 11 and 12 as granted, which would require a further search and therefore adjournment of the oral proceedings again bringing into play Article 13(3) RPBA ( point 11 and 12 of the decision).

*Request for correction of the minutes of oral proceedings*

With a letter dated 16 December 2011, the petitioner requested correction of the minutes of the oral proceedings by insertion, after the words "Auxiliary request III, filed at 9:15 was replaced by Auxiliary request III filed at 19:15" of the words: "After the Board did not admit Auxiliary requests III to VII, respondent's representative Mr.S. Andrae expressed that he felt "misled" by the board and that he considers the non-admission as being a case for an R-decision".

Opponents 02, 03 and 09 sent written comments on the request for correction, each of them submitting that they had not heard the petitioner make such a statement and that its request should not be granted.

In its communication of 21 February 2012 the Board of Appeal rejected the request for correction on the ground that the members of the Board had no recollection of this event; nor did their handwritten notes support this assertion.

*The proceedings of the petition for review*

- IV. With a communication issued on 20 July 2012 in accordance with Articles 13 and 14(2) RPEBA and attached to the summons for oral proceedings, the Enlarged Board informed the petitioner of its preliminary view on the issues raised in the petition and of its provisional conclusion that the petition was clearly inadmissible and also clearly unallowable.



- V. With a letter dated 30 August 2012 the petitioner objected to the rapporteur as a member of the Enlarged Board of Appeal on the ground of suspected partiality (Article 24(3) EPC), the communication being said to ignore important arguments submitted in the petition and stating that the proceedings would be only "close" to a fair trial.
- VI. By decision of 26 September 2012 and in a composition not including the concerned member, in compliance with Article 24(4) EPC and Article 4 RPBEA, the Enlarged Board rejected the petitioner's request.
- VII. The petitioner's submissions in writing and expounded during the oral proceedings to substantiate the grounds of its petition may be summarised as follows.
- The cornerstone of the petition for review as filed was that multiple violations of the right to be heard had occurred (Article 112a(2) (c) in conjunction with Article 113 EPC), but the petition was also based on Article 112a(2) (d) EPC in respect of "further deficiencies". Regarding the definition of the right to be heard, it was contended that Article 113 EPC should be applied in line with the standard of Article 6 of European Convention of Human Rights or Article 47(2) of the European Charter of Fundamental Rights or in compliance with the ALI/UNIDROIT Principles of Transnational Civil Procedure.
- VIII. In the subsequent submissions in response to the Enlarged Board's communication, separate from the objection to the rapporteur, the grounds for the

petition were presented in the form of a table as follows.

Action of the Board of Appeal	Observance of Rule 106 EPC	Legal consequences
- ignoring comments on further auxiliary requests	Objection raised according to Rule 106 EPC	Violation of Art. 112a(c) and 113 EPC
- No discussion about Art. 123(2) EPC regarding auxiliary request III	Objection under Rule 106 EPC impossible	Violation of Art. 112a(c) EPC Violation of Art. 112a(d) and Rule 104 EPC.

The arguments in support of the admissibility and the allowability of these contentions were the following.

*Admissibility of the petition based on the first ground (violation of the right to be heard originating from the misuse by the Board of its discretion, resulting in an automatic dismissal of the auxiliary requests).*

An objection complying with Rule 106 EPC was made. The representative expressed his surprise and said he had felt misled and that the refusal of auxiliary requests III to VII was a matter for an "R-case". There was no other possible interpretation of this remark than as an objection under Rule 106 EPC. There must be a willingness on the part of the judge to understand what a party meant. In addition, there was no rule in the EPC from which it can be concluded that the minutes of oral proceedings were complete and that an objection

had not been raised if it was not mentioned in the minutes. Indeed, the way in which the minutes were drafted, i.e., without their being read out at the end of the hearing, left the parties without any possibility to know their contents until the minutes were sent to parties. A party had no means to ensure that the Board had understood it correctly.

*Admissibility of the petition based on the second ground (violation of the right to be heard regarding Article 123(2) EPC and auxiliary request III, and violation of Article 112a(d), Rule 104 EPC).*

It was argued that the petitioner had not been able to raise an objection in compliance with Rule 106 EPC because the debate was closed after the Board decided on the admissibility of auxiliary request III. There had been no reason for the petitioner to expect that the Board would come to a final decision, all the more so because the petitioner had believed that the oral proceedings would be continued the following day.

