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**Datasheet for the decision
of 27 October 2011**

Case Number: T 1022/09 - 3.2.07

Application Number: 02732216.3

Publication Number: 1429968

IPC: B65D 1/12, B65D 25/14,
B65D 85/72, B65D 79/00,
B65B 31/02, B32B 15/08,
B21D 51/26, B67C 3/02,
B67C 3/00, C12G 1/00

Language of the proceedings: EN

Title of invention:
Process for packaging wine in aluminium cans

Patent proprietor:
Barokes Pty Ltd.

Opponents:
Sektellerei Schloss Wachenheim AG/Vintalia Weinhandels GmbH &
Co. KG
Rexam Beverage Can Company
CROWN Packaging UK PLC
Prinz Max Emmanuel von Thurn & Taxis
Gargantas De Lata S.R.L.
Hermann Pfanner Getränke GmbH
Aloys, Günther
Sektellerei Peter Herres GmbH

Headword:
-

Relevant legal provisions:
EPC Art. 54, 56, 100(b), 123(2)
EPC R. 80, 115(2)
RPBA Art. 13(3)

Relevant legal provisions (EPC 1973):

-

Keyword:

"Non-appealing opponent 05 party to proceedings: not necessary to decide (point 1)"

"Admissibility of documents (filed with an opposition) into the proceedings: yes (point 2)"

"Insufficiency: no"

"Lack of novelty: no"

"Lack of inventive step: yes (main request, auxiliary request II)"

"Admissibility of late filed auxiliary requests (III, III amended, IV to VII): points 6 and 8 to 13"

Decisions cited:

T 0558/06, T 0382/05, T 0359/06

Catchword:

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Case Number: T 1022/09 - 3.2.07

D E C I S I O N
of the Technical Board of Appeal 3.2.07
of 27 October 2011

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Decision under appeal:

**Decision of the Opposition Division of the
European Patent Office posted 3 March 2009
rejecting the opposition filed against European
patent No. 1429968 pursuant to Article 101(2)
EPC.**

Composition of the Board:

Chairman: H. Meinders
Members: P. O'Reilly
E. Dufrasne

Summary of Facts and Submissions

- I. Opposition was filed against European patent No. 1 429 968 as a whole based on Articles 100(a) EPC (lack of novelty and lack of inventive step), 100(b) (insufficiency) and 100(c) (added subject-matter).

The opposition division decided to reject the oppositions.

- II. The appellants (opponents 02, 03, 06 and 09) filed an appeal against that decision.

- III. Oral proceedings were held on 17 October 2011 in the presence of opponents 02, 03 and 09. There, these appellants requested that the decision under appeal be set aside and that the patent be revoked.

Although duly summoned appellant/opponent 06 and opponents 01, 04, 08 (parties as of right) and 05 did not appear at the oral proceedings. In accordance with Rule 115(2) EPC and Article 12(3) RPBA, the proceedings were continued without them. In written proceedings the appellant/opponent 06 requested that the decision under appeal be set aside and that the patent be revoked. None of the parties as of right made any requests or submissions.

The respondent (patent proprietor) requested at the oral proceedings that the appeals be dismissed or, in the alternative, that the decision under appeal be set aside and that the patent be maintained on the basis of one of the sequence of following requests:

Auxiliary request II, filed with letter dated 27 September 2011;
Auxiliary request III, filed at 19.15 during the oral proceedings;
Auxiliary request IV, filed at 19.15 during the oral proceedings;
Auxiliary requests V and VI filed during the oral proceedings;
Auxiliary request VII, filed at 19.15 during the oral proceedings;
Auxiliary request III, filed at 9.15 and refiled at 20.55 during the oral proceedings.

Auxiliary request I, filed with letter dated 27 September 2011 was withdrawn during the oral proceedings.

Auxiliary request III filed at 9.15 during the oral proceedings was replaced by auxiliary request III filed at 19.15.

The oppositions of opponents 07 and 10 were withdrawn during the appeal proceedings.

The opponents 01, 04, 08 (parties as of right) and 05 did not file any requests or submissions during the appeal proceedings.

IV. Claim 1 of the **main request** (patent as granted) reads as follows:

"A process for packaging wine in two-piece aluminium cans including the steps of:

preparing wine characterised in that it has less than 35 ppm of free SO₂, less than 300 ppm of chloride, and less than 800 ppm of sulfates;
filling a two-piece aluminium can body with the wine and sealing the can with an aluminium closure such that the pressure within the can is at least 1,72 bar (25 psi) and wherein the inner surface of the aluminium is coated with a corrosion resistant coating."

Claim 1 of **auxiliary request II** reads as follows (amendments when compared to claim 1 of the main request are depicted in bold or struck through by the Board):

"A process for packaging wine in two-piece aluminium cans including the steps of:
preparing wine characterised in that it has less than 35 ppm of free SO₂, less than 300 ppm of chloride, and less than 800 ppm of sulfates;
filling a two-piece aluminium can body with the wine and sealing the can with an aluminium closure such that the pressure within the can is at least 1,72 bar (25 psi) ~~and~~ wherein the inner surface of the aluminium is coated with a corrosion resistant coating, **and wherein the corrosion resistant coating is a thermoset coating.**"

Claim 1 of **auxiliary request III filed at 9.15** reads as follows (amendments when compared to claim 1 of the **main** request are depicted in bold or struck through by the Board):

"A process for packaging wine in two-piece aluminium cans including the steps of:

preparing wine characterised in that it has less than 35 ppm of free SO₂, less than 300 ppm of chloride, and less than 800 ppm of sulfates;
filling a two-piece aluminium can body with the wine and sealing the can with an aluminium closure such that the pressure within the can is at least 1,72 bar (25 psi) ~~and~~ wherein the inner surface of the aluminium is coated with a corrosion resistant coating, **wherein the corrosion resistant coating is a thermoset coating, and wherein the coating is crosslinked by baking at temperatures in the range of 165-185°C for twenty minutes.**"

