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**Datasheet for the decision
of 12 April 2012**

Case Number: T 1848/09 - 3.2.03
Application Number: 04380160.4
Publication Number: 1619459
IPC: F26B 5/06, F26B 25/00
Language of the proceedings: EN

Title of invention:
Device for loading and unloading containers

Patentee:
TELSTAR TECHNOLOGIES, S.L.

Opponent:
IMA LIFE THE NETHERLANDS BV

Headword:
-

Relevant legal provisions:
EPC Art. 107, 54

Keyword:
"Admissibility of patent proprietor's appeal (no)"
"Main and first auxiliary request of Proprietor: not
admissible (Reformatio in peius)"
"Second auxiliary request of proprietor: allowable (novel)"

Decisions cited:
T 0386/04, T 0332/87, T 0506/91, G 0004/93, T 0054/00

Catchword:
-



Case Number: T 1848/09 - 3.2.03

DECISION
of the Technical Board of Appeal 3.2.03
of 12 April 2012

Appellant: TELSTAR TECHNOLOGIES, S.L.
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Appellant: IMA LIFE THE NETHERLANDS BV
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Decision under appeal: Interlocutory decision of the Opposition
Division of the European Patent Office posted
17 July 2009 concerning maintenance of European
patent No. 1619459 in amended form.

Composition of the Board:

Chairman: U. Krause
Members: C. Donnelly
K. Garnett

Summary of Facts and Submissions

- I. The appeals lie from the decision of the opposition division, posted on 17 July 2009, maintaining European patent no. 1619459 in amended form.
- II. Both the opponent (hereinafter "Appellant II (opponent)") and the patent proprietor (hereinafter "Appellant I (patent proprietor)") filed a notice of appeal, on 14 and 28 September 2009 respectively. The parties filed their grounds of appeal on 27 and 17 November 2009 respectively.
- III. In support of its case Appellant II (opponent) referred to the following document:

D1: EP-A-1 756 499; priority date of 11 June 2004, published as WO2005/121671 A1 on 22 December 2005, prior art under Article 54(3) EPC
- IV. In a communication dated 16 January 2012, pursuant to Article 15(1) RPBA annexed to the summons to oral proceedings, the board informed the parties of its provisional opinion. In particular, it indicated that the appeal of the patent proprietor appeared to be inadmissible since its main request had been allowed by the opposition division.
- V. Oral proceedings were held on 12 April 2012. As announced by its letter of 28 March 2012, Appellant II (opponent) did not attend.
- VI. Before closure of the debate the following requests were confirmed by Appellant I (Patent proprietor):

(1) As regards its own appeal, that the decision under appeal be set aside and the patent be maintained on the basis of the main request, alternatively the first or second auxiliary requests all filed with the statement of the grounds of appeal.

(2) As regards the opponent's appeal, that the decision be set aside and the patent be maintained on the basis of the main request, alternatively the first or second auxiliary requests all filed with its (the patent proprietor's) statement of grounds of appeal (the second auxiliary request corresponding to a request for dismissal of the opponent's appeal).

Appellant II (opponent) requested in its letter of 28 March 2012 that the decision under appeal be set aside and that patent no. 1 619 459 be revoked as regards claims 1 to 5, and 7 of the amended version found to meet the requirements of the European Patent Convention in the decision under appeal.

VII. Claim 1 according to Appellant I (patent proprietor)'s main request reads:

"Device (1) for loading and unloading containers (2) into and out of an enclosure of an installation (3) for treating substances contained in containers (2), the device including a support structure (17), means (4,5,6) for positioning said containers (2) on the device (1), a fixed platform (7), first means (8) for moving said containers during a loading process, said first means including at least one telescopic linear actuator (9) which is integral to its free end to a bar

(8) or the like, which said bar (8) acting as a pusher during loading and as a stop during unloading, second means (14) for moving the containers during an unloading process and third means (16,19,21) for moving said second means (14) to a position higher than said containers when moving said second means (14) into said enclosure (e.g. before unloading) and out of said enclosure (e.g. after loading), said second means (14) acting as a stop during loading and as a pusher during unloading, an extendible platform (10) attached to said fixed platform (7), to form, during loading and unloading, a union between said fixed platform (7) and an interior shelf (11) of said enclosure, characterised in that, said extendible platform (10) unfurls from said support structure (17), and in that said third means comprise parts (16a,16b) that unwind from said support structure (17) to the interior of the enclosure."