*As to the allowability of the first ground it was contended that:*

- The Board of Appeal's behaviour in exercising its discretion repeatedly during the oral proceedings not to admit the auxiliary requests amounted to a violation of the right to be heard.

The discretion of the Board to decide on the allowability of an auxiliary request was not unlimited and had to be exercised within the limits of a fair trial. This implied that the party be allowed to comment on objections and issues raised for the first

time; the right to be heard was not limited to the simple presence of the judge: he also had to consider all the contentions of the parties (a reference was made during the hearing to the German constitutional law).

On the contrary, the automatic dismissal of the auxiliary requests (IIIa, IVa and VIIa) on the sole ground that they contained the feature of the epoxy resin which would necessitate a new search, without due consideration of all the facts, was a mere excuse by the Board which in fact had already made up its mind to reject any further requests. The petitioner had been given the impression when the Board gave it the opportunity to amend its claims that these would be discussed further, all the more since a second day of oral proceedings had been scheduled. In the petitioner's view the opponents, who had raised an objection under Article 123(2) EPC, could have expected that the petitioner would try to overcome this objection by re-introducing into the claim the missing feature of the epoxy resin.

*As to the allowability of the second ground it was argued as follows:*

- A second fundamental violation of the right to be heard occurred because the petitioner could not present its argument on the compliance of auxiliary request III with Article 123(2) EPC because, at 21:00, i.e. 12 hours after the hearing started, the discussion was restricted to its admissibility in the light of procedural issues, especially whether this auxiliary request III initially filed at 9:15 was replaced at 19:15 by so-called auxiliary request IIIa.

- The petitioner also argued that it did not even have the opportunity to request the interruption of oral proceedings, and that limiting oral proceedings to one day when another day had been scheduled was not only a violation of the right to be heard but also a further procedural deficiency within the meaning of Rule 104(a) EPC (as interpreted by the petitioner), namely not merely a failure to "arrange" oral proceedings in breach of Article 116 EPC, but also a failure to give the petitioner sufficient "room and time" for discussing the admissibility of auxiliary request III. Too much time, the petitioner said, was allocated to the discussion of issues in favour of the opponents, or to unexpected objections which could have been quickly rejected (discussion about Article 83 EPC objections eventually assessed as ill-founded). Only 30 minutes time were allocated to vital issues such as inventive step and the discussion about this issue also took place at a point in time when normal oral proceedings would already have been over. Even so the Board continued to put the petitioner under time pressure, whereas the petitioner had counted on their being a second day. The judge must not overburden the representatives of the parties with hearings exceeding ten hours. Under these circumstances the closure of the debate on the first day came as a surprise. Three affidavits from the three professional representatives who attended the oral proceedings were filed by the petitioner in support of its contentions.

IX. Oral proceedings before the Enlarged Board were held on 17 October 2012. Apart from the request for oral

proceedings the petitioner's requests remained unchanged, as follows:

- to set aside decision T 1022/09 of Technical Board 3207 dated 27 October 2011;
- to re-open the proceedings before the Technical Board of Appeal while replacing all the members who had participated in the decision;
- to reimburse the fee for petition for review.

At the end of the hearing the Enlarged Board announced its decision.

## **Reasons for the Decision**

### *Preliminary remarks about the principles and law applicable*

The legal principles in the references quoted in the petition (German constitution, PTCP, ECHR) might be of some assistance to the Enlarged Board if there was a loophole in the procedural provisions of the EPC (Article 125 EPC) or if the applicable provisions (in the present case Article 113 EPC) were contrary to the general principles quoted.

That is not the case, as the petitioner itself acknowledged in its submissions in response to the Enlarged Board's communication: the petitioner does not contest the legitimacy of the provisions of the EPC applicable in the present case but argued that the way in which the Board of Appeal applied these provisions in the case under review resulted in a violation of the right to be heard and did not conform the requirements of a fair trial.

1. Admissibility of the petition

1.1 The formal requirements with respect to the time limit for filing a petition and to payment of the petition fee are met (Article 112a(4) and Rule 107 EPC).  
The petitioner was adversely affected by the decision.

1.2 Rule 106 EPC

A petition for review under Article 112a(2)(a) to (d) EPC is only admissible where an objection in respect of the procedural defect was raised during the appeal proceedings and dismissed by the Board of Appeal, except where such objection could not be raised during the appeal proceedings.