Claim 1 of **auxiliary request III filed at 19.15** reads as follows (amendments when compared to claim 1 of the **main** request are depicted in bold or struck through by the Board):

"A process for packaging wine in two-piece aluminium cans including the steps of:
preparing wine characterised in that it has less than 35 ppm of free SO₂, less than 300 ppm of chloride, and less than 800 ppm of sulfates;
filling a two-piece aluminium can body with the wine and sealing the can with an aluminium closure such that the pressure within the can is at least 1,72 bar (25 psi) ~~and~~ wherein the inner surface of the aluminium is coated with a corrosion resistant coating, **wherein the corrosion resistant coating is a thermoset coating, which is an epoxy resin combined with a formaldehyde base crosslinking agent and wherein the coating is crosslinked by baking at temperatures in the range of 165-185°C for twenty minutes.**"

Claim 1 of **auxiliary request IV** reads as follows (amendments when compared to claim 1 of the **main** request are depicted in bold or struck through by the Board):

"A process for packaging wine in two-piece aluminium cans including the steps of:
preparing wine characterised in that it has less than 35 ppm of free SO₂, less than 300 ppm of chloride, and less than 800 ppm of sulfates;
filling a two-piece aluminium can body with the wine and sealing the can with an aluminium closure such that the pressure within the can is at least 1,72 bar (25 psi) ~~and~~ wherein the inner surface of the aluminium is coated with a corrosion resistant coating, **wherein the corrosion resistant coating is a thermoset coating, which is an epoxy resin combined with a formaldehyde base crosslinking agent wherein the coating is crosslinked by baking at temperatures in the range of 165-185°C for twenty minutes, and wherein the weight of the coating is at least 175 milligrams for a 375 ml can.**"

Claim 1 of **auxiliary request V** reads as follows (amendments when compared to claim 1 of the **main** request are depicted in bold or struck through by the Board):

"A process for packaging wine in two-piece aluminium cans including the steps of:
preparing wine characterised in that it has less than 35 ppm of free SO₂, less than 300 ppm of chloride, and less than 800 ppm of sulfates;

filling a two-piece aluminium can body with the wine and sealing the can with an aluminium closure such that the pressure within the can is ~~at least 1,72 bar (25 psi)~~ **1.72-2.76 bar (25-40 psi)** and wherein the inner surface of the aluminium is coated with a corrosion resistant coating."

Claim 1 of **auxiliary request VI** reads as follows (amendments when compared to claim 1 of the **main** request are depicted in bold by the Board):

"A process for packaging **still red or still white** wine in two-piece aluminium cans including the steps of: preparing wine characterised in that it has less than 35 ppm of free SO₂, less than 300 ppm of chloride, and less than 800 ppm of sulfates; filling a two-piece aluminium can body with the wine and sealing the can with an aluminium closure such that the pressure within the can is at least 1,72 bar (25 psi) and wherein the inner surface of the aluminium is coated with a corrosion resistant coating."

Claim 1 of **auxiliary request VII** reads as follows (amendments when compared to claim 1 of the **main** request are depicted in bold or struck through by the Board):

"A process for packaging **still red or still white** wine in two-piece aluminium cans including the steps of: preparing wine characterised in that it has less than 35 ppm of free SO₂, less than 300 ppm of chloride, and less than 800 ppm of sulfates; filling a two-piece aluminium can body with the wine and sealing the can with an aluminium closure such that

the pressure within the can is at least ~~1,72 bar (25 psi)~~ and **1.72-2.76 bar (25-40 psi)** wherein the inner surface of the aluminium is coated with a corrosion resistant coating, **wherein the corrosion resistant coating is a thermoset coating which is an epoxy resin combined with a formaldehyde base crosslinking agent and wherein the coating is crosslinked by baking at temperatures in the range of 165-185°C for twenty minutes.**"

V. The documents cited in the present decision are the following:

of the opposition proceedings:

D2a: Translation of JP-A-62 52048

D9: Abstract of JP-A-63 241 077

D17: "Protective and Decorative Coatings, Homepage Metal Packaging Manufacturers Association, printout from 15 January 2007.

D18: WO-A-2006/026801

D19: Horsford, William, et. al., The Aluminium Beverage Can, Scientific American, pages 48 - 53, 1994

D25: The composition of Australian grape juice, chloride, sodium and sulfate ions, Leske et. al., Australian journal of Grape and Wine Research, vol. 3, page 26 - 30, 1997

D28: Statutory declaration of Adrian Dermott Coulter dated 17.05.2005

D29: Ferrarini et. al., The packaging of wine in aluminium containers, Vignevini, No. 5, 1992

D29a: Translation of D29

- D32: Beverage Canning Practice Recommendations, 6th Ed. Carnaudmetalbox Bevcan Plc,
- D32a: Letter from Carnaudmetalbox to Guinness Brewing Worldwide dated 25 October 1996
- D43: Schweizer Lebensmittelbuch, Kapitel 30, Wein, April 2001
- D52: Australia New Zealand Food Standards Code, Standard 4.5.1, Wine production requirements (Australia only)
- D53: Argentinean wine regulations: Summary of relevant provisions,
http://www.inv.gov.ar/TolerAnal/tolerancias_analiticas.htm
- D59: WO-A-2006/105610
- D63: Chemie des Weins, Würdig and Woller, pages 466 - 467, 568, 569, 640 and 641, E.U. Verlag, 1989
- D71: Copies of correspondence of opponent 09
- D81: Wine and Must analysis, Amerine and Ough, pages 9, 16 - 20, 81 - 85, and 93 - 104, 1974

of the appeal proceedings:

- D87: Witness statement of Mr. Taylor
- D88: Affidavit of Mr. Dirick
- D89: "Kosher Wines Aren't Just Sweet" website extract
- D90: Wiley Encyclopedia of Packaging Technology, 2nd Ed., Brody and Marsh, pages 615 to 629, Wiley, 1997
- D92: Lehrbuch der Anorganischen Chemie, Nils Wiberg, pages 166 and 167, Walter de Gruyter, 1995
- D93: German "Weinverordnung"
- D94: CN-A-1 263 027
- D94a: Translation of D94
- KP12: Affidavit of Mr. Lorscheider

AP25:Report dated 15 September 2011 by Mr. Gibson for
Barokes Pty Ltd filed by the respondent with
letter dated 27 September 2011

VI. The arguments of the appellants may be summarised as follows whereby they are presented here collectively without being split up into the separate arguments of each appellant:

(i) The documents to which the respondent has objected should be admitted into the proceedings.

