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D E C I S I O N
of 25 February 2005

Case Number: T 0957/03 - 3.2.3
Application Number: 98942649.9
Publication Number: 0961909
IPC: F24F 1/02, F24F 13/22
Language of the proceedings: EN

Title of invention:

Box for the feeding of the inner units or air-conditioning systems

Patentee:

Pignolo, Nicola

Opponent:

TECNOSYSTEMI S.r.l.

Headword:

-

Relevant legal provisions:

EPC Art. 54, 56, 87, 100b), 107

Keyword:

"Priority (not valid)"

"Late-filed request (not admitted)"

"Appeal from Patentee not admissibile (not adversely affected)"

Decisions cited:

G 0002/98

Catchword:

-



Case Number: T 0957/03 - 3.2.3

D E C I S I O N
of the Technical Board of Appeal 3.2.3
of 25 February 2005

Appellant I: TECNOSYSTEMI S.r.l.
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Appellant II: Pignolo, Nicola
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Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted 14 July 2003
rejecting the opposition filed against European
patent No. 0961909 pursuant to Article 102(2)
EPC.

Composition of the Board:

Chairman: U. Krause
Members: Y. G. A. Jest
J. P. B. Seitz

Summary of Facts and Submissions

I. An appeal was lodged on 5 September 2003 by the Opponent (hereinafter: Appellant I) against the decision of the Opposition Division, posted 14 July 2003, to reject the opposition and to maintain European Patent No. 0 961 909 as granted. The appeal fee was paid the same day and the grounds of appeal were submitted on 24 November 2003.

On 12 September 2003 the Proprietor (hereinafter: Appellant II) filed also an appeal "as far as the admissibility of the opposition ... and the loss of priority right are concerned" by the impugned decision. The appeal fee was paid the same day and the statement of the grounds of appeal was filed on 21 November 2003.

II. The opposition was based on Article 100b) EPC for lack of disclosure of the invention, on Article 100c) EPC for unallowable added subject-matter, and on Article 100a) EPC for lack of novelty and inventive step of the claimed subject-matter. The Opposition Division came to the conclusion that the opposition was admissible since at least one opposition ground (Article 100c) EPC) was clearly sufficiently substantiated. In addition the Division concluded that the other grounds, i.e. Article 100a) and 100b) EPC, were also adequately substantiated within the meaning of Rule 55c) EPC.

The Opposition Division found that the invention was sufficiently described and that granted claim 1 did not comprise added subject-matter. Furthermore the Opposition Division considered that the claimed

priority of IT VI970049U of 31 July 1997 was not valid so that the pieces of evidence published or rendered accessible to the public between the claimed priority date and the effective filing date of 29 July 1998 of the international application PCT/EP98/04724 were state of the art within the meaning of Article 54(2) EPC.

When assessing the relevant prior art the Opposition Division came to the conclusion that:

- the alleged prior use, hereinafter denoted "PU.I", based on D8-D10, was not proven beyond reasonable doubt; the late filed pieces of evidence, D12 and the affidavit of Ms Anna Munari, both related to said alleged prior use, were not relevant enough to the case, with the result that they were disregarded by the Opposition Division under Article 114(2) EPC;
- the late filed documents D11, D13 and D14 were again not relevant enough to be introduced by the Opposition Division (Article 114(2) EPC).

III. The Board of Appeal expressed its provisional opinion of the case with a communication pursuant to Article 110(2) EPC, dated 18 June 2004, and with a communication pursuant to Article 11(1) RPBA dated 1 December 2004.