1.2.1 *Admissibility of the petition so far as it concerns the first alleged violation of the right to be heard (automatic dismissal of the auxiliary requests because of a misuse of discretion):*

A fair trial and fairness towards the parties imply legal certainty, which, in turn, implies predictability of the application of legal provisions. Regarding the fundamental principles underlying the petition for review it must be borne in mind that this procedure has been intended to be an exceptional means of redress against a decision which has become *res judicata*, so as to remedy intolerable deficiencies occurring in individual appeal proceedings (Preparatory document CA/PL 17/00, point II: "Main features of the Petition for Review"). In this respect the objection under Rule 106 EPC has been considered, right from the entry

into force of the petition for review procedure, to be an important procedural act, the significance of which must be immediately clear for the Board of Appeal, because it is also a means for rectification of the procedural defect, precisely to avoid the need to challenge a decision which is *res judicata* (see as examples R 4/08 of 20 March 2009, point 2 of the reasons; R 17/10 of 15 June 2011, point 2 of the reasons and R 1/10 of 22 February 2011, point 6 of the reasons).

In the case in suit there is no trace or evidence of the statements allegedly made by the petitioner's representative during the oral proceedings. The Board of Appeal rejected the request for correction of the minutes aimed at inserting the sentences claimed to have been pronounced and three opponents confirmed that they did not hear such remarks.

But even if for the sake of argument the Enlarged Board assumed that the representative mentioned that he felt misled and believed that it was a case for an "R-decision", the subsequent disagreement about what was said or what was not said, and how what was said should have been interpreted, demonstrates how much the formal requirement of an objection under Rule 106 EPC is justified.

In any event, the remarks, if made, were not in a form that the Board of Appeal could recognise them immediately and without doubt as an objection under Rule 106 EPC (see R 4/08 point 2.1 of the reasons). As a consequence, and bearing in mind the function of the petition for review, the petitioner's argument that in the course of oral proceedings the dismissal of an objection by the Board may be expressed informally, for



instance by a mere gesture from the Board's chairperson, without any record in the minutes of the attempt to object and the dismissal of the objection, are not relevant.

Just as unconvincing are the arguments that there is no legal presumption that the minutes are complete or that the parties have no means to check what the minutes contain: Not only when the chairperson confirms the final requests before closing the debate, but at any time when the Board is about to deliberate, (the risk of a final decision after deliberation being always present), it is the duty of a party to check whether its objection to a fundamental procedural defect occurring during the oral proceedings has been recognised by the Board and will be dealt with. Even if the objection was raised earlier during the oral proceedings, it is not, contrary to what the petitioner contended during the oral proceedings before the Enlarged Board, comparable to an intermediate request, something which is not always reflected in the minutes: As stated in R 4/08 point 2.1 of the reasons, an objection under Rule 106 EPC is additional to and distinct from other statements. The point is not that the minutes do not reflect the whole oral proceedings; the point is that, if a party is really convinced that a violation of its right to be heard has occurred during the oral proceedings the subsequent objection must be clearly raised as such, and not as a mere aside, so that it will oblige the Board of Appeal to react, and require this to be recorded in the minutes in accordance with Rule 124 EPC, at least at a party's request. Failing that, if the procedural defect was apparent during the oral proceedings, as in the present

case, there is no way to escape from the conclusion of inadmissibility under Rule 106 EPC.

Consequently, in the present case the petition with respect to the first ground based on the dismissal of auxiliary requests IIIa, IVa and VIIa is clearly inadmissible under Rule 106 EPC.

- 1.2.2 *Admissibility of the petition so far as it concerns the second ground of the petition based on a second and third alleged violation of the right to be heard, the third consisting also of a fundamental procedural violation according to Article 112a(d) and Rule 104 EPC*

The Enlarged Board is not fully convinced that the petitioner was unable to raise an objection in respect of this complaint and remains doubtful as to the admissibility of this second ground. But given the conclusion reached upon the allowability of the petition as a whole, the question whether this ground is clearly inadmissible can be left open.

2. *Allowability of the petition for review with respect to the two alleged violations of the right to be heard mentioned in the second ground of the petition*

In summary, the two remaining alleged violations of the right to be heard consist on the one hand of the impossibility for the petitioner to discuss the Article 123(2) EPC issue regarding auxiliary request III and on the other hand of the more general contention that the speeding up and the concentrating of the debate into a single day put the representatives

under pressure, depriving the petitioner of its right to be properly heard.

