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**Datasheet for the decision
of 20 June 2012**

Case Number: T 1959/09 - 3.2.01

Application Number: 97203992.9

Publication Number: 850833

IPC: B64D 11/02

Language of the proceedings: EN

Title of invention:
Stowable module airplane lavatory

Patentee:
The Boeing Company

Opponent:
Airbus UK Limited/Airbus SAS/Airbus France SAS/
Airbus Deutschland GmbH/Airbus España SL

Headword:
-

Relevant legal provisions:
EPC Art. 100(c), 123(2), 112(1)(a)
EPC R. 106
RPBA Art. 13(1)

Keyword:
"Extended subject-matter (main request, auxiliary requests 1
to 3: yes)"
"Referral of a question to the Enlarged Board (no)"
"Admissibility (auxiliary requests 4 and 5: no)"

Decisions cited:
G 0009/91, G 0010/91, T 0514/04

Catchword:
-



Case Number: T 1959/09 - 3.2.01

D E C I S I O N
of the Technical Board of Appeal 3.2.01
of 20 June 2012

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Decision under appeal:

Interlocutory decision of the Opposition
Division of the European Patent Office posted
10 August 2009 concerning maintenance of
European patent No. 850833 in amended form.

Composition of the Board:

Chairman: G. Pricolo
Members: C. Narcisi
D. T. Keeling

Summary of Facts and Submissions

- I. European patent No. 850 833 was maintained in amended form by decision of the Opposition Division posted on 10 August 2009. Against this decision an appeal was filed by the Opponents (joint Opponents acting through a common representative) on 18 September 2009 and the appeal fee was paid at the same time. The statement of grounds of appeal was filed on 10 December 2009.
- II. Oral proceedings were held on 20 June 2012. The Appellants (Opponents) requested that the decision under appeal be set aside and that the patent be revoked. The Respondent (Patentee) requested that the appeal be dismissed and that the patent be maintained in the form as upheld by the Opposition Division (main request), or, in the alternative, as amended in one of the first or second auxiliary requests filed with letter dated 10 May 2010, or as amended in one of the 3rd to 5th auxiliary requests filed at the oral proceedings. Furthermore, the Respondent requested the referral of a question to the Enlarged Board of Appeal.

Claim 1 of the main request reads as follows:

"A stowable module lavatory assembly (10) for use in an airplane, comprising:

(a) a lavatory (20), when mounted in the airplane being affixed proximate an exit doorway (15) in said airplane, the lavatory (20) having a side wall (65) capable of receiving a module which is translatable from a stowed position within the said lavatory to a deployed position substantially outside of said

lavatory within a doorway space (40) proximate the doorway,

(b) first locking means for securing an upper portion of said module when said module is in said stowed position and when said module is in said deployed position,

(c) second locking means for securing a lower portion of said module when said module is in said stowed position and when said module is in said deployed position;

(d) means for allowing translation of said module out of and into said lavatory;

(e) means acting as a safety brake and impact limiting mechanism during translation of said module;

(f) third locking means for securing a lower portion of said module when it is in said stowed position and when it is in said deployed position."

Claim 1 of the first auxiliary request reads as follows:

"A stowable module lavatory assembly (10) for use in an airplane, comprising:

(a) a module (25) comprising a storage container,
(b) a lavatory (20), which when mounted in the airplane is affixed proximate an exit doorway (15) in said airplane, the lavatory (20) having a side wall (65) capable of receiving said module which is translatable from a stowed position within the said lavatory to a deployed position outside of said lavatory within a doorway space (40) proximate the doorway, access to an inside of the module being available in both the stowed and deployed positions,

(c) first locking means for securing an upper portion of said module when said module is in said stowed position and when said module is in said deployed position;

(d) second locking means for securing a lower portion of said module when said module is in said stowed position and when said module is in said deployed position;

(e) means for allowing translation of said module out of and into said lavatory;

(f) means acting as a safety brake and impact limiting mechanism during translation of said module; and

(g) third locking means for securing a lower portion of said module when it is in said stowed position and when it is in said deployed position."