The documents are all relevant representing either the general technical knowledge of the skilled person or a response to the decision of the opposition division. It is agreed that a decision on the admittance of documents that relate to prior uses can be put back until after the other documents have been considered.

(ii) The invention is not disclosed in a manner that is sufficiently clear and complete for it to be carried out by the skilled person (Article 100(b) EPC).

In claim 1 of the main request there is specified a lower limit but no upper limit for the pressure inside the can. A patent should be workable throughout the whole scope of the claim. Since there is no upper limit for the pressure it is quite clear that it cannot be worked for the whole of this range.

There is no indication of the temperature at which this pressure should be measured. It varies with temperature and the wine may be chilled before filling and warmed afterwards so that the temperature may vary from 14°C

when chilled to 32°C as indicated on page 13/19 of annex AP25 of the respondent. The measured pressure would vary accordingly.

There is also no indication at which point in the process the pressure should be measured.

In AP25 there are many further method steps indicated as being necessary in order to carry out the invention and obtain the alleged advantages, which are not included in the claim, e.g. the amount of free sulphur dioxide should be at least 32 ppm, the amount of copper and nitrates should be controlled, and the pressure should be within a specific range. Therefore the teaching of claim 1 is not complete.

The expression "corrosion-resistant coating" is not clear so that the skilled person would not know how to provide a suitable such coating.

(iii) The subject-matter of claim 1 of the main request is not novel.

D29/29a discloses all the features of claim 1 of this request. In particular, the can disclosed therein is a two-piece can. This is evident from D19 which in the table on page 52 shows that at the time of publication of D29/29a all cans were two-piece cans. In table 1 of D29/29a there is no mention of chlorides or sulfates so that there is none in the wine. The claimed ranges for them have no lower limit and so encompass a situation with no sulphates or chlorides. Alternatively, it is indicated in table 4 that chlorides and sulphates are undesirable so the skilled person would understand that

the amounts would have to be kept low. Furthermore, the claimed ranges do not qualify for a selection invention so that they cannot confer novelty. D25, D63 and D81 show that many countries require levels of chlorides and sulphates for their wines that are in any case below those specified in the claim.

(iv) The subject-matter of claim 1 of the main request does not involve an inventive step.

Taking D29/29a as the nearest prior art the skilled person when deciding which type of can to use would choose a two-piece can as this is the most common.

Already from D29/29a the skilled person is encouraged to keep the amount of chloride and sulphates low since it is indicated in tables 2 and 3 that these can be detrimental to the can. The fact that in other aspects they can be positive does not alter this negative effect.

It has not been shown that the claimed ranges solve any problem. There is no indication of any effects which occur below the specified limits but not above. These limits therefore appear to be arbitrary. The only results given in the patent description do not indicate the constituents of the tested wine so that no conclusions can be drawn from these. In any case they only cover a storage over six months and known canned wines can remain stable for this length of time as well.

The wines covered by the definition given in the claim are well known. A large percentage of normal wines are

covered including, for instance, Swiss and German wines as evidenced from D43 and D63 respectively.

(v) Auxiliary request II should not be admitted into the proceedings.

The amendment to claim 1 of the request does not comply with Rule 80 EPC and does not bring anything.

(vi) The subject-matter of claim 1 of auxiliary request II does not involve an inventive step.

Thermoset coatings for aluminium cans are well known as evidenced by D2a, see page 10, seventh paragraph, D9, and D17, see page 2, paragraph entitled "Epoxy-based Lacquers". Also, the respondent in its submission dated 4 January 2010 admitted this on page 50 of that submission. Furthermore, the measure does not solve any problem.

(vi) The other auxiliary requests should not be admitted into the proceedings.

Claim 1 of auxiliary request III filed at 09.15 and refiled at 20.55 clearly has problems with Article 123(2) EPC. The amendment involves taking the baking temperature range and time for the thermoset coating from the description of the patent without taking the other features from that part of the description which specifies the composition of the coating. This evidently raises problems of added subject-matter.

Claim 1 of each of auxiliary requests III (filed at 19.15), IV and VII contains the extra feature that the thermoset coating is an epoxy resin combined with a formaldehyde crosslinking agent wherein the coating is crosslinked by baking at temperatures in the range of 165 - 185°C for twenty minutes. This feature has been taken from the description of the patent in suit. It would therefore be necessary to carry out an extra search. Even to search the documents already in the proceedings would take more time than is available in an oral proceedings.

Claim 1 of auxiliary request V also includes a feature from the description so that a further search may be necessary and even a search solely in the documents already in the proceedings would take more time than is available in an oral proceedings.

The same applies to auxiliary request VI. Although there is reference to still wines in claims 11 and 12 as granted these claims are in a different category. The reference to red and white still wines affects the arguments regarding the pressure since D29/29a only specified a pressure in relation to a sparkling wine.

Since claim 1 of auxiliary request VII contains both the amendments made to claim 1 of each of auxiliary requests V and VI the same considerations apply.

VII. The arguments of the respondent may be summarised as follows:

(i) The documents D18, D28, D43, D52, D53, D59, D71, D87 - D90 and D92 - D94/94a should not be admitted into the proceedings.

D18, D28, D43, D52, D53, D59 and D71 were not admitted into the opposition proceedings and should not be admitted into these proceedings. D87 - D90 and D92 - D94/94a are late filed and therefore should not be admitted into the proceedings either. Moreover, their content is not more relevant than those documents already in the proceedings.

(ii) The invention is disclosed in a manner that is sufficiently clear and complete for it to be carried out by the skilled person (Article 100(b) EPC).