Oral proceedings took place on 25 February 2005 during which the discussion was based on the following three sets of amended claims (hereinafter named respectively MR, AR1 and AR2) filed by Appellant II during these proceedings:

- (a) Claim 1 of the first set (MR) differs from claim 1 as granted only by the change of term "a side wall" in the first characterising feature into "the rear side wall"; the wording of claim 1 and its dependent claims 2 and 5 is as follows:

"1. Built-in box (1) for the feeding of the inner units of air-conditioning systems, characterized in that it comprises:

- a hollow element (2) substantially shaped as a parallelepiped, said hollow element having open base and the rear side wall (22) provided with a plurality of ribs (24);
- a small tank (3) for the drainage of the condensate, said tank being positioned in correspondence with the open base of said hollow element (2) and being provided with at least a section of pipe (33) connecting it to the drain pipe (6) of the building main system;
- a substantially flat cover (4) that can be fixed to the edge of the tank."

"2. Built-in box (1) according to claim 1, characterized in that the tank (3) is provided with two opposite pipe sections (33) for the connection with the drain pipe, each section being provided with a diaphragm (332) suitable for being broken through in order to permit the drainage of the condensate in the drain pipe."

"5. Built-in box (1) according to any of the previous claims, characterized in that said hollow element (2) and said tank (3) are carried out separately and comprise lateral (21, 31) and rear (32) coupling means suitable for connecting said hollow element to said tank."

- (b) Claim 1 of the second set of claims (AR1) consists of the combination of claims 1 and 5 of the first set MR (this limitation substantially corresponding to a previous auxiliary request filed with letter of 19 November 2003),
- (c) Claim 1 of the third set of claims (AR2) consists of the combination of claims 1, 2 and 5 of the first set MR (this limitation substantially corresponding to a previous auxiliary request filed by fax of 23 February 2005).

IV. The following pieces of evidence and facts were considered during the appeal procedure:

- (a) filed within the nine-months opposition period:

D1: Claimed Priority: Italian Patent Application VI97U000049 filed 31 July 1997,

PU1: a first alleged prior use based on:

D8: Copies of seven Debit Notes issued by Niccons Srl (owned by the Patent Proprietor, Appellant II) to Tecnosystemi Srl (Opponent and Appellant I), all dated between 30 January 1998 and 30 July 1998, the sold product being built-in boxes called "Climabox", and affidavit of Mrs Anna Munari, and an English translation thereof, filed during oral proceedings of 17 June 2003 in opposition procedure,

D10: Product catalogue by Niccons showing the built-in boxes "Climabox",

(b) filed during opposition but after the nine-months period:

- D11: JP-A-10-170018, published on 26 June 1998, and an English abstract thereof with a computer generated English translation,
- D14: JP-A-09 217 944, published on 19 August 1997, and an English abstract thereof with a computer generated English translation,

(c) filed with the appeal:

- PU2: a second alleged prior use based on three declarations D15 to D17 in lieu of oath, with English translation, regarding the purchase from Tecnosystemi of built-in boxes "Climabox" before 29 July 1998, accompanied by Debit Notes, transport-packing lists and copy of catalogue excerpt from Technosystemi "Air Conditioning Pipe Fixing Systems" (the original was supplied in the oral proceedings).

These declarations are:

- D15: made by Mr Pasqualini Guido,
D16: made by Mrs Vedovato Raffaella,
D17: made by Mr Martellato Giorgio.

Appellant I further offered oral testimony of the alleged facts for both PU1 and PU2 from Mrs Munari, Mrs Vedovato, Mr Pasqualini and Mr Martellato under the provision of Article 117 and Rule 72 EPC.

V. Requests and arguments of Appellant I.

Appellant I requests the decision of the first instance to be set aside and the revocation of the patent on the grounds of Articles 100(a) and (b) EPC.

The objection under Article 100(c) originally raised and concerning the term "a side wall" in claim 1 was not maintained in view of the change of "a side wall" into "the rear side wall" made in amended claim 1 of each set of claims MR, AR1, and AR2.

As to the sufficiency of disclosure (Article 100b) EPC), Appellant I argues that the patent contains insufficient information about the "flexible anchorage means" housed in holes 241, about the "diaphragm" in the connection element 33, and about the "drain pipe 6".