Claim 1 of the second auxiliary request reads as follows:

"An airplane comprising a stowable module lavatory assembly (10) for use in an airplane, comprising:
(a) a module (25) comprising a storage container,
(b) a lavatory (20) affixed proximate an exit doorway (15) in said airplane, the lavatory (20) having a side wall (65) capable of receiving said module which is translatable from a stowed position within the said lavatory to a deployed position outside of said lavatory within a doorway space (40) proximate the doorway,

(c) first locking means for securing an upper portion of said module when said module is in said stowed position and when said module is in said deployed position;

(d) second locking means for securing a lower portion of said module when said module is in said stowed position and when said module is in said deployed position;

(e) means for allowing translation of said module out of and into said lavatory;

(f) means acting as a safety brake and impact limiting mechanism during translation of said module; and

(g) third locking means for securing a lower portion of said module when it is in said stowed position and when it is in said deployed position."

Claim 1 of the third auxiliary request differs from claim 1 of the main request in that the wording "A stowable module lavatory assembly (10) for use in an airplane, comprising:" is replaced by the wording "An airplane with a stowable module lavatory assembly (10), comprising:".

Claim 1 of the fourth auxiliary request reads as follows:

"A stowable module lavatory assembly (10) for use in an airplane, comprising:

(a) a lavatory (20), when mounted in the airplane being affixed proximate an exit doorway (15) in said airplane, the lavatory (20) having a side wall (65) capable of receiving a module which is translatable from a stowed position within the said lavatory to a deployed position substantially outside of said lavatory within a doorway space (40) proximate the doorway,

(b) first and second locking means for securing said module when said module is in said stowed position and

when said module is in said deployed position, said first and second locking means comprising spring-biased locking pins (110) supported by the lavatory (20) which spring into forward and aft receptacles (115) disposed in a top roller rail or slide (120) and a bottom lower rail or slide (125) disposed on the module;

(c) means for allowing translation of said module out of and into said lavatory;

(d) means acting as a safety brake and impact limiting mechanism during translation of said module; and

(e) third locking means for securing said module when it is in said stowed position and when it is in said deployed position, said third locking means comprising an additional latching system (145) disposed at the front of the lavatory floorpan (70)."

Claim 1 of the fifth auxiliary request differs from claim 1 of the fourth auxiliary in that the wording "A stowable module lavatory assembly (10) for use in an airplane, comprising:" is replaced by the wording "An airplane with a stowable module lavatory assembly (10), comprising:".

III. The Appellants' submissions may be summarized as follows:

Claim 1 of the main request does not comply with the requirements of Article 123(2) EPC since its features (b), (c) and (f) extend beyond the content of the application as originally filed. Claim 1 of the application as filed (see published patent application, hereinafter designated as EP-A) defines in feature (b) "first locking means for securing said module within said lavatory in said stowed position" and in features

(c) and (f) "second locking means for securing said module within said lavatory in said stowed position" and "second locking means for securing said module when it is out of said lavatory" respectively. Thus, claim 1 as filed does not provide any basis for the inclusion of the features "upper portion of said module" and "lower portion of said module" in claim 1 of the main request, nor does it provide a basis for the inclusion of the feature "third locking means". The description of EP-A likewise does not include a support for the amendments according to features (b) and (c) of present claim 1, since the description (see EP-A, column 4, lines 39-52; column 4, line 53-column 5, line 23) merely discloses a specific embodiment of the invention comprising "locking pins 110, suitably supported in the lavatory subassembly 20, which spring into forward and aft receptacles 115 disposed in at top roller rail or slide 120 and a bottom lower rail or slide 125 disposed on the module subassembly (see FIGS. 3-5)". Feature (f) of present claim 1 cannot be derived from the description of EP-A either, given that the description (see EP-A, column 4, line 53, column 5, line 4) discloses an "additional latching system 45" which "comprises a latch 150 which may be received in a recess 155 formed in the lower portion of the lavatory door 30". Consequently, said features (b), (c) and (f) of claim 1 of the main request rely on an impermissible generalization of a particular embodiment of the invention as disclosed in the description of EP-A, in contravention of Article 123(2) EPC.