The upper limit for the pressure is given in the patent description and the skilled person would in any case know the practical upper limit.

The temperature at which the pressure should be measured is clearly the normal room temperature.

The pressure is evidently measured at the end of the production process.

There are many extra practical measures and know-how which are mentioned in AP25 which are not necessary to the invention. These are not essential features.

The expression "corrosion-resistant coating" is clear and has the meaning indicated by the Board in its preliminary opinion.

(iii) The subject-matter of claim 1 of the main request is novel over the disclosure of D29/29a.

There is no indication in D29/29a that a two-piece can is disclosed. Three-piece cans are also known. It is implicit that the wine mentioned in D29/29a has chloride and sulphate components because these come from the grapes and could not be zero. The wine indicated in D29/29a is not a typical wine because its pH is too low for this. As apparent from D81 (see page 82) most wines can have a sulphur dioxide level higher than the 35 ppm specified in the claim. Also the legal limits for many countries are above those set out in the claim. The document does not disclose a particular wine having a composition satisfying the three upper limits set out in the claim.

The claimed ranges are also not a selection invention because there are no ranges given in D29/29a from which they could be considered selected.

(iv) The subject-matter of claim 1 of the main request involves an inventive step.

Starting from D29/29a it is first noted that it does not contain a recommendation to put wine in a can; rather it indicates problems that arise when this is attempted. Moreover, it does not mention which type of can and the choice is not straightforward since there are for instance three-piece cans. The wine mentioned

in D29/29a has a rather low pH value which indicates a very poor quality whereas the ranges set out in the claim indicate a good quality wine.

With respect to the effects of the constituents of the wine it is indicated in tables 2 and 3 of D29/29a that free sulphur dioxide, sulphates and chlorides are positive for the chemical/physical stability of the wine so that the skilled person has an incentive to keep the amounts of these high as opposed to that which is set out in claim 1 which limits the amounts of these.

The problem to be solved is to provide long term stability. It is true that the test results given in the patent in suit do not go beyond 6 months, which was possible in the prior art, but the need to file the patent application prevented longer testing.

Although there are countries whose maximum allowed amounts for chloride and sulphates are similar or lower than those set out in the claims there are other countries where this is not the case so that the skilled person does not get a clear teaching to keep these below the claimed levels.

In the art of canning wine the greatest danger is that the reputation of a wine can be negatively affected if it is canned and is not stable so that it does not taste good. The claim sets out limits for certain constituents of wine and in this way eliminates wines that are not suitable for canning. The pressure is not just a matter of the structural stability of the can but it ensures that the coating is not stressed and

thus avoids micro-fissures occurring which could lead to breakdown of the coating.

(v) Auxiliary request II should be admitted into the proceedings.

Claim 1 has been amended to incorporate the feature of claim 6 as granted and the request was filed in time one month before the oral proceedings.

(vi) The subject-matter of claim 1 of auxiliary request II involves an inventive step.

Not all coatings are thermoset coatings since alternatively a thermoplastic coating can be used. D2a, D9 and D17 are particular documents and do not represent general technical knowledge.

(vii) The other auxiliary requests should be admitted into the proceedings.

Auxiliary request III (filed at 09.15 and refiled at 20.55) does not raise any problems with Article 123(2) EPC. The feature that is taken from the description is not linked to the other features of the same paragraph of the description; in particular it is not linked to the composition of the thermoset coating.

Auxiliary requests III (filed at 19.15), IV and VII each contain the extra feature that the thermoset coating is an epoxy resin combined with a formaldehyde crosslinking agent wherein the coating is crosslinked by baking at temperatures in the range of 165 - 185°C for twenty minutes. A further search is not necessary

as it is acknowledged that epoxy resins combined with a formaldehyde crosslinking agent are known *per se*. It is not, however, known to use them for coating aluminium cans.

The amendments to claim 1 of auxiliary requests V and VI would avoid in differing ways the value of the pressure disclosed in D29/29a so that these should be admitted, as should auxiliary request VII whose claim 1 contains a combination of the amendments made in the claim 1 of each of auxiliary requests V and VI.

Reasons for the Decision

1. *Parties to the proceedings*

- 1.1 The opposition of opponent 05 was deemed inadmissible by the opposition division. This opponent does not have its principal place of business in one of the contracting states so that it filed its opposition via a professional representative. The professional representative subsequently withdrew its representation in the case. The opposition division decided that this subsequent withdrawal of representation, without appointing another professional representative upon the request of the EPO resulted in the opposition being deemed inadmissible.

This opponent did not file an appeal against the decision of the opposition division.

Since this opponent did not take any actions in the appeal proceedings it is not necessary for the Board to

reach a conclusion regarding its status in the appeal proceedings.

1.2 Opponent 07 did not file an appeal and during the appeal proceedings it withdrew its opposition. This opponent is therefore no longer a party to the appeal proceedings.

1.3 Opponent 10 filed an appeal. During the appeal proceedings it withdrew first of all its appeal and then its opposition. This opponent is therefore no longer a party to the appeal proceedings.

1.4 Opponents 02, 03, 06 and 09 are parties to the proceedings as appellants.

1.5 Opponents 01, 04 and 08 are parties as of right (Article 107 EPC) to the proceedings.

2. *Admissibility of documents filed during the opposition and appeal proceedings*

2.1 The respondent argued that a number of documents filed in the opposition proceedings, as well as documents filed during the appeal proceedings were not admissible into the proceedings.

2.2 D18, D28, D43, D52, D53 and D59 were each filed with a corresponding notice of opposition. In each case the filing of the document was substantiated by the document being discussed in detail with respect to at least one ground of opposition.

The opposition division considered that these documents were not part of the opposition proceedings for one or more of the following reasons: it was not proven that they were publicly available; their publication was not proven; their dates of publication were not proven to have been before the date of priority; or they were filed by opponent 05 whose opposition the opposition division retrospectively considered to have been inadmissible.

