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**Datasheet for the decision
of the Enlarged Board of Appeal
of 15 January 2016**

Case Number: R 0013/14
Appeal Number: T 1142/12 - 3.3.03
Application Number: 05021885.8
Publication Number: 1772486
IPC: C08L 23/04
Language of the proceedings: EN

Title of invention:

Polyethylene composition for injection moulding with improved stress crack/stiffness relation and impact resistance

Applicant:

Borealis Technology Oy

Headword:

-

Relevant legal provisions:

EPC Art. 112a(2)(c) and (d)
EPC R. 104(b)

Keyword:

Right to be heard violated [no]
Requests not dealt with [no]
Petition for review not allowable

Decisions cited:

R 0001/08, R 0004/11, R 0009/14

Catchword:

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Case Number: R 0013/14

D E C I S I O N
of the Enlarged Board of Appeal
of 15 January 2016

Appellant: Borealis Technology Oy
(Applicant) P.O. Box 330
06101 Porvoo (FI)

Representative: Kador & Partner
Corneliusstrasse 15
80469 München (DE)

Decision under review: **Decision of the Technical Board of Appeal
3.3.03 of the European Patent Office of
8 April 2014.**

Composition of the Board:

Chairman: W. van der Eijk
Members: M.-B. Tardo-Dino
A. Lindner
F. Blumer
W. Sekretaruk

Summary of Facts and Submissions

- I. The petition for review concerns decision T 1142/12 of Board of Appeal 3.3.03, announced at the end of oral proceedings on 8 April 2014 and notified in writing on 20 June 2014, to dismiss the appeal against the decision of the examining division of 29 December 2011 refusing European patent application No. 05021885.8. The petitioner is the applicant and appellant.
- II. The petition was filed on 27 August 2014 and the corresponding fee paid on the same date. The petition for review is based on Article 112a(2)(c) and (d) EPC in connection with Rule 104(b) EPC, on the grounds that a fundamental violation of Article 113 EPC occurred and that the board decided on the appeal without deciding on requests relevant for the decision.
- III. Prior to the oral proceedings, which were held in the composition pursuant to Rule 109(2)(a) EPC the Enlarged Board sent a communication informing the petitioner of its provisional view.
- IV. Oral proceedings took place on 28 September 2015. At the end of the proceedings, the Board announced that it had decided to submit the case to the Enlarged Board in its five-member composition pursuant to Rule 109(2)(b) EPC.
- V. Oral proceedings before the Enlarged Board in its five-member composition were held on 15 January 2016. At the end of the proceedings the Board announced its decision.

Facts underlying the petition for review

- VI. In its decision of 8 December 2009, the examining division had refused the European patent application No. 05021885.8.
- This decision was set aside by Board of Appeal 3.3.03 (decision T 933/10 of 25 January 2011), on the grounds that the refusal to accede to the request of the applicant to hold the oral proceedings in Munich rather than The Hague was not reasoned (violation of Article 113 EPC). In particular, the examining division had failed to take into consideration the argument that the activities of Borealis Technology Oy were concentrated in Munich.
- VII. The examining division issued a second decision rejecting both the request to hold the oral proceedings in Munich instead of The Hague and the request for the grant of a patent.
- VIII. The petition for review concerns the decision of the board of appeal to the extent that it did not set aside the decision of the examining division to refuse the request to hold the oral proceedings in Munich instead of The Hague.

Summary of the arguments

- IX. The petitioner contends that the board of appeal decided on the appeal without deciding on two requests relevant for this decision in the meaning of Rule 104(b) EPC. The board found that it was not empowered to decide to refer a point of law about the location of the oral proceedings to the Enlarged Board of Appeal. It also decided that it was not competent to challenge

the refusal by the examining division of the request to change the location of the oral proceedings. According to the petitioner, this means that the board did not consider its arguments regarding the board's competence or its arguments why its request for relocation was reasonable.

- The petitioner argued that the right to be heard is not restricted to the possibility to present arguments; it also means that the board has to take these arguments into consideration. In particular, it argued that:

(a) Deciding whether the petitioner had a right to request that the oral proceedings be held in Munich was not a matter of management but rather one of procedural rights and guarantees by the EPC, and as such did not fall within the competence of the President of the Office. The refusal of its requests amounted to a procedural error.

(b) Contrary to what the board of appeal stated, in refusing the request, the examining division had made a decision and was not merely expressing the way in which the EPO is managed.

(c) The board was therefore competent to decide on the appeal against this decision in the same way as the examining division was competent to decide, and, actually, these two instances decided on two occasions: T 933/10 and T 1012/03.

- The decision under review contradicts the first decision made by the same board in a different composition.

- In deciding that it was not competent to review the decision of the examining division, the board had deprived the petitioner of a means of redress, all the more so since it did not indicate which body was in fact competent to do so instead. The notion of partial incompetence will have heavy consequences in the future in terms of the rights of the parties.

- At the oral proceedings, the petitioners also asked the Enlarged Board to consider in its decision its request to have the oral proceedings relocated to Munich to be a reasonable request which should in the future be considered by the boards of appeal.

The requests

- X. The petitioner's requests were that the decision T 1142/12 be set aside and the proceedings re-opened before the boards of appeal and that the petition fee be reimbursed.