When dealing with the requirements of patentability under Article 100a) EPC, a preliminary issue involved determining whether or not the priority of the patent is validly claimed (Article 87(1) EPC). While the Opposition Division decided that a side wall provided with a plurality of ribs was not disclosed in the Italian priority application (D1), it remained silent as to whether a tank with "at least a section of pipe", hence with a single pipe section, was disclosed. Since the box was clearly shown in the figures and described as comprising two pipe sections 3 and 4, the two main features, present in claim 1 of each set of claims MR, AR1 and AR2, are not supported by D1 and the priority is therefore not valid. As a matter of consequence the alleged prior uses PU1 and PU2 as well as documents D11 and D14 (having been made public within the priority

interval) are to be considered as comprised within the state of the art in the meaning of Article 54(2) EPC.

With regard to novelty (Article 54(1) EPC), the object of both prior uses PU1 and PU2, namely the "Climaboxes", disclosed all the features of claim 1 of the first set MR, prior to the effective filing date of the patent. Additionally the claimed object also lacked inventive step (Article 56 EPC) when considered against documents D11 or D14 as the closest prior art. The boxes derivable from D11 or D14 would differ from the subject-matter of claim 1 of the first set MR only with respect to the ribs provided at the rear sidewall. The provision of ribs on said rear wall would lie within the normal practice of the person skilled in the art, for example for cost/material saving reasons and for stiffening purposes. A suggestion or general hint could be found in D14, disclosing ribs 54 provided at the lid 53 to prevent deformation of the box when the lid is attached (see the text bridging pages 6 and 7 of the English translation). A transfer of said ribs from the lid to the rear side wall is a matter of normal activity of the skilled person.

The subject-matter of claim 1 of AR1 lacks novelty when compared to the "Climaboxes" of PU2 since the drain part or tank was moulded separately from the box element (see affidavit of Mr Pasqualini, D15: "the condensation collection pan detachably coupled with the body of the box"). But even if this feature was not considered as being disclosed by PU2, it would not add anything inventive since it is generally known in the field of plastics moulding to reduce production costs by making separate mouldings of parts of a unit and by

coupling them by suitable means. Additionally the skilled person would contemplate such a staged manufacturing process for reasons of increased flexibility of design of the built-in boxes, and thus further reduced production and storage costs. As shown in Figures 3 and 6 of D14 it may indeed be a requirement to provide the tank with a drain pipe section either on the left or right side of the tank. A two piece construction, i.e. with a separate moulding of the tank, would allow more flexibility in providing a box with left or right drainage connection.

Having regard to the late filing of AR2, Appellant I commented that it should not be allowed by the Board since it would require the case to be remitted to the first instance and therefore unduly lengthen the procedure. This is in line with its request for accelerated processing of the appeal, sent with letter of 5 December 2003.

VI. Requests and arguments of Appellant II.

Appellant II requested the appeal of Appellant I to be dismissed and the patent to be maintained in an amended form on the basis of one of the three sets of claims MR, AR1, AR2, filed during the oral proceedings on 25 February 2005.

Appellant II considers itself partly adversely affected by the decision of the first instance, within the meaning of Article 107 EPC, because the opposition was considered admissible and the priority right was denied. The objections under Article 100(a) EPC filed by the Opponent (Appellant I) are considered by Appellant II

as not sufficiently substantiated in the notice of opposition so that the opposition was not admissible. Having regard to the loss of priority Appellant II declared that this decision was adversely affecting his case because of the additional state of the art published between the priority and filing dates.

It stated further that the invention claimed in the patent was the same as the one disclosed in its priority D1. From Figures 1 and 2, it was clear that the box element presents ribs extending from the rear side wall and the person skilled in the art would have understood that the tank of the built-in box of D1 could be provided with a single pipe section for the drainage.

The invention of the patent is sufficiently disclosed within the meaning of Article 100b) EPC: the skilled person knows what "flexible anchorage means" and "diaphragm" mean, and corrects the term "damps" into "clamps". These features address anyway only minor details and not the core of the invention.

