

**Internal distribution code:**

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

**Datasheet for the decision  
of 6 November 2008**

**Case Number:** T 0773/07 - 3.3.10

**Application Number:** 00110532.9

**Publication Number:** 1055661

**IPC:** C07C 51/50

**Language of the proceedings:** EN

**Title of invention:**

Process for producing sorbic acid or salts thereof

**Patentee:**

DAICEL CHEMICAL INDUSTRIES, LTD.

**Opponent:**

Nutrinova Nutrition Specialties & Food Ingredients

**Headword:**

-

**Relevant legal provisions:**

Rfees Art. 5(2)

Arrangement for deposit account (ADA) entered into force on  
1 January 2005 points 5.2, 5.3, 6.3, 6.4, 6.5, 6.6

**Relevant legal provisions (EPC 1973):**

EPC Art. 108

EPC R. 65(2)

**Keyword:**

"Admissibility of appeal (no) - insufficient funds in deposit  
account to pay appeal fee in due time"

**Decisions cited:**

T 1366/04

**Catchword:**

-



Case Number: T 0773/07 - 3.3.10

**D E C I S I O N**  
of the Technical Board of Appeal 3.3.10  
of 6 November 2008

**Appellant:** Nutrinova Nutrition Specialties & Food  
(Opponent) Ingredients GmbH  
Brüningstrasse 50  
D-65929 Frankfurt am Main (DE)

**Representative:** Schweitzer, Klaus  
Plate Schweitzer Zounek  
Patentanwälte  
Rheingaustrasse 196  
D-65203 Wiesbaden (DE)

**Respondent:** DAICEL CHEMICAL INDUSTRIES, LTD.  
(Patent Proprietor) 1 Teppo-cho, Sakai-ku  
Sakai-shi, Osaka 590-8501 (JP)

**Representative:** Grünecker, Kinkeldey,  
Stockmair & Schwanhäusser  
Anwaltssozietät  
Leopoldstrasse 4  
D-80802 München (DE)

**Decision under appeal:** Interlocutory decision of the Opposition  
Division of the European Patent Office posted  
23 February 2007 concerning maintenance of  
European patent No. 1055661 in amended form.

**Composition of the Board:**

**Chairman:** R. Freimuth  
**Members:** P. Gryczka  
J.-P. Seitz

## Summary of Facts and Submissions

- I. A notice of appeal was filed on 25 April 2007 by the Opponent (Appellant) against the interlocutory decision of the Opposition Division sent by post on 23 February 2007 finding that the amended European patent Nr. 1055661 based on the European patent application 00 110 532.9 met the requirements of the EPC.
- II. With its notice of appeal the Appellant issued a debit order to pay the appeal fee. With a communication dated 2 May 2007 the EPO informed the Appellant that they were insufficient funds in the deposit account for the payment of the appeal fee. By the same communication the Appellant was invited to replenish the account and to pay an administrative fee as provided for in point 6.6 of the Arrangements for deposit account (ADA) until the 12 June 2007 at the latest.
- III. On 20 December 2007 the Registrar of the Board notified a loss of rights pursuant to Rule 112(1) EPC since the appeal fee had been paid out of time limit on 8 May 2007 and that, consequently, the appeal was deemed not to have been filed.
- IV. With letter dated 14 January 2008 the Appellant requested a decision according to Rule 112(2) EPC since he disagreed with that findings.
- V. According to the Appellant the appeal fee had to be considered as paid in due time, since the amount of money available on the Appellant's account when filing the appeal on 25 April 2007 would have been sufficient

if the appeal fee had been debited from the account before other fees be paid on that day, in particular those paid by the automatic debiting procedure (AAD). In this respect, it had to be expected that fees paid by the automatic debiting procedure (AAD fees) were only debited at the end of the day, just before 12.00 pm and not before the fees paid with individual debit orders. There was no legal basis for booking the "AAD fees" before the other fees in the Arrangements for deposit account (ADA) applicable to the present case, since such a priority was only established in the version of the ADA which entered into force in December 2007. In any case, since on the morning of the 25 April 2007, 5546 Euros were left on the account, the conditions set out in point 6.3 of ADA requiring that sufficient funds had to be present in the deposit account to cover the debit, were fulfilled. Furthermore, it was not possible for the account holder to determine whether the funds on the account were sufficient for the payment of all fees due on that day since the online consultation of the account did not give the status of the account in "real time" but with several days delay. Since mistakes occurred on the accounts, fees being sometimes debited twice, and since numerous fees were booked from the account, it was also not possible for the account holder to calculate if the account had sufficient coverage. Therefore, the EPO could not expect that the accounts always showed sufficient funds to cover the total debit. The appeal fee had thus to be considered as paid on 25 April 2007, i.e. in due time for the appeal to be considered as admissible.

- VI. The Respondent (Proprietor of the patent in suit) considered that it was not within the discretion of the account holder to decide which fees were to be debited at what time from its running account and to decide afterwards which fees should or should not have been paid. It was the account holder's responsibility to make sure that the account had sufficient coverage on those days where fees had to be paid. Since the appeal fee was not paid in due time, but only on the 8 May 2008 the appeal should be rejected as inadmissible.
- VII. The Appellant requested that the decision under appeal be set aside and that the patent be revoked.
- VIII. The Respondent requested that the appeal be dismissed.
- IX. At the end of the oral proceedings which took place on 6 November 2008 the decision of the Board was announced.