Claim 1 according to the first auxiliary request reads:

"Device (1) for loading and unloading containers (2) into and out of an enclosure of an installation (3) for treating substances contained in containers (2), the device including a support structure (17), means (4,5,6) for positioning said containers (2) on the device (1), a fixed platform (7), first means (8) for moving said containers during a loading process, second means (14) for moving the containers during an unloading process said second means including a bar (14) or the like mounted transversally to the direction of travel of the containers (2), and a pair of carriages (13) which can move longitudinally, attached to both ends of said bar (14), said bar (14) being

situated behind the row of containers (2) to act as a stop during loading, and as a pusher during unloading, said device further including third means (16,19,21) for moving said second means (14) to a position higher than said containers when moving said second means (14) into said enclosure (e.g. before unloading) and out of said enclosure (e.g. after loading), an extendible platform (10) attached to said fixed platform (7), to form, during loading and unloading, a union between said fixed platform (7) and an interior shelf (11) of said enclosure, characterised in that said extendible platform (10) unfurls from said support structure (17), and in that said third means comprise parts (16a,16b) that unwind from said support structure (17) to the interior of the enclosure."

Claim 1 as maintained by the opposition division (which corresponds to Appellant I's second auxiliary request) reads:

"Device (1) for loading and unloading containers (2) into and out of an enclosure of an installation (3) for treating substances contained in containers (2), the device including a support structure (17), means (4,5,6) for positioning said containers (2) on the device (1), a fixed platform (7), first means (8) for moving said containers during a loading process, second means (14) for moving the containers during an unloading process and third means (16,19,21) for moving said second means (14) to a position higher than said containers when moving said second means (14) into said enclosure (e.g. before unloading) and out of said enclosure (e.g. after loading), said second means (14)

acting as a stop during loading and as a pusher during unloading, an extendible platform (10) attached to said fixed platform (7), to form, during loading and unloading, a union between said fixed platform (7) and an interior shelf (11) of said enclosure, a loading surface made up of the fixed platform (7), the extendible platform (10) and part of the interior shelf (11) of the treatment installation (3), characterised in that said extendible platform (10) unfurls from said support structure (17), said third means comprise parts (16a,16b) that unwind from said support structure (17) to the interior of the enclosure, said first means for moving the containers (2) during the loading process include at least one telescopic linear actuator (9) which is integral to its free end to a bar (8) or the like, with said bar (8) acting as a pusher during loading and as a stop during unloading, said second means include a bar (14) or the like mounted transversally to the direction of travel of the containers (2), and a pair of carriages (13) which can move longitudinally, attached to both ends of said bar (14) or the like, and in that said loading surface is delimited laterally by guides (15), which confine the containers (2), to the front by the pusher bar (8) and to the rear by the bar (14) attached to the carriages (13)."

VIII. The arguments of the parties can be summarised as follows:

(a) Appellant I (Patent proprietor)

Admissibility

In its grounds of appeal the appellant-proprietor argued that due to the narrowing of the amended form of claim 1 maintained by the opposition division it had been adversely affected by the decision. Thus, according to Article 107 EPC it was entitled to appeal. No part of the patent had ever been abandoned or renounced such that there was nothing to prevent it from seeking to amend its request to improve the scope of the patent compared with that maintained by the opposition division and as supported by the case-law of the Boards of Appeal, for example in decision T 0386/04. No further arguments were added during the oral proceedings.

Novelty

Claim 1 as maintained.

D1 does not disclose a device comprising a pair of carriages attached to both ends of the transfer bar. Instead it shows an apparatus with a pair of first and second linking members 64,68 attached to the ends of the transfer bar.

D1 also fails to show a device wherein:

- (i) said bar of the first means acts as a stop during unloading,
- (ii) said second means acts as a stop during loading, and wherein

(iii) said loading surface is delimited laterally by guides, which confine the containers, to the front by the pusher bar and to the rear by the bar attached to the carriages.

Figure 9 of D1 illustrates a second embodiment wherein the transfer bar 42 is used to load the vials into the chamber 12 (see page 13, lines 21 to 26). When loading, as shown in figure 7(a), the transfer bar 42 is located in front of the rows of vials to contact the first row of vials 86 and push the rows into the chamber 12 (see page 10, lines 5 to 7 of D1).