With respect to the issues of patentability of the claimed subject-matter, Appellant II commented on the cited prior art as follows:

- The "Climaboxes" of PU2 corresponding to Code Number 11100091 and shown in undated catalogue "Air Conditioning Pipe Fixing Systems" from Tecnosystemi (Appellant I) corroborating with the excerpts included in D15 to D17, were made in one piece since it is mentioned that "the collecting condensation tray is incorporated". The Patentee's

Company Niccons manufactured these boxes and they were made as a single piece moulded element until July 1998, thus in the period relevant to prior use PU2. A separate moulding of the tank part was only started in production by the end of July 1998.

- The box of document D14 comprises ribs on its lid part but not on the rear side-wall. The skilled person would have no incentive to change the location of the ribs in the apparatus of D14. Additionally the function of the ribs according to the invention is not to stiffen the respective part of the box but to provide support for the locking clamps 6 (see Figures 3 and 4, and column 3, §18 of the patent) and for positioning the electric cables (see Figures 3 and column 3, §19). The technical problem solved by the location of the ribs on the rear side-wall thus encompasses not only the effect of stiffening but also additional functions related to the support of components. The person skilled in the art would therefore not have considered ribs on the rear sidewall as an obvious measure starting from prior art D14. Furthermore all the embodiments of the box of D14 are made in a single piece with an integrally formed tank. There is no hint for the person skilled in the art to manufacture the tank part separately from the remaining box. If this split manufacturing had been obvious for reasons of costs and greater flexibility for the mounting operation, prior art D14 should already have referred to this possible construction since the two embodiments shown respectively in Figures 3 and 6 differ from each other by the location of

the drain pipe: on the left and right side of the tank, respectively. This actually reinforces the fact that the solution of claim 1 of AR1 was not obvious for the skilled person.

- The same reasoning applies for document D11 which does not disclose ribs on the rear side-wall of the built-in box or a two-piece construction of the box and tank unit.

The subject-matter of claim 1 of both requests MR and AR1 are thus new and involve an inventive step.

As far as the late filing of the second auxiliary request (fax on 23 February 2005), Appellant II stated that it is common practice and generally accepted to file requests at a late stage and even during oral proceedings of the appeal procedure. The subject-matter of AR2 was furthermore unambiguously new and inventive with respect to the cited state of the art. Auxiliary request AR2 should therefore be allowed.

Reasons for the Decision

1. The appeal of Appellant I is admissible.
2. The appeal filed by the Proprietor (Appellant II), related to the findings in the decision under appeal that the opposition was considered admissible and the claimed priority not valid, is not admissible since it does not meet the requirements of Article 107 EPC. Pursuant to Article 107 EPC only parties adversely affected by a decision may appeal. A party is adversely

affected if the decision does not accede to its requests, regardless of whether it conforms in every respect, in particular in respect of the grounds or reasoning on which it is based, to the party's argument. Since the decision to reject the opposition acceded to the request of the Proprietor, the Appellant II is not adversely affected by the decision and, therefore, not entitled to appeal. Even though some of the reasoning in the decision (namely, regarding his claim to priority) was contrary to the contentions of and therefore adverse to the Patentee, he could not on this basis file an appeal against the decision (see T 73/88, OJ 1992, 557). As a consequence, its appeal is not admissible.

Nevertheless, Appellant II remains a party to the appeal proceedings as Respondent (Article 107, second sentence, EPC), and its "appeal" and "statement setting out the grounds of appeal" are, therefore, considered as submissions made during the proceedings initiated by the admissible appeal of Appellant I. It is understood, on the basis of its submissions, that Appellant II requests that the appeal of Appellant I be dismissed with the proviso that the patent be maintained in amended form on the basis of the amended claim 1 of one of the three requests MR, AR1 and AR2.