2.2.1 In the view of the Board the question of whether the publication date or content of the respective document makes them relevant to the discussion of the grounds of opposition is a separate consideration to that of admissibility when the document is filed with an admissible notice of opposition and its alleged significance is discussed in that notice. In this respect the opposition division has confused the criteria for admissibility of **late-filed** documents with those for documents filed with and referred to in an admissible notice of opposition. In the latter case the content and publication date does not come into play for the question of admissibility.

2.2.2 With respect to the documents filed by opponent 05 along with its notice of opposition the Board notes that at least at the time of filing the opposition the documents were automatically in the opposition proceedings as they were also referred to in that notice of opposition. The opposition division decided that the subsequent withdrawal of representation by the professional representative meant that the opposition was deemed inadmissible.

As indicated above (see point 1.1) the Board does not consider it necessary to reach a conclusion on the admissibility of this opposition. With regard to the documents filed along with the notice of opposition the Board considers that since their filing was substantiated they were automatically in the opposition proceedings. This fact cannot be changed retrospectively by the subsequent withdrawal of representation by the professional representative.

2.2.3 In the view of the Board all of these documents filed in the first instance proceedings are therefore in the proceedings.

2.3 D71 is in fact a group of documents forming part of the evidence in support of an alleged prior use. It was filed with one of the notices of opposition. The opposition division decided not to admit the document as it contains no publication date.

During the oral proceedings the Board informed the parties that it would consider the admissibility of this and other documents relating to alleged prior uses only in the event that it came to the conclusion that one of the requests of the respondent could be allowed in the face of the other documents in the proceedings.

However, it came to the conclusion that in this manner none of the requests could be allowed so that it is not necessary to reach a decision on the admissibility of documents relating to alleged prior uses.

2.4 D87 - D90 and D92 - D94 were all filed with grounds for appeal whereby a complete translation (D94a) of D94 was first filed one month before the oral proceedings.

D87 is a witness statement by a Mr Taylor regarding the compositions of wines the test reports of which he had reviewed in respect of the presence of relevant substances. Since the document is evidence of the general composition of wines and was filed at the start of the appeal proceedings in response to part of the reasons for the impugned decision the Board decides to admit the document.

D88 relates to a new alleged prior use. During the oral proceedings the Board decided to put back any decision on the admittance of evidence relating to prior uses until a point in the proceedings were it could become relevant (see point 2.3 above).

The appellant/opponent 09 who filed D89 indicated that it would not insist upon its admittance if D18 were to be admitted. Since D18 has been admitted (see point 2.2 above) it is not necessary to admit this document.

D90 is an extract from an Encyclopaedia of Packaging Technology and thus represents the general technical knowledge of the skilled person. The Board therefore decides to admit the document.

D92 is an extract from a textbook and so represents the general technical knowledge of the skilled person. The Board accordingly decides to admit the document.

D93 is a document setting out German regulations relating to wine. At the start of the document it is indicated that a new version was made in May 2002 which was subsequently amended in November 2008. Therefore the contents of the document are not clearly proven to be publicly available before the priority date of the patent in suit. The Board therefore does not admit this document into the proceedings.

D94 is a Chinese patent with an abstract in English which was filed to show that lining of cans was known before the priority date, since the opposition division with respect to lack of inventive step arguments starting from D32/32a had cast doubt on this. The late filing of the translation does not raise any new issues since its contents were essentially contained in the English language abstract. The Board therefore decides to admit D94 and its translation D94a.

- 2.5 In summary: the Board postponed and subsequently did not need to take a decision on the admittance of D71 and D88 as well as an affidavit filed as KP12 by appellant/opponent 09 with letter dated 27 September 2011, since they all related to alleged prior uses and the Board reached a decision on the patent without needing to consider their admittance; D89 and D93 are not admitted into the proceedings; and all other documents are admitted into the proceedings.

Main request

3. *Insufficiency (Article 100(b) EPC)*

3.1 The appellants first argued that the patent contained no teaching as to how to provide a process in which any pressure above 1.72 bar could be provided in the can. They argued that the invention should be workable throughout the scope of the claim and this was clearly not possible for a claimed pressure with an undefined upper limit.

3.1.1 The Board cannot agree with this line of argumentation. Although the range of pressures that is claimed does not include an upper limit the skilled person knows how to provide the pressure up to a practical limit, e.g. via the amount of liquid nitrogen injected into the headspace. The upper limit will be dependent in particular upon the properties of the can, but the skilled person would not have a difficulty in dealing with this since it is possible to establish the upper limit by trial and error.

3.1.2 The appellants further argued in this respect that there was neither an indication of the temperature at which the pressure was to be measured nor the point in the process at which it was measured. The appellants suggested that the temperature could vary from the temperature of cooled wine up to the temperature of 32°C mentioned in AP25 filed by the respondent (see page 13/19 thereof).

3.1.3 The arguments of the appellants are not persuasive. With regard to the point in the process at which the pressure is measured this is quite clearly at the end of the process when the wine has been packaged.

Also, the question of the temperature is not so critical as suggested by the appellants since the relevant temperatures are not the temperatures in degrees centigrade, i.e. 14°C for cooled wine and 32°C mentioned in AP32, but the temperatures in degrees Kelvin, i.e. 287°K and 305°K respectively. The relative variation in degrees Kelvin determines the corresponding variation in the pressure. This variation is approximately 7% and thus within any reasonable tolerance. Moreover, the temperature will be that prevailing at the end of the process when the pressure is measured.

- 3.2 The appellants further argued that it was clear from AP25 that there were many further method steps necessary to carry out the invention which were not included in the claim, e.g. the amount of free sulphur dioxide should be at least 32 ppm, the amount of copper and nitrates should be controlled and the pressure should be within a specific range.

The Board cannot agree with this line of argumentation either. As argued by the respondent AP25 indicates many practical details of the process which do not contradict the claim which indicates the essential steps of the alleged invention. It is clear that there are always many variables in a process which are not set out in the claim but which the skilled person will apply in practice.

- 3.3 In a last line of argumentation the appellants argued that the skilled person would not know how to provide a corrosion-resistant coating for a can containing wine because the meaning of this term is not clear.

