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**Datasheet for the decision  
of 14 September 2010**

**Case Number:** T 0041/09 - 3.2.07

**Application Number:** 01500089.6

**Publication Number:** 1247753

**IPC:** B65D 47/08

**Language of the proceedings:** EN

**Title of invention:**

Container for food bulk products

**Patent Proprietor:**

Vidal Golosinas, S.A.

**Opponent:**

Sanchez Cano, S.A.

**Headword:**

Inadmissible language of appeal

**Relevant legal provisions:**

EPC Art. 14(4), 108, 122

EPC R. 6(3), 115(2)

RRF Art. 8(1)

RPBA Art. 15(3)

**Keyword:**

"Notice of appeal - inadmissible language"

"Translation - not a notice of appeal"

"Re-establishment of rights - (no)"

**Decisions cited:**

G 0006/91, G 0002/97, J 0013/90, T 0149/85, T 0905/90,

T 0489/04, T 1152/05

**Catchword:**

See points 2.1 to 2.6



Case Number: T 0041/09 - 3.2.07

**DECISION**  
of the Technical Board of Appeal 3.2.07  
of 14 September 2010

**Appellant:** Vidal Golosinas, S.A.  
(Patent Proprietor) Avda. Gutiérrez Mellado s/n  
ES-30500 Molina de Segura, Murcia (ES)

**Representative:** Bottema, Johan Jan  
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Postbus 29720  
NL-2502 LS Den Haag (NL)

**Respondent:** Sanchez Cano, S.A.  
(Opponent) Ctra. de Madrid, Km 385  
ES-30500 Molina de Segura (Murcia) (ES)

**Representative:** Gislon, Gabriele  
Torner, Juncosa i Associats, S.L.  
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**Decision under appeal:** Decision of the Opposition Division of the  
European Patent Office posted 8 December 2008  
revoking European patent No. 1247753 pursuant  
to Article 102(1) EPC.

**Composition of the Board:**

**Chairman:** H. Meinders  
**Members:** E. Dufrasne  
K. Poalas

## Summary of Facts and Submissions

- I. The appeal is against the decision of the opposition division notified on 8 December 2008, to revoke European patent 1 247 753 of which Vidal Golosinas, S.A., a Spanish legal entity, is the proprietor.
- II. The notice of appeal was filed by the appellant (patent proprietor) on 19 December 2008 in Dutch, with an attached translation in English. The reduced appeal fee was paid on the same day and the statement setting out the grounds of appeal was filed on 20 April 2009.
- III. In its communications dated 6 May 2009 and 29 April 2010, the Board expressed its preliminary opinion that the notice of appeal filed in Dutch by a legal entity having its principal place of business in Spain was not in compliance with Article 14(4) EPC and that under Article 108 EPC it intended to deem the appeal as not having been filed.
- IV. With its letters dated 6 July 2009 and 8 September 2010, the appellant challenged the Board's preliminary opinion. Its arguments may be summarised as follows:
  - (a) To the notice of appeal in Dutch, dated 19 December 2008, was attached the same letter in English, which has to be considered by itself as the notice of appeal in the official language of the proceedings.
  - (b) The principle of equity underlying Rule 6(3) EPC, which Rule aims at providing a positive compensation to applicants and parties from a

Contracting State not having an official EPO language, as interpreted in decision G 6/91, point 17 of the Reasons, should allow for a remedy.

- (c) A warning from the EPO was legitimately expected by the appellant. Since the EPO was aware of the patent proprietor's nationality, the language deficiency associated with the notice of appeal was readily identifiable and a timely warning from the EPO would have offered the patent proprietor the possibility to correct it in due time.
- (d) By payment of the reduced appeal fee, only 20% of that fee were missing, which should be considered as a small amount lacking in the meaning of Article 8(1) RRF.