3. Sufficiency of disclosure (Article 100b) EPC).

The patent meets the requirement of sufficiency of disclosure within the meaning of Article 100b) or 83 EPC. Although the information provided about the "flexible anchorage means" housed in holes 241, about the diaphragm in the connection element 33 and about

the "drain pipe 6" is not wholly clear, the skilled person is able to derive the correct information from the patent as a whole. In fact, it follows from paragraphs 0018 and 0025 that the "damps 6" (an obvious printing error in the patent specification, which should read "clamps", as originally filed) shown as flexible bands in Figure 4 are "anchorage means" extending through the holes 241 in the ribs 24 for fastening the mounting bracket 9 for the air conditioner 10, disclosing an example of how the flexible anchorage means of claim 3 as granted could be realised. The use of reference signs 6,11 for the drain pipe, the clamps and the screw anchor in paragraphs 0018, 0021, 0024, 0025 and 0027 is indeed inconsistent but the connection between the connection element 33 and the drain pipe, whether "6" or "11", seems to be clearly derivable from paragraph 0021 and Figure 4. Considering that according to paragraph 0027 the drain pipe is "fixed" and "previously laid in a chase together with the box 1", it obviously corresponds to the drain pipe of the building main system connected to the pipe (33), as defined in claim 1 as granted. Blind connection elements to be opened by breaking an internal diaphragm are generally known in the field of plastics moulding and, therefore, no further information thereon is required.

4. *Validity of the claimed priority (Article 87 EPC)*

The Board takes the view that the subject-matter of the invention as claimed in claim 1 of all three requests does not define the same invention as the one described in priority document D1. Accordingly one of the requirements of Article 87 EPC is not met so that the

priority is not valid. As set out in G 2/98 the novelty test applies to verify whether the subject-matter of an application or a patent is the same as the one of the claimed priority. In the current case claim 1 of all the requests comprises an essential feature, namely the provision of ribs on the rear side wall and, by defining "at least a section of pipe", covers an embodiment having a single drain pipe section.

It seems to be clear from the whole patent document that the term "ribs" in claim 1 applies to the ribs 24 extending across the wall 22 shown in Figures 1 to 3 of the patent, rather than to the "reinforcing ribs" extending away from the back wall, as shown in Figure 1 of D1. For example, the description of the patent reserves the term "rib" for the ribs 24 extending across the wall 22 and utilises the term "coupling element 231" for the central "reinforcing rib". Since no ribs corresponding to the ribs 24 of the patent are disclosed in D1 (it is undisputed that the reference to the "ribs" in line 19 of the English translation is due to a translation error and should read "fracture lines"), the subject-matter of claim 1, including ribs on the rear side-wall, is not derivable from the invention described in the priority document and, consequently, the priority is not valid (Article 87 EPC).

The filing date applying for the patent is thus the effective filing date of 29 July 1998 of the International patent application PCT/EP98/04724.

Hence, there is in principle no need to decide whether D1 discloses "at least a section of pipe" for

connection to the drain pipe. However, the Board takes the view that the omission of the second pipe 4 in Figure 1 of D1 is a drawing inaccuracy because the "two-way"-feature is essential (see the "two-way tank" in claim 1 and the "two-ways 3 and 4" in the description of Figure 1, page 2, line 14 of the English translation), and the description on page 2, lines 8 to 10 indicates that the box shown in Figure 1 corresponds to that of Figure 2, having two pipe sections. Thus the embodiment included in the claimed invention according to the patent and referring to a single drain pipe is not disclosed as such in the priority document. The claimed priority is, therefore, also invalid because of this second difference.

5. *State of the art according to Article 54(2) EPC*

Since the filing date of the invention according to the patent is the effective filing date, 29 July 1998, the state of the art comprises documents D11 (published 26 June 1998) and D14 (published 19 August 1997), as well as alleged prior uses PU1 (alleged public availability: between 30 January and 30 July 1998) and PU2 (public availability: in the course of the first half of 1998).

