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D E C I S I O N
of 27 September 2004

Case Number: T 0306/01 - 3.2.2

Application Number: 95929314.3

Publication Number: 0762856

IPC: A61F 2/02

Language of the proceedings: EN

Title of invention:
A flexible expandable stent

Former Patentee:
MEDINOL LIMITED

Former Opponents:
1. Tomlinson, Edward James
2. Cordis B.V.
3. Boston Scientific Corporation
4. Janssen Pharmaceutica N.V.

Headword:
-

Relevant legal provisions:
EPC Art. 111(1)

Keyword:
"Jurisdictional measure in response to a request based on the alleged fundamental violation of Article 113 EPC in the course of appeal proceedings and aimed at the revision of a final decision taken by a Board of Appeal"

Decisions cited:
G 0001/97

Catchword:
-

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Beschwerdekammern | Boards of Appeal | Chambres de recours

Case Number: T 0306/01 - 3.2.2

D E C I S I O N
of the Technical Board of Appeal 3.2.2
of 27 September 2004

Former Respondent: (patentee)
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Representative:
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Decision concerned:
Decision of the Board of Appeal 3.2.2 of the European Patent Office given on 31 March 2004 concerning revocation of European patent No. 0762856.

Composition of the Board:

Chairman: T. Kriner
Members: M. G. Noël
R. T. Menapace

Summary of Facts and Submissions

I. In appeal case T 306/01 concerning an opposition against European patent No. 0 762 856, the Board of Appeal 3.2.2 gave its final decision revoking the patent on 31 March 2004. The decision in writing together with the reasons for it was posted on 29 June 2004.

II. On 3 September 2004 the representative of the former respondent (patentee) filed a petition for review by the Enlarged Board of Appeal of the decision referred to above. The petition is based on the grounds that a fundamental violation of Article 113 EPC occurred during the appeal proceedings, more specifically at the oral proceedings held on 31 March 2004. A Legal Opinion prepared by Prof. Joseph Straus in support of a similar petition in respect of a decision taken by another board of appeal in another case was attached.

III. In the petition referred to above the Enlarged Board of Appeal is requested:

A. to review and to set aside the decision referred to above and order Board 3.2.2 to re-open the appeal proceedings;

B. subsidiarily, to stay/suspend the review proceedings until Article 112a EPC will formally enter into force;

C. to summon oral proceedings under Article 116 EPC if these two requests cannot be formally decided on in written proceedings;

IV. On 20 September 2004 the Chairman of the Enlarged Board of appeal forwarded the petition referred to above to the present Board of Appeal.

Reasons for the decision

1. *Jurisdiction*

Requests A to C of the petition are addressed to the Enlarged Board of Appeal. They are based on an alleged violation of a fundamental procedural principle and aimed at the revision of a final decision taken by the Board of Appeal 3.2.2 pursuant to Article 111(1) EPC, first sentence.

According to the decision G 1/97 of the Enlarged Board of Appeal (OJ EPO 2000, 322, point 6 of the reasons) the responsibility for hearing requests of this kind lies with the Board which took the contested decision, not with any other Board or the Enlarged Board. Thus, it is the Board of Appeal 3.2.2 (not necessarily in the same composition as that in which it took the contested decision - decision G 1/97, point 6, 4th paragraph of the reasons) which has exclusive jurisdiction for hearing the requests A to C.

Despite the fact that, by the end of the period for signature of 1 September 2001, the Revision Act containing a new Article 112a EPC concerning petitions for review by the Enlarged Board was signed by several Contracting States, decision G 1/97 is still applicable for the following reasons. As clearly follows from

Article 8 of the Revision Act, the revised text shall not enter into force until two years after ratification or accession by the fifteenth Contracting State or the first day of the third month following ratification or accession by the last of all Contracting States. Neither of these conditions has been met until now, nor is new Article 112a EPC open to provisional application under Article 6 of the Revision Act. Thus, as new Article 112a EPC cannot be applied yet, the principles set out in decision G 1/97 are still valid for the present petition.

2. *Request A*

Request A is based on an alleged violation of a fundamental procedural principle and is aimed at the revision of the final decision in case T 306/01 given on 31 March 2004. As follows from decision G 1/97, point 6 of the reasons, the jurisdictional measure to be taken in response to such a request is its refusal as inadmissible.

3. *Requests B and C*

According to request B the review proceedings should be suspended/stayed until Article 112a EPC will formally enter into force. According to the further auxiliary request C oral proceedings under Article 116 EPC shall take place, if the requests A and B are not granted in written proceedings.

Regarding the procedure to be followed by a Board of Appeal for applying jurisdictional measures in response to a request aimed at the revision of its own decision

it is stated in decision G 1/97 that the Board concerned will be able to consider such a request immediately and without further procedural formalities. In accordance with this finding the Board rejects the procedural requests B and C.

This is justified all the more as, according to Article 1, point 4 of the decision of the Administrative Council of 28 June 2001 on the transitional provisions under Article 7 of the Revision Act, new Article 112a EPC shall only apply to decisions taken as from the date of its entry into force. Thus, even if the present proceedings were stayed as requested, the new provisions concerning revision could not be applied.

Order

For these reasons it is decided that:

1. The request for setting aside the decision given by the Board of Appeal on 31 March 2004 and for re-opening the appeal procedure is refused as inadmissible.

2. The requests for staying the procedure and for oral proceedings are rejected.

The Registrar: The Chairman:

V. Commare T. Kriner