V. With a second letter also dated 6 July 2009, the appellant requested re-establishment of rights under Article 122 EPC. The corresponding fee was paid on the same day. The appellant's arguments in this context may be summarised as follows:

The appellant asserts an isolated clerical mistake having been made by the administrative department of its professional representative in the exceptional circumstances of exceptional work pressure since a colleague had left the administrative department and because the testing phase of a new digital document management system was being executed.

Having signed the notice of appeal in Dutch, the professional representative had noticed the error and signed a corrected document in English. However, his

assistant, in the above-mentioned context, placed the wrong document in an envelope and sent it out. When checking the file, the head of the department of portfolio assistants noticed the copy of the letter in English in the file and as a consequence removed the pending deadline from the monitoring system. This was a one-time error in a well-functioning system of monitoring time-limits and performing cross-checks, i.e. despite all due care.

- VI. A new notice of appeal, also dated 6 July 2009, accompanied the request for re-establishment of rights and the corresponding appeal fee was paid on the same day.
- VII. In its communication dated 29 April 2010, the Board further expressed its preliminary opinion that the request for re-establishment of rights would have to be refused and, accordingly, that the appeal dated 6 July 2009, i.e. more than two months after the notification of the impugned decision, did not comply with Article 108 EPC and would be deemed as not having been filed.
- VIII. With its letters dated 6 July 2009, the appellant requested oral proceedings in case the Board intended to reject its requests.

With its communication dated 29 April 2010, the Board summoned the parties to oral proceedings.

With its letter dated 9 August 2010, the respondent (opponent) indicated that it would not attend the oral proceedings.

With its letter dated 8 September 2010, the appellant indicated that it would not attend the oral proceedings and requested a decision based on the written procedure.

The date for oral proceedings was maintained and they were held on 14 September 2010.

- IX. The appellant requests that the decision under appeal be set aside and that the patent be maintained on the basis of the main request or, in the alternative, of one of the first and second auxiliary requests, all filed with letter dated 20 April 2009.

The respondent requests that the appeal be dismissed.

## **Reasons for the Decision**

### *1. Continuation of the proceedings*

Although having been duly summoned, the parties did not attend the oral proceedings, as announced.

According to Rule 115(2) EPC and Article 15(3) RPBA, the proceedings were continued without the parties, based on their written submissions.

2. *Notice of appeal dated 19 December 2008*

2.1 Notice of appeal in Dutch

It is not challenged by the appellant that under Article 14(4) EPC the notice of appeal filed in Dutch is in a non admissible non-EPO official language for a patent proprietor having its principal place of business in Spain. The residence or principal place of business of the professional representative used is of no relevance in that matter (T 149/85, OJ EPO 1986, 103, point 6 of the Reasons). Therefore, in accordance with Article 108 EPC, the corresponding appeal is deemed not to have been filed.

2.2 Translation in English

The letter in English, also dated 19 December 2008, expressly indicates that it is "a translation of the notice of appeal" of the same date filed in Dutch. Therefore, its legal effect depends on said notice of appeal filed in Dutch and it cannot be considered as such to be the proper notice of appeal.

The Board is of the opinion that G 6/91 (OJ EPO 1992, 491, point 10 of the Reasons) and T 1152/05 (of 8 April 2008, not published in OJ EPO, points 2.4 to 2.6 of the Reasons), have to be followed in the present case. These decisions indicate in the clearest possible way that a "translation cannot become the original".

Point 12 of the Reasons of G 6/91 (*supra*), cited by the appellant, is directed to the question of a possible confusion between the "translation" and the original

document, when the "translation" is filed earlier than the original. The present case clearly distinguishes itself from such a situation, since the translation was expressly qualified as such, making absent any possible confusion, and filed together with the original notice of appeal. Therefore, in the present case, the Board does not see point 12 as more relevant than point 10, nor even simply relevant.

The appellant also points out that the facts of the case having led the referral to the Enlarged Board of Appeal in G 6/91 (*supra*) are different to the ones of T 1152/05 (*supra*) and of the present case. The Board sees point 10 of the Reasons of G 6/91 as a legal analysis the conclusions of which not being restricted in any way to the specific facts of the case referred.