The same objections apply to claim 1 of the first and second auxiliary request and therefore these requests must fail for the same reasons as stated hereinabove.

Claim 1 of the third auxiliary request does not meet the requirements of Article 123(2) EPC for the same reasons as above, for it includes the same features (b), (c) and (f) of claim 1 of the main request. It is perfectly legitimate to raise an objection pursuant to Article 123(2) EPC against this claim, given that the ground of opposition based on Article 100(c) EPC was introduced into the opposition proceedings by the Opposition Division and the compliance of amended independent claims 1 and 17 of the main request as well as of granted claim 18 with Article 123(2) EPC was considered by the Opposition Division in the impugned decision. Therefore, claim 1 of the present third auxiliary request, which is identical with claim 17 of the main request, both being based on claim 18 of the contested patent, was examined by the Opposition Division as to its compliance with Article 123(2) EPC (see impugned decision, point 3 (pages 6,7)). Hence any allegation that the aforesaid objections relating to Article 123(2) EPC against claim 17 of the third auxiliary request amount to the introduction of a fresh ground of opposition is manifestly untenable.

The fourth and fifth auxiliary requests were filed during the oral proceedings, i.e. at a very late stage of the appeal proceedings, and apparently claim 1 of these requests includes deficiencies with respect to Article 123(2) EPC. Therefore these requests should be held to be inadmissible.

IV. The Respondent's arguments may be summarized as follows:

Claim 1 of the main request does not extend beyond the subject-matter of the application as originally filed.

Even though the amendments introduced into claim 1 do not literally result from the corresponding parts in the description of EP-A, nonetheless features (b), (c) and (f) of claim 1 are equivalent to the corresponding features disclosed in the description. To begin with, features (b) and (c) of claim 1 of the main request are evidently based on features (b) and (c) of claim 1 as filed (see EP-A), which respectively mention "first locking means for securing said module within said lavatory in said stowed position" and "second locking means for securing said module within said lavatory in said stowed position". Further, the features "upper portion" and "lower portion" are derived from the description of EP-A insofar as therein the terms "upper" and "lower" are used interchangeably with "top" and "bottom". In effect, the first and second locking means take the form "spring-biased locking means 110, suitably supported in the lavatory sub-assembly 20, which spring into forward and aft receptacles 115 disposed in a top roller rail or slide 120 and a bottom lower rail or slide 125 disposed on the module sub-assembly 25" (see EP-A, column 4, lines 41-47). The locking pins 110 are best shown in figure 3 adjacent, "upper and lower roller tracks 85, 95". By contrast, the forward and aft receptacles 115 into which the locking pins 110 spring forward are best shown in fig. 4 in conjunction with "upper guide rollers 165 and lower guide rollers 170" (see EP-A, column 5, lines 15-19). The Opposition Division was therefore correct in concluding that the terms "upper portion" and "lower portion", although added, found support in the application as originally filed. Finally, as to feature (f) of claim 1 as filed it appears that an obvious error has occurred, in that the term "second locking

means" was erroneously used in place of the correct term "third locking means". This is supported by the disclosure of EP-A (see column 4, line 53-column 5, line 4), where it is stated that an "additional latching system 145 comprises a latch 150 which may be received in a recess 155 formed in the lower portion of the lavatory door 30". Thus, the "additional latching system" is indeed nothing else but said "third locking means". At the same time this passage likewise confirms that the terms "lower portion" and "upper portion" find a support in the application as filed.

The same arguments as set out hereinbefore apply to the objections raised against claim 1 of the first and second auxiliary request pursuant to Article 123 (2) EPC.