The Board already indicated in its provisional opinion that it considered that the expression "corrosion-resistant coating" was a functional definition, which meant that the coating resisted the contents of the can. The skilled person would understand this and could therefore provide a suitable coating. One such coating is mentioned in the description of the patent and the appellants did not show that the skilled person would not be able to find others.

3.4 Therefore the ground of insufficiency of disclosure does not succeed.

4. *Novelty*

4.1 The appellants argued that D29/29a took away the novelty of the subject-matter of claim 1.

4.2 The document comprises an article from an Italian wine magazine (D29) and a translation thereof (D29a). This document with translation was filed by more than one opponent and the translations are not identical in particular with respect to page layout. The present decision will refer to the translation filed by opponent 02 on 23 January 2007.

4.3 The document describes various experiments that the authors carried out with respect to the stability of wine in an aluminium can (see last paragraph on page 10 and to the "Conclusions" which each refer to cans). A single sparkling white wine was used for the tests (see table one). The information regarding this wine given in table 1 includes the free sulphur dioxide (4 mg/l,

i.e. ppm) and total sulphur dioxide (79 ppm). According to the first paragraph on page 7 the sparkling wine had an excess pressure of 2 atmospheres, i.e. approx. 44 psi or 3.03 bar. In table 4 (see page 7) the results of various tests involving 0, 10, 20 and 35 mg/l free sulphur dioxide are given. The cans have a lid, and this as well as the rest of the body is coated (see table 4) as shown by the paragraph following table 5. The coating is clearly intended to protect the material of the can (aluminium) against the effect of the wine or *vice versa* (see table 4 which indicates the results on the wine of the differing coatings A - C).

4.4 Therefore in the opinion of the Board the document does not, however, disclose the following features of claim 1:

- a) the can is two-piece;
- b) the wine in the can has less than 300 ppm chloride; and
- c) the wine in the can has less than 800 ppm sulfates.

4.5 With respect to feature a) the appellants argued that a two-piece can was normal for this type of can. Also, it was argued with reference to D19 that only such cans are used.

The Board notes that the table on page 52 of D19 refers to the situation in the USA whereas D29/29a is concerned with the situation in Italy. It cannot be assumed that these situations will be the same since

there are very often local requirements and customs with respect to packaging. The Board considers that in the absence of any indication in D29/29a with regard to the type of can it cannot be considered that the can referred to would inevitably be a two-piece can since there are other forms of can, e.g. three-piece.

- 4.6 The appellants argued that the skilled person reading D29/29a would understand that it included wines having less than 300 ppm chlorides. It was not particularly disputed by the respondent that a significant proportion of wines on the market fulfilled this criterion. However, there is nothing in D29/29a to indicate the chloride content of the actual wines referred to. It was also somewhat surprisingly argued by one of the appellants that since table 1, which lists some of the contents of the wine under test, did not mention chlorides then the amount of these must be zero.

For the Board, chlorides are just one of many possible constituents of the wine which, for whatever reason, were not mentioned in the table so this conclusion of a zero value cannot be directly extracted from the absence of a mention. More fundamentally, as the appellants must know the wine will always have chloride content, even if it is low, as this is already present in the grapes.

- 4.7 The appellants alternately argued that the skilled person would understand that the chloride content should be low, referring in this respect to table 3 of the document and normal values as set out for instance in D63 (see tables 86 to 93) and D81 (see page 100).

However, the indication in table 3 that chlorides and sulphates may be seen as undesirable does not alone lead to a conclusion that the skilled person would understand the disclosure of D29/29a as having a value for the chlorides of below the maximum set out in this feature. The fact that a number of countries have maximum values for chlorides that are less than that specified in the claim must be seen beside the fact that other countries set legal limits that are higher.

The Board also does not agree that criteria for a selection invention should be applied to the present patent since this is not a case of a selection of a narrower range from a range disclosed in the closest prior art document since no range is specified in D29/29a. Rather, maximum values for various constituents are specified.

4.8 With regard to feature c) the Board considers that the situation is the same as that of feature b). The feature is neither explicitly disclosed in D29/29a nor is it implicitly disclosed for the same reasons as explained with respect to feature b).

4.9 Therefore, the subject-matter of claim 1 of this request is novel in the sense of Article 54 EPC.

5. *Inventive step*

5.1 The appellants argued against the presence of an inventive step in the subject-matter of claim 1 starting from a number of alternative documents and on the basis of general considerations. For the purposes

of the present decision it is only necessary to consider one of these lines of argumentation which is the one starting from D29/29a.

- 5.2 The process of claim 1 is distinguished over the disclosure of this document by the features a), b) and c) indicated in point 4.4 above.
- 5.3 The skilled person considering the teaching of D29/29a and wishing to put it into practice would have to consider the type of can to be used. The two-piece can is one of the most commonly available, already in 1992. The skilled person would therefore immediately consider this type of can. There is no indication of any prejudice against this type of can, nor is there any indication in the patent that anything other than its known advantages are achieved in its use in the claimed process.
- 5.4 Features b) and c), independently from feature a), set out upper limits for the amount of chloride and sulphates to be contained in the wine. Already in D29/29a in tables 2 and 3 the influences of these constituents were considered. It is indicated therein that they have a negative effect on the aluminium can but a positive effect on the chemical/physical stability. The skilled person was therefore aware that depending upon the circumstances there would be advantages in attempting to limit the amount of these constituents in wine as much as possible, to avoid a negative influence on the taste of the wine by corrosion of the aluminium can. The skilled person would also be aware that as evidenced by D81 (see page 100 and table 32 on page 101) the level of

chlorides in European wine is generally below approximately 300 ppm. This is supported by the declaration of Mr Taylor (D87) that all the wines of the test reports that he had reviewed which were tested for chlorides had a chloride level below 300 ppm.