2.1 *The first alleged violation*

When the initial auxiliary request III was first discussed by the Board, Article 123(2) EPC was beyond any doubt an issue because the new request III, filed at 19:15 hrs by the petitioner to replace it, was intended precisely to remedy the non-compliance with Article 123(2) EPC of this first auxiliary request III (the reasons for such non-compliance being dealt with in paragraphs 8.2 and 9.2 of the reasons). The petitioner conceded this, but contended that its right to be heard had not been exhausted by the filing of a new request and that it had been deprived of the opportunity of submitting further arguments.

However, the Enlarged Board's case law makes it clear that the right to be heard is satisfied if a party is aware of and thus has had the opportunity to comment upon arguments on which the decision is based. In the case in suit the petitioner did not deny that it was aware, at least when auxiliary request III was first filed, that Article 123(2) EPC was an issue. Its reaction then was to file a new auxiliary request III to remedy the objection. It also admitted that, on the re-introduction of this request, there was a thorough discussion about its admissibility. It is commonplace (and the parties must be prepared for it) that Articles 84 and 123(2) EPC, even though they are not really "formal" requirements are none the less part of the discussion on the admissibility of late-filed

requests. Thus at that time there was a second opportunity for discussion. Consequently, bearing in mind that the right to be heard is satisfied when the party is given the opportunity to discuss the arguments on which the decision will be based, the way in which a party makes use of its opportunity is its own responsibility. It cannot complain after the decision has been made, that its defence was not complete because it did not use this opportunity as it could have done (see R 18/09 of 27 September 2010, point 11).

## 2.2 *The second alleged violation*

The Enlarged Board made clear in its communication that the duration of oral proceedings was not as such listed among the procedural defects that might justify filing a petition for review (R 21/10 of 16 March 2011, point 4). It has been clearly established in the case law under Article 112a EPC that the list of Rule 104 EPC which implements this article is exhaustive (see for instance R 10/09 of 22 June 2010, point 2.5). In this respect the petitioner relied on a particular interpretation of Rule 104(a) EPC, namely that the rule should be understood not only as an obligation to arrange oral proceedings but also to give the parties enough time to exercise their right to be heard.

However, it is not sufficient for the petitioner to claim that the duration of the oral proceedings and, more generally, that the Board of Appeal's behaviour resulted in a violation of the right to be heard, in addition to and distinct from the two other alleged violations examined above. To succeed it must establish

that for reasons of lack of time or time pressure it was deprived of the possibility to properly defend its case, resulting in a decision which was then based on grounds that it did not have an opportunity to comment upon. The Enlarged Board however sees no evidence of this on the facts as they appear from the file. As regards the Article 123(2) EPC issues relating to Auxiliary request III, the Enlarged Board has already come to the conclusion that the petitioner was not deprived of an opportunity to discuss them (see 2.1 above).

As regard the non-admissibility of the further auxiliary requests the Enlarged Board has found this ground clearly inadmissible (see 1.2.1 above). The Technical Board of Appeal rejected all the requests on the common ground that further search was needed a ground which was, the petitioner says, an excuse to finish the proceedings at the end of the first day. Assuming for the sake of argument that this complaint were admissible, which remains questionable in the light of paragraph 1.2.1 above, the Enlarged Board can only remark that there is no evidence at all of such an intention, and in the absence of any fact which could give it some plausibility it remains a mere assertion. In fact, this assertion amounts to contending that the Board of Appeal did not properly exercise its discretion when it decided in the exercise of its power under Article 15(5) RPBA and in application of the criteria provided by Article 13 RPBA that the case was ready for the decision and that the auxiliary requests were not admissible because they would require an adjournment of the oral proceedings. The fact that the Board of Appeal relied upon only one common ground for all requests is not per se evidence, let alone proof

that the petitioner's right to be heard could not be fully exercised regarding the discussion restricted to the admissibility of the auxiliary requests. On the contrary it appears from the decision of the Board of Appeal (see point vi of facts and submissions, 9.4 of the reasons) that the petitioner made comments on what was the main procedural obstacle to the admissibility, namely the need for further search and the consequential adjournment of the proceedings. It follows that the petitioner has not established any further procedural violation of the right to be heard due to the conduct of the oral proceedings.

3. The upshot of this is that the petition, being partially clearly inadmissible, and partially clearly unallowable is as a whole declared clearly unallowable.

**Order**

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

The petition is rejected as clearly unallowable.

The Registrar:

The Chairman:

P. Martorana

W. van der Eijk