The appellant finally refers to the difference in legal consequences between T 1152/05 (*supra*), where only the appeal of the patent proprietor was deemed not to have been filed but the appeal proceedings were in any case continued on the basis of the opponent's appeal, and the present case, where a complete loss of rights would result from the patent proprietor's appeal being deemed not to have been filed. First of all, the Board sees no legal basis for a possible distinction in applying the relevant Article 14(4) EPC on the basis of the possible legal consequences. Further, the legal consequence of the appeal being deemed not to have been filed is the same in both cases, i.e. the loss for the party concerned of the right to be an appellant and to challenge in its favour the impugned decision.



### 2.3 Principle of equity underlying Rule 6(3) EPC

The appellant supports that the "principle of equity underlying Rule 6(3)" EPC should allow for a remedy in the present case. The Board cannot see in Rule 6(3) EPC a "principle of equity" to be broadly applied. G 6/91, (*supra*, in point 17 of its Reasons), only refers to Rule 6(3) EPC's aim of equity in interpreting that provision. Further, Rule 6(3) EPC is the implementing rule to Article 14(4) EPC and explicitly restricts its scope of application to the natural or legal persons referred to in said Article, i.e. those having filed an appeal in a language admitted by that provision. In the present case, on the contrary, Dutch is not a language to be admitted for the filing of an appeal by a patent proprietor having its principal place of business in Spain. Therefore, neither Article 14(4) EPC nor the specific content of its implementing Rule 6(3) EPC can find any application in the present case.

### 2.4 Legitimate expectations

The appellant further argues that the EPO should have warned it, for correction in due time, of the impending loss of rights following from the easily identifiable deficiency of using a non-admissible non-EPO language in its notice of appeal. It cites point 9 of J 13/90 (OJ EPO 1994, 456), stating that if, contrary to the principle of good faith, the EPO fails to draw the applicant's attention to a deficiency, it cannot claim that a loss of rights has ensued if the deficiency is later corrected.

The principle of protection of legitimate expectations, or of good faith, is effectively recognised by the case-law of the Boards of Appeal. However, this principle does not impose any obligation on a Board to notify an appellant if there is no indication in the notice of appeal or in any other document filed in relation to the appeal from which it could be inferred that the lack of such notification would result in a loss of rights for the appellant (G 2/97, OJ EPO 1999, 123, Order). There is no obligation on a Board to warn a party of deficiencies within the area of the party's own responsibility. To take the principle of good faith that far would imply, in practice, that the Boards of Appeal would have to systematically assume the responsibilities of the parties to proceedings before them, a proposition for which there is no legal justification in the EPC, nor in general principles of law (G 2/97, *supra*, point 4.2 of the Reasons).

This distinguishes the facts of the cited J 13/90 (*supra*) from the situation of the present case. In this decision, the deficiency was further readily apparent from the request itself whereas in the present case it is not readily apparent from the notice of appeal, only referring to the name of the appellant, without any indication of the location of its principal place of business.

The Board therefore sees in the present case no breach of the legitimate expectations of the appellant.

- 2.5 In view of the above, the Board concludes that the appeal of the patent proprietor, on the basis of both its letters dated 19 December 2008, is deemed not to

have been filed under Article 14(4) EPC in accordance with Article 108 EPC. The payment of the respective appeal fee has, as a consequence, no legal basis and is to be reimbursed.

2.6 Small amount of fee lacking

The appeal being deemed not to have been filed, there is no need for the Board to examine whether or not the missing 20% of the appeal fee should be considered as a small amount lacking in the meaning of Article 8(1) RRF.

In any case, even following the appellant's position that the English translation should be considered as the notice of appeal, the Board would follow the reasoning of T 905/90 (OJ EPO 1994, 306, corrigendum 556), i.e. the missing 20% of the appeal fee could not be considered a small amount lacking, with the same outcome that the appeal would be deemed not to have been filed.