D43 is a collection of pages from the Swiss wine guidelines ("Richtlinien"). The respondent disputed the publication date of the document. The appellants argued the varying dates at the bottom of each page indicated the guidelines were issued in the form of a collection of loose leaf pages and that the date at the bottom of the page indicated when that page had been updated. The Board considers the argument of the appellants to be plausible and in line with normal practice, e.g. this practice is used for the Guidelines for Examination of the EPO. Table 30A.1 of D43 is on a page which is marked "April 1993" at the bottom so that it is reasonable to believe that it was available in this form to the public at or around that time, i.e. well before the priority date of the patent in suit. In this table D43 indicates that the Swiss wine regulation required chloride to be in the range of 10 to 100 ppm and sulphates in the range of approximately 140 to 550 ppm (the values are given in potassium sulphate equivalents in the table and have been here converted to units of anions).

D63 indicates that the German wine regulations required that the chloride value be below 100 ppm (see page 640). D63 further indicates that these regulations required sulphates to be below 552 ppm (see page 641).

D81 (see table 32 on page 101) gives average values for sulphates from various countries that are mostly, though not always below 800 ppm.

From the above the Board concludes that limiting the amount of chlorides and sulphates was very much on the mind of the skilled person at the priority date of the patent in suit and that a significant proportion of then existing wines had chloride and sulphate contents that were below the respective limits set out in the claim.

Applying the teaching of D29/29a to such wines, a task to be expected of the skilled person, would therefore not require any inventive skills.

- 5.5 The respondent explained that whilst wines are known of which the chloride and sulphate contents are inside and outside the limits set out in the claim the difficulty was to know which ones were suitable for canning. It noted that failure had to be avoided since the reputation of a wine with consumers could be ruined if its taste went off in the can. It emphasised that the claimed limits excluded wines that were not suitable for canning.

The Board cannot agree with this argument. First of all there are indications in D29/29a itself (see tables 2 and 3) that there can be advantages in having low chloride and sulphate contents. Secondly, at least German and Swiss wines fulfil the limits and the skilled person would want to can these wines for commercial exploitation. Thirdly, no effect has been shown that occurs within the limits that does not occur

outside of the limits. The patent is completely silent as to the selection of the particular values for the limits, i.e. why the claimed values for the limits and not some other values. There are only the results of some tests on one wine example and the composition of this wine is not even given so that no conclusions may be drawn.

5.6 The respondent argued that the wine used in the article D29/29a was not even a representative wine, due to its extremely low pH of 2.91. The Board cannot agree with this argument either since the claim does not contain any requirements for the pH level. Further the patent itself concerns wines of which the pH is 3.0 to 3.4, thus not a significantly different value. Finally this value of 2.91 relates to a sparkling white wine whereas D29/29a also relates to still wines (table 4) and in any case mentions the need for product variables to be adapted as needed, and to adapt them to those product characteristics which cannot be changed.

5.7 The respondent finally argued that for the still wines referred to in D29/29a it was not desirable that the cans were pressurized.

This pressurization argument cannot be accepted either, since the pressurization of the cans is in any case a necessary step for providing structural stability to the filled thin-walled aluminium can.

5.8 Therefore, the subject-matter of claim 1 of the main request does not involve an inventive step in the sense of Article 56 EPC.

Auxiliary request II

6. *Admissibility*

6.1 Claim 1 of this request is a combination of claims 1 and 6 as granted. The request was filed one month before the oral proceedings.

The appellants argued that the amendment did not bring anything and that it was not occasioned by a ground of opposition (Rule 80 EPC).

6.2 The claim includes the extra feature compared to claim 1 of the main request that the coating is a thermoset coating.

Since the feature limits the scope of the independent claim it may reasonably be considered to be in response to a ground of opposition and thus does not offend Rule 80 EPC. There are no formal objections to the amendment.

The argument of the appellants that it did not bring anything was not supported by any further explanation so that it can be dismissed.

6.3 The Board therefore decides to admit the request into the proceedings.

7. *Inventive step*

7.1 D29/29a refers to the coating disclosed therein as "varnish". A varnish is normally applied to a surface and allowed to dry so that it would not normally be

considered to be a thermoset coating, i.e. one that cures under a heat treatment.

- 7.2 The Board first notes that, as pointed out by the appellants, the respondent in its submission dated 4 January 2010 (see page 50) indicated that it was a well established practice to spray the inside of aluminium cans with an epoxy based organic coating and also an epoxy resin is referred to in the patent in suit (see paragraph [0035]) as a thermoset coating.

The appellants further referred to D2a, D9 and D17 to show that thermoset coatings for cans were well known. D2a is directed to internal coating for aluminium cans which contain beverages, e.g. wine-containing beverages (see page 9, fourth full paragraph). The coating can be an epoxy resin (see page 10, seventh full paragraph). According to D9 a metallic can is coated with an epoxy resin. D17 is concerned with protective and decorative coatings for cans and mentions on page 2 epoxy resins that are cross-linked at high temperature.

The respondent suggested that these are many different documents, also not establishing general technical knowledge in this field and moreover that there are other types of coatings, e.g. thermoplastic.

- 7.3 In the view of the Board a thermoset coating for the interior of an aluminium wine can is clearly an important option for the skilled person. In particular, D17 contains a general discussion of protective coatings and not just a specific disclosure.

Furthermore, as pointed out by the appellants, it has not been shown that the provision of the coating being a thermoset coating solves any particular problem over for example a varnish and indeed no effect is mentioned in the patent in suit for the provision of this coating.

- 7.4 Therefore, the subject-matter of claim 1 of auxiliary request II does not involve an inventive step in the sense of Article 56 EPC.

Admissibility of the further auxiliary requests

8. *Auxiliary request III filed during the oral proceedings at 09.15 and re-filed at 20.55*

- 8.1 This request was first filed at 09.15 in the oral proceedings. It replaced auxiliary request III filed with letter dated 27 September 2011. It differed from that request in that the upper end of the temperature range specified in the claim was changed from 180°C to 185°C to conform to the disclosure of this range in the description of the patent. It was **replaced** by auxiliary request III filed at 19.15 in the oral proceedings.