In agreement with the reasoning and conclusion of the impugned decision, the first alleged prior use PU1 is disregarded by the Board under Article 114(2) EPC.

Documents D11 and D14, as well as alleged prior use PU2, being considered as relevant, are, however, admitted into the proceedings.

5.1 The fact that prior use PU2 is comprised within the state of the art, as made available before the effective filing date of the patent, has not been disputed by Appellant II. Neither the circumstances of the public availability (sale of products before the filing date of the patent to several customers not bound to confidentiality) nor the basics of its subject-matter, namely the "Climaboxes" of Code 11100091 shown in the Catalogue of Tecnosystemi and corresponding to the boxes shown in Catalogue D10 in the Name of Niccons, are challenged. These boxes were undisputedly built-in boxes for the feeding of the inner units of air-conditioning systems having a hollow parallelepiped-shaped element with an open base and a plurality of ribs provided at its rear side wall (as clearly shown in the original Catalogue of Tecnosystemi presented in the oral proceedings), and a flat lid. These boxes further comprised an incorporated condensation collecting tray in correspondence with the open base of said hollow element, said tray having two pipe sections suitable and obviously intended for its connection to a drain system.

The sole disputed issue relates to the question whether the "Climaboxes" sold before July 1998 according to prior use PU2 were actually made in form of a single moulded piece or of two separately moulded parts, i.e. with a tank made separately from the hollow box element and with suitable coupling means.

5.2 Prior art D14 (as well as D11 which may be considered as technically equivalent to D14 when compared to the subject-matter of the patent) discloses a piping box 42 for connecting a refrigerant pipe 30 and a drain hose

31 to an indoor unit, said box being buried in a wall 24 (Figures 1 and 2). It comprises a hollow parallelepiped-shaped element 45 (Figures 3,5,9,13 and page 4 of the English translation) with an open base and a flat lid 53 (first line of page 7 of the English translation and Figures 12 and 13). These boxes further comprise a condensation collecting tray 46,46a in correspondence with the open base of said hollow element, said tray having either a left-hand (Figure 3) or a right-hand (Figure 6) drain pipe section 31 for connection to a drain pipe.

6. *Main request (MR)*

6.1 The Board follows the reasoning of the Appellant I that the subject-matter of claim 1 is obvious in view of the written prior art alone. In fact, it is evident from the analysis of document D14 in point 5.2, that the box defined in claim 1 differs from that disclosed in D14 (or D11) only in that the rear side wall is provided with ribs. However, the provision of such ribs on the rear side wall of the built-in box of either D14 or D11 is to be considered an obvious measure because, in the field of plastics moulding, it is generally accepted that a compromise can be achieved between the amount of plastics material and the mechanical strength of the end product by providing so-called reinforcement ribs on larger surfaces. The ribs, as defined in the description of the patent or in dependent claims 3 and 4, may have additionally a supporting function; however no feature which could provide such an additional effect is present in claim 1 so that the technical problem to be solved cannot take these additional merits into account. The box according to claim 1 of MR

is thus obviously derivable for the skilled person, on the basis of his general knowledge, from D14 of D11.

6.2 When considering the alleged prior use PU2, the following conclusions can be drawn.

From the assessment made previously in point 5.1 of the technical properties of the "Climabox" of prior use PU2 with Code 11100091, it is clear that these built-in boxes comprise all the features of claim 1 of the MR; this has not been disputed by Appellant II.

The subject-matter of claim 1 of the MR therefore lacks novelty (Articles 52(1) and 54(1) EPC).