3. *Request for re-establishment of rights*

The appellant asserts an isolated clerical mistake having been made by the administrative department of its professional representative in the exceptional circumstances of exceptional work pressure since a colleague had left the administrative department and because the testing phase of a new digital document management system was being executed.

Article 122(1) EPC requires for a re-establishment of rights to the patent proprietor that he demonstrates

having missed the time limit despite all due care having been taken as required by the circumstances.

According to the established case-law of the Boards of Appeal, due care is considered to have been taken if the non-compliance with the time limit results either from exceptional circumstances or from an isolated mistake within a normally satisfactory system, in particular a proper organisation of administrative procedures.

In the present case, the error has been made by the assistant of the professional representative, who prepared a notice of appeal in Dutch language for a patent proprietor having its principal place of business in Spain, and by the professional representative who signed that document. Although having been noticed by the professional representative after his signature, the error has not been effectively corrected.

- 3.1 An excessive work pressure is usually not recognised as an exceptional circumstance. It is part of the representative's organisational duty in exercising all due care to make contingency arrangements to ensure that all professional duties are fulfilled and that office services are maintained (Singer/Stauder, The European Patent Convention A Commentary, third edition, Article 122, marginal number 95). As concerns the fact that a colleague had left the administrative department, it is not demonstrated among others how recent that was or whether it was unexpected, nor which measures had been taken to compensate for that absence and to ensure correct functioning of the administrative department

nor the causal relation between the absence of that person and the problem at issue.

The installation of a new computer system is also not an exceptional circumstance, the resulting burden on employees has to be considered as foreseeable and containable, had appropriate measures been taken in good time (T 489/04 of 8 September 2005, not published in the OJ EPO, point 5 of the Reasons). This seems to apply by analogy to the testing phase of the new digital document management system of the present case.

- 3.2 Since the Board in the present case does not see exceptional circumstances, it has to consider if an isolated mistake occurred within a normally satisfactory system.

From the general description given by the appellant, it appears that it was the intention of the professional representative's firm to have a system of monitoring and checking in place, able to detect and to correct errors.

In the present case, the error has been noticed by the professional representative after signature of the wrong document. However, even after signature of a new corrected document, the wrong document has not been shredded or at least definitively isolated from the file. On the contrary, it has been placed by his assistant in an envelope and sent out. Further, when placing the documents back in the file, the assistant did not see that the corrected document had not been sent out but was still present as an original in the file. When checking the file for removing the deadline

from the management system, also the head of the department of portfolio assistants did not notice that the original to be sent out was still in the file, with the copy of the corrected letter, and therefore did not perform an effective check. The deadline was then removed on the basis of a document which had not been sent.

In the circumstances of this case, the assistants of the professional representative had to be aware of the particular importance of the notice of appeal to be filed in the correct language, of the absolute criticality of the error detected by the professional representative and of its possible fatal consequences for the appeal and for the patent at issue. That should have justified a particular attention to the document to be sent out.

From the above and in particular from the cascade of failures to effectively correct the error detected, the Board considers that the present situation does not result from an isolated mistake in a normally satisfactory system.

The Board is as a consequence of the opinion that the appellant has not demonstrated to have taken all due care in the specific circumstances of the present case.

Therefore, the Board considers that the request for re-establishment of rights has to be refused.

4. *Notice of appeal dated 6 July 2009*

Since the Board refuses the request for re-establishment of rights, the notice of appeal dated and filed on 6 July 2009, i.e. more than two months after the notification of the impugned decision, does not comply with Article 108 EPC and is therefore deemed not to have been filed.

As a consequence the payment of the corresponding appeal fee, requested by letter dated 6 July 2009 to be debited from the appellant's account lacks legal basis and is as a consequence also to be reimbursed.

**Order**

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

The appeals are deemed not to have been filed.

The Registrar:

The Chairman:

G. Nachtigall

H. Meinders