After auxiliary request III filed at 19.15 in the oral proceedings was found to be inadmissible (see below) the respondent re-filed the 9.15 version of auxiliary request III at 20.55.

- 8.2 Apart from the change in the upper limit of the temperature range the request is identical to the one filed with letter of 27 September 2011.

It is part of the case law of the Boards of Appeal that the admissibility of a request (Case Law of the Boards of Appeal, 6th Edition 2010, VII.E.16.4.1) including amended claims is amongst other matters dependent upon the claims being at least clearly allowable with respect to the formal matters. This can also apply to requests filed one month before the oral proceedings, i.e. before the final date indicated by the Board for submissions, (see for example T 0558/06, points VII and 1.1; T 0382/05, points 1.1 and 1.5; and T 0359/06, point 1).

The amendment to claim 1 involves the incorporation of a temperature range and time for baking of the thermoset coating. The basis for the amendment according to the respondent is paragraph [0035] of the patent as granted. In that paragraph, however, the material of the coating is first discussed mentioning a particular material for the coating, i.e. an epoxy resin combined with a formaldehyde based crosslinking agent. Then the temperature range and time is mentioned. The appellants argued that taking the temperature range alone and out of the context of the material to which it applied was an unallowable amendment which added subject-matter.

The Board agrees that the amendment to the claim is not one which is clearly allowable under Article 123(2) EPC. A temperature range for baking a substance is normally dependent upon the nature of the substance. Stating a temperature range and time which should apparently apply to any thermoset coating does not make technical sense since these factors are always dependent upon the substance. Therefore the skilled

person would understand that the disclosure of the temperature range and baking time is unbreakably linked to the specification of the material to be baked so that these cannot be taken apart.

8.3 Since claim 1 of the request is already not clearly allowable for formal reasons the request is not admitted.

9. *Auxiliary request III filed during the oral proceedings at 19.15*

9.1 This version of the request differed from the version filed at 09.15 in that the thermoset coating is defined to be an epoxy resin combined with a formaldehyde based crosslinking agent.

9.2 This amendment was an attempt to make the request clearly allowable at least with respect to the above mentioned (point 8.2) formal matters.

9.3 The appellants pointed out that this amendment is derived from the description of the patent (see paragraph [0035]) so that they would need to carry out a search. They argued that even searching through the documents already in the proceedings could take longer than is possible during an oral proceedings.

9.4 The respondent conceded that a thermoset coating comprising an epoxy resin combined with a formaldehyde based crosslinking agent is known *per se* and argued that therefore no further search was needed by the appellants. However, the respondent further argued that

such a coating was not known in the context of lining for cans.

- 9.5 In the view of the Board the fact that the respondent conceded that the composition of the thermoset coating was *per se* known does not remove the need for the appellants to carry out a further search (also of the documents forming part of the proceedings) since the arguments of the respondent were based on this composition not being known in the context of can linings. The appellants would therefore have wished to search for this composition in this context in order to respond to the arguments of the respondent.

Such a search could clearly not be carried out during the oral proceedings. This would not even have been possible for the documents in the proceedings since there are a large number of such documents - almost one hundred - so that the time required would have been prohibitive.

In the view of the Board the filing of these amended claims during an oral proceedings which legitimately require a further search will normally be inadmissible since it would require adjournment of the oral proceedings contrary to Article 13(3) RPBA. The present case is not an exception.

- 9.6 Therefore this request is not admitted.

10. *Auxiliary requests IV and VII filed during the oral proceedings at 19.15*

10.1 These requests were both filed at 19.15 along with one of the versions of auxiliary request III. Claim 1 of each of these requests includes the feature that the thermoset coating is defined to be an epoxy resin combined with a formaldehyde based crosslinking agent. The presence of this feature in claim 1 of the auxiliary request III filed at 19.15 led to that auxiliary request not being admitted into the proceedings.

10.2 Therefore these requests are not admitted for the same reason as applies to auxiliary request III filed at 19.15.

11. *Auxiliary request V*

11.1 This request was filed at 9.15 at the start of the oral proceedings.

Claim 1 of this request contains the extra feature that an upper limit is placed on the pressure in the can. This feature is taken from paragraph [0036] of the patent in suit.

As pointed out by the appellants they could previously rely on any disclosure disclosing a pressure above the minimum that was specified in claim 1 in each of the requests on file before the start of the oral proceedings. With this amendment they would have to have carried out a further search directed to a

disclosure presenting pressures also below the maximum of this range.

Such a search could clearly not be carried out during the oral proceedings. This would not even have been possible for the documents in the proceedings since there are a large number of such documents - almost one hundred - and the time required would have been prohibitive.

In the view of the Board the filing of these amended claims during an oral proceedings which legitimately require a further search will normally be inadmissible since it would require adjournment of the oral proceedings contrary to Article 13(3) RPBA. The present case is not an exception.

11.2 Therefore this request is not admitted.

12. *Auxiliary request VI*

12.1 This request was filed at the start of the oral proceedings.

Claim 1 of this request contains the extra feature that the wine is a still red wine or a still white wine. This feature is taken from the description of the patent in suit as well as from 'product of the process' type claims 11 and 12 as granted.

As pointed out by the appellants they could rely on the disclosure of D29/29a for a pressure above the minimum specified in claim 1 of each of the requests on file before the start of the oral proceedings. In D29/29a

this pressure is the result of the therein disclosed process being applied to a sparkling wine. With this amendment they would have to have carried out a further search for a disclosure presenting pressures above the minimum specified in the claim but not produced by a sparkling wine.

Such a search could clearly not be carried out during the oral proceedings. This would not even have been possible for the documents in the proceedings since there are a large number of such documents - almost one hundred - and the time required would have been prohibitive.

In the view of the Board the filing of amended claims during an oral proceedings which require a further search will normally be inadmissible since it would require adjournment of the oral proceedings contrary to Article 13(3) RPBA. The present case is not an exception to this.

12.2 Therefore this request is not admitted.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The patent is revoked.

The Registrar:

The Chairman:

G. Nachtigall

H. Meinders