7. *First auxiliary request (AR1)*

Claim 1 of AR1 is based on the combination of claim 1 and dependent claim 5 of MR, and defines the mode of realisation in which the hollow element and said tank are carried out separately and comprise lateral and rear coupling means suitable for connecting said hollow element to said tank. Appellant I stated that this additional feature was also known from the "Climaboxes" sold in the context of PU2 as indicated in the affidavit of Mr Pasqualini (D15). Appellant II responded to this assertion by arguing that the said boxes were moulded in the form of a single piece until the end of July 1998 and this was actually confirmed by the text accompanying the picture in the catalogue, which refers to "an incorporated tank". Whilst, in the Board's view, the expression "incorporated" does not mean "made integral with" and could apply to a construction having separate box and tank elements eventually assembled together, the question of whether

the boxes of PU2 were made in one piece or had a separate tank coupled to the hollow box element cannot be answered to a sufficient degree of certainty on the basis of the available evidence and would, therefore, require further investigations.

However, the Board considered that it would not be appropriate to remit the case to the first instance for further prosecution of this aspect of prior use PU2 (for instance for the witness hearing offered by Appellant I) because it would unduly lengthen the procedure and because, even if this feature was not disclosed by the prior use PU2 before the filing date of the patent, it would not involve an inventive step over this state of the art. The objective problem which can be derived from this feature consists in reducing manufacturing costs and additionally in allowing a greater flexibility of products by providing several types of tanks (for instance with left or right drain pipe, with flat or inclined bottom walls) for a single box element. The person skilled in the art would be acting in the field of plastics moulding or at least would be a team including such a skilled person. In the field of plastics moulding it is generally known that the moulding of a specific embodiment may be rather complicated and expensive if made in form of a single piece and that production costs can be reduced by dividing in a suitable manner the moulding process by selecting several components or parts which can be moulded separately. Coupling means would then of course be needed to assemble these separate parts. In the current case the skilled person would envisage a separate moulding of the box and the tank as particularly suitable since it would provide additional

advantages, such as a greater flexibility of products with a reduced number of box types. The Board therefore concludes that the subject-matter of claim 1 of AR1, even though it may be new over prior use PU2, is obvious in view of this state of the art for the person skilled in the art. The first auxiliary request AR1 is thus not allowable because of a lack of inventive step of its subject-matter (Article 56 EPC).

8. *Second auxiliary request (AR2)*

Second auxiliary request AR2 substantially corresponds to the request filed with fax dated 23 February 2005, i.e. two days before the oral proceedings.

In the European Case Law, the Boards of Appeal have laid down several criteria for limiting the admissibility of amended requests, like the time of filing, the reasons for the late filing, the obvious allowability, the lengthening of the procedure.

Here, first, the late-filed request AR2 was filed only two days before the oral proceedings and without any reasons for its allowability. Second, the auxiliary request was not caused by exceptional circumstances or surprising developments during the proceedings.

When considering the criteria of prima facie allowability of the amended claims the Board took account of the following considerations. From prior use PU2 and on the basis of the written evidence, part of the additional features of claim 2 are known as well: the drawing of the article with Code 11100091 indeed

shows that the tank is provided with two opposite pipe sections for the connection with the drain pipe.

The remaining question resides in the provision for each section of a diaphragm suitable for being broken for use as drainage of the condensate. Appellant I declared that the pipe sections of the "Climaboxes" were provided with such diaphragms and that confirmation could be found by hearing Mr Pasqualini as a witness. In the Board's view, even if the provision of breakable diaphragms was not known from PU2, it remains a well-known measure for the person skilled in the field of moulded pipes. The advantages of this kind of diaphragm, for instance the possibility for the end user to select the fluid-flow line in accordance with the specific needs, are easily foreseeable. The subject-matter of the late-filed request AR2 cannot be seen as prima facie allowable when compared to the state of the art. Additionally, a remittal to the first instance, to further investigate the issue related to prior use PU2, would unduly lengthen the procedure.

Taking the above considerations into account, the Board came to the decision not to admit the late-filed auxiliary request AR2.

Order

For these reasons it is decided that:

1. The appeal of Appellant II (Proprietor) is dismissed.
2. The decision under appeal is set aside.
3. The patent is revoked.

The Registrar:

The Chairman:

A. Vottner

U. Krause