### **Reasons for the Decision**

1. Since the notice of appeal was filed on 25 April 2007, the Arrangements for deposit account (ADA) in the revised version entered into force on 1 January 2005 (supplement to OJ EPO 1/2005) are applicable to the present case. Payment of fees can be executed in accordance with these arrangements by virtue of Article 5(2) of the Rules Relating to Fees.
2. With its notice of appeal received on 25 April 2007, the Appellant issued a debit order to pay the appeal fee amounting to 1065 Euros. On 25 April 2007, before

payment of any fee the Appellant's account showed a credit of 5546,01 Euros. However, on that day, six fees for a total of 5119 Euros were already booked, leaving thus only a credit of 427,01 Euros, when the EPO cashier sought to book the appeal fee of 1065 Euros (Annex A2 to the Appellant's letter dated 14 January 2008). Since, the funds in the deposit account were not sufficient to cover the appeal fee as required by point 5.2 of ADA, the date of receipt of the deposit order, namely the 25 April 2007 could not be considered as the date on which payment of the appeal fee was made (point 6.3, third sentence of ADA).

- 2.1 It is not contested that all fees booked on the 25 April 2007 were due on that day, a day being the smallest time unit foreseen by the ADA (see for example point 6.3 second sentence, "stamped with the date of receipt"). Since the debit orders are booked in chronological order of receipt by the EPO (point 5.3 of ADA, first sentence), the appeal fee could not be booked when the cashier sought to do so since the funds were no longer sufficient. In this respect, the cashier has no power to make any choice within the different fees to be paid on that same day, since the applicable ADA do not set any priority based on the nature of the fee, nor any priority between fees paid by debit order or with the automatic debiting procedure.

The Board can, thus, not follow the argument of the Appellant that the appeal fee could have been or should have been booked before the other six fees on that date, in particular before the fee paid by the automatic debiting procedure. In this respect, it is not for the EPO cashier to choose priorities between fees to be

paid, all the more since it is the responsibility of the account holder to ensure that the account contains sufficient funds at all times (point 5.2 ADA). The account holder cannot be discharged from this responsibility, as argued by the Appellant, only for the reason that the online consultation of the account may not give a "real time" status of the account, since it is at least possible for the account holder to record the fees for which he gave himself debit orders and which will consequently be debited from its account and, to evaluate whether sufficient funds are available to cover the total debit on a given day as required by point 6.3 ADA.

Furthermore, since the Appellant did not rely on any specific mistaken debit on its account in the context of the present case, the Board cannot follow his argumentation that the status of the account was sometimes flawed by erroneous debits made by the EPO and that consequently it was not possible to evaluate the amount of money left on the account.

The fact that according to the version of the ADA only applicable as from 13 December 2007, priority is given each day to fees subject to an automatic debiting procedure and then to fees for which the debit order is filed by online means is irrelevant in the present case since it entered into force after the relevant date of the appeal (see point 5.3 of ADA in the revised version which entered into force with the EPC 2000 on 13 December 2007 and published in the supplement to OJ EPO 10/2007) and since it addresses online debits orders, not the present debit order on paper.

- 2.2 Therefore, the Board arrives at the conclusion that the appeal fee could not be debited from the Appellant's deposit account on 25 April 2007 since the funds in said account were insufficient which is within the sole responsibility of the account holder.
3. With a communication dated 2 May 2007 pursuant to point 6.4 ADA, the EPO informed the Appellant that they were insufficient funds in the deposit account since 637,99 Euros were missing for the payment of the appeal fee. By that same communication the Appellant was invited to replenish the account and to pay until the 12 June 2007 at the latest an administrative fee of 191,04 Euros as provided for in point 6.6 of the ADA. If the account is sufficiently replenished to enable the appeal fee to be debited and if the administrative fee is paid within the time limit set in the communication, then the date on which the debit order was received is regarded as that on which payment of the appeal fee was made (point 6.5 ADA). The Appellant conceded, however, that he never paid the administrative fee of 191,04 Euros, so that also by virtue of point 6.5 ADA the date of payment of the appeal fee cannot be the date of receipt of the debit order either.
4. In fact, the Appellant replenished sufficiently its account on 8 May 2007, and the EPO booked consequently the appeal fee on that day. However, and this is not contested by the Appellant, the time limit for payment of the appeal fee, namely within two months after the date of notification of the decision appealed from, expired on 7 May 2007 (Article 108 EPC 1973, first and second sentence which is applicable since the appeal



was filed on 27 April 2007, see decision T 1366/04, point 1.2, not published in OJ EPO). The appeal fee was consequently paid after said time limit.

5. Since the appeal fee was not paid in due time, the notice of appeal is deemed not to have been filed in time. The appeal is thus inadmissible pursuant to Rule 65(2) EPC 1973.

## **Order**

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

The appeal is rejected as inadmissible.

The Registrar:

The Chairman:

C. Rodríguez Rodríguez

R. Freimuth