Reasons for the Decision

Admissibility of the petition for review

- 1. The requirements with respect to the time limit and the payment of the petition fee are met.

1.1 Rule 106 EPC

1.2 In its preliminary opinion, the Enlarged Board raised an issue regarding the objection under Rule 106 EPC which had been raised in earlier written submissions but not reiterated at the oral proceedings. In the light of the petitioner's arguments in its reply to the communication from the Enlarged Board, in particular that the present petition for review is specific inasmuch as the grounds on which it is based relate to the particular reasoning used in the decision as shown below, this objection is no longer relevant. Accordingly, the Enlarged Board accepts that the alleged deficiencies could be identified only after the petitioner had been made aware of the written decision.

In view of this latter consideration, the Enlarged Board came to the conclusion that the question whether or not the objection was validly raised was now moot.

2. **Allowability**

2.1 The petitioner's complaint revolved around the "negative" declaration by the board of appeal concerning its power to decide on the location of oral proceedings: by virtue of this declaration, the board had excluded any possibility of a decision being taken on the requests (referral, remittal with the order to have the oral proceedings held in Munich). By the mere fact that it denied to be empowered to decide on the location of the oral proceedings, on the grounds that this was a matter of management, it also excluded any

possibility of discussion of the petitioner's arguments concerning the merits of its requests.

- 2.2 The Enlarged Board understands that the petitioner is not arguing that its requests were overlooked or ignored, but that they were not dealt with within the proper meaning of Rule 104(b) EPC.
- 2.3 The Board also understands that the petitioner has taken the terminology used in the decision literally. When the board stated that it *"has no power to challenge the contested refusal of the request to hold oral proceedings in Munich instead of The Hague"*, or *"is not empowered to refer a question in respect of the location of oral proceedings"*, or that *"the place, the room and even the date [of oral proceedings] are of organisational nature"*, the petitioner interpreted this literally, understanding it to mean that the board had not even considered the case and had refused to decide on any of these issues.
- 2.4 However when these expressions are read in context the interpretation put forward by the petitioner cannot be accepted. Beyond the appearances created by the wording, it cannot be denied that the board (a) heard the petitioner's arguments on the relevant issue and (b) decided on the requests relevant for the decision.
- 2.4.1 (a) In its communication of 18 February 2013, prior to the oral proceedings, the board set out, in particular in point 4, the legal issue which it deemed to be crucial to deciding on the location of the oral proceedings. The board expanded on its view that the practical side of the organisation of oral proceedings

is a matter of management of the EPO, which lies within the power of the President of the EPO as provided for by Article 10(2) EPC. It concluded that, since the examining division is not empowered to take a decision on the location of oral proceedings, the board of appeal is not empowered to review the contested refusal to hold them in Munich instead of The Hague.

2.4.2 In its response to this communication, the petitioner argued in favour of the competence of the board to decide, and gave reasons why its request for relocation should be granted.

2.4.3 In stating that it had no power to challenge the "contested 'refusal of the request to hold oral proceedings in Munich instead of The Hague'" (paragraph 2.9.2 for the reasons of the decision), the board implicitly decided on the petitioner's request, even if its decision was not expressed with the usual and formal terminology.

2.4.4 It is true that the reasons given by the board do not seem to directly address the petitioner's arguments in favour of having the oral proceedings in Munich. But in fact the board based its reasoning on the crucial reason announced in its communication, i.e. the general principle that the organisation of oral proceedings lies within the competence of the President and cannot be reviewed by the board of appeal pursuant to the principle of the separation of powers (point 2.10 of the reasons). This principle doomed the petitioner's arguments regarding the inconvenience and the competence of the board to be irrelevant or non-persuasive respectively (point 2.9.3 of the reasons).

In this same passage, the board also answered the petitioner's question about who should be competent, when it stated that means other than appeal proceedings have to be found.

2.4.5 It must be remembered that it is not the purpose of petition for review proceedings to evaluate whether or not the reasons selected by the board are appropriate. This was made clear from the beginning in points 2.1 and 4 of the reasons in R 1/08 of 15 July 2008, which also referred to the *travaux préparatoires* for the EPC 2000 and has since been endorsed by the Enlarged Board, for example in R 9/14 of 24 February 2014 and R 4/11 of 16 April 2012. What matters with respect to petitions for review is whether the reasons given for the decision came as a surprise for the party. In the present case and for the reasons given above the answer is that they did not.

2.4.6 (b) At first glance, when reading that the board held that it was not empowered to refer a question to the Enlarged Board, it could also be concluded that the board did not decide on this particular request. However, the Board said that this request was to be "rejected" for the same reason as given for the refusal to challenge the request for relocation of the oral proceedings. Whatever the terminology used, the fact remains that the request was rejected, i.e. a decision was made.

2.4.7 For the same reason, namely that within the scope of petition for review proceedings the duty of the Enlarged Board is not to review the merits of the case, the oral request to say something about the

reasonableness of the request for relocation cannot succeed.

3. It follows from the above that the petition must be rejected as not allowable.

Order

For these reasons it is decided that:

The petition for review is rejected as being unallowable.

The Registrar:

The Chairman:

C. Eickhoff

W. van der Eijk