(b) Appellant II (Opponent)

The fact that "during loading of the containers, the loading surface is being delimited to the rear by the bar of the second means" does not correspond to a technical feature, but rather the operation of the second means to perform that action.

The bar effectively present in D1 is suitable for this action without any modification. If a known product is in a form suitable for the stated use, even though it has never been described for that use, it deprives the claim of novelty. This is confirmed in decision T 332/87.

It is irrelevant that in D1 there is no hint to modify the sequence of movements and it is not correct, as alleged by the opposition division, that it would require a modification of the device itself for it to be able to carry this functional feature.

Since the physical means are the same in the opposed patent and in D1 and the only difference is the way in which it is operated, novelty is not given.

It is also not correct that setting a different command program of the device according to D1 to implement the operating sequence according to claim 1 corresponds to a modification of the device itself. D1 describes a device for loading of unloading containers regardless of a specific command program, i.e. each command program which can be implemented for operating such a device must be considered as implicitly disclosed in D1.

Reasons for the decision

1. *Admissibility, Article 107 EPC*
 - 1.1 Both parties have appealed. However, the appeal of the patent-proprietor is inadmissible since it was not adversely affected by the decision, as required by Article 107 EPC, given that its main request was allowed by the opposition division (see point 3.18 of the minutes and page 3, third paragraph, of the decision). See the Case Law of the Boards of Appeal, 6th ed. (2010), section VII.E., para. 7.4.2, and, e.g. T 506/91 and T 54/00.
 - 1.2 The decision in T 0386/04 referred to by Appellant I (patent proprietor) is not relevant since in that case the proprietor's main request had been refused by the opposition division so that the proprietor was indisputably prejudiced by the decision; the question

in the appeal was the admissibility of its main request, not the admissibility of its appeal.

2. *Admissibility of Appellant I's (Patent proprietor's) requests in Appellant II's (Opponent's) appeal.*

2.1 Since the subject-matters of Appellant I's main and first auxiliary requests in Appellant II's appeal are of broader scope than that of the version maintained by the opposition division, these requests are not admissible since the opponent, as sole remaining appellant, would be disadvantaged if they were maintained, contrary to the principle of *reformatio in peius* (G04/93 - Headnote point II).

2.2 Appellant I's second auxiliary request in Appellant II's appeal, namely for maintenance of the patent as per the order of the opposition division, is in effect a request that Appellant II's (opponent's) appeal be dismissed.

3. *Novelty*

3.1 Lack of novelty with respect to D1 is the sole argument raised by Appellant II (opponent) in its grounds of appeal.

3.2 D1 fails at least to disclose that:

(i) said bar of the first means acts as a stop during unloading,

(ii) said second means acts as a stop during loading,

and

- (iii) said loading surface is delimited laterally by guides, which confine the containers, to the front by the pusher bar and to the rear by the bar attached to the carriages.
- 3.3 These features taken together mean that the apparatus must be constructed such that the second means is capable of carrying out the unloading operation whilst the first means is deployed as a stop and similarly that the first means must be capable of executing the loading operation whilst the second means is deployed as a stop, thereby delimiting the loading surface.
- 3.4 This amounts to more than a mere implementation of a different operating sequence of known elements and corresponds to a modification of the device itself since it implies the provision of the appropriate power supplies, sensors, logic circuits and clearances etc. to allow simultaneous deployment and/or positioning of both the first and second means.
- 3.5 Contrary to Appellant II's assertions, it is not unambiguously and clearly derivable from D1 that the device is designed for or capable of fulfilling these conditions without any modification.
- 3.6 Decision T 332/87, referred to by Appellant II, discusses the question of novelty with respect to the use of chemical compositions rather than the operation of a device. Hence, its conclusions are not immediately relevant to the present case since it is more analogous to the use of a device to perform a specific task, distinguished for example by the type of vial to be

loaded. This is not to be confused with how the device is adapted to perform that task.

3.7 In conclusion, the subject-matter of claim 1 as maintained by the opposition division meets the requirements of Article 54 EPC.

4. Since the only reason why the decision of the opposition division is said by Appellant II to have been wrong is that the relevant claims lack novelty, it follows that its appeal must be dismissed.

Order

For these reasons it is decided that:

1. The appeal of the Appellant I (patent proprietor) is rejected as inadmissible.
2. The appeal of Appellant II (opponent) is dismissed.

Registrar

Chairman

D. Hampe

U. Krause