Claim 1 of the third auxiliary request is identical with amended claim 17 of the main request as upheld by the Opposition Division. Against this claim Article 123 (2) EPC or Article 100(c) EPC was not invoked by the Opponents nor were objections based on these grounds dealt with in the impugned decision. In particular, in the impugned decision objections based on the aforesaid grounds relating to said features (b), (c) and (f) were considered exclusively in relation to claim 1, whereas independent claim 17 was erroneously regarded as depending on claim 1 (see decision, page 6, last paragraph; page 7, first paragraph; page 15, first paragraph) and therefore no discussion at all of any of the above objections took place with respect to this independent claim. Moreover, said features (b), (c) and (f) were already included in granted claim 18 on which amended claim 17 was based. Against this background it is clear that the mentioned objections raised by the

Opponents against claim 17 during the appeal proceedings amount to the introduction of a fresh ground of opposition under Article 100(c) EPC and this is not permitted without the consent of the Patentee according to the Enlarged Board of Appeal decision G 10/91 (OJ EPO 1993, 420). This was confirmed in the Board of Appeal decision T 514/04, a case in which the same legal situation occurred.

Therefore the Respondent submits the following request:

"It is hereby requested that the question as to whether an existing ground of opposition raised in respect of a different independent claim amounts to a fresh ground of opposition as set out in G 10/91 be referred to the Enlarged Board of Appeal. Reference is made to T 514/04 where it was stated that "in the Board's judgement, the extent and ground for opposition mentioned in Rule 55 (c) EPC are connected in the sense that a specific claim(s) is/are objected to under a specific ground or grounds. It is inadmissible without the approval of the patentee to extend the opposition over and above this basic concept which defines both the extent to which the patent was originally opposed (cf G9/91) and the grounds originally submitted with respect to subject-matter opposed under Article 99 (1) and Rule 55 (c) EPC (cf G 10/91).

In view of the fundamental importance of this question and the clear divergence between the reasoning of the Board in T 514/04 as compared to the Board in the present proceedings, it is requested that this question be referred to the Enlarged Board of Appeal pursuant to Art. 112(1)(a) EPC in order to ensure uniform application of the law".

The fourth and fifth auxiliary requests should be admitted to the appeal proceedings since they are filed in response to the objections raised by the Appellants only during the oral proceedings against independent claim 17. Moreover respective claim 1 of these requests is prima facie allowable in view of Article 123(2) EPC and no new features possibly requiring a new search have been introduced. Therefore these requests appear to be admissible in view of Article 13(1) and (3) RPBA (Rules of procedure of the Boards of Appeal), given that in particular no case can be made out for added complexity or for the necessity of a remittal to the first instance.

V. During the oral proceedings the Respondent raised the following objection pursuant to Rule 106 EPC:

"The Patentee hereby objects under Rule 106 EPC that the procedure of the Board of Appeal at the oral proceedings on 20 June 2012 in relation to the above patent is contrary to the EPC on the grounds set out in Art. 112a(2)(c) and Art. 112a(2)(d).

In particular a ground of opposition under Art. 123(2) EPC was not raised by the Opponent or the Opposition Division in the earlier opposition proceedings in respect of claim 17 of the main request neither was it raised by the Opponent in the present Appeal. Such a ground represents a "Fresh Ground" within the meaning of G 10/91 and so should not be admitted into the proceedings without the approval of the patentee".

The Respondent further stated that said objection under Rule 106 EPC would be withdrawn in the event that the Board would remit the case to the first instance for

further prosecution prior to taking any decision on the admissibility of said fresh ground of opposition raised against claim 1 of the third auxiliary request. The Board asked the Respondent whether it had been given enough opportunities and time to put its case during the oral proceedings, particularly with respect to the issue of said fresh ground of opposition, and the Respondent answered in the affirmative. The objection under Rule 106 EPC was dismissed by the Board.

Reasons for the Decision

1. The appeal is admissible.

2. Claim 1 of the main request contravenes Article 123(2) EPC since features (b), (c) and (f) of the claim extend beyond the content of the application as filed. Claim 1 of EP-A includes "first locking means for securing said module within said lavatory in said stowed position" and "second locking means for securing said module within said lavatory in said stowed position" but does not state that said first and second locking means are intended for securing respectively an "upper portion" (see feature (b) of claim 1 of the main request) and a "lower portion" of said module (see feature (c) of claim 1 of the main request). In effect, the terms "upper portion of said module" and "lower portion of said module" are not to be found literally in the claims or in the description of EP-A. The passages cited by the Respondent relate to specific embodiments of the invention and do not provide sufficient support for the broader and far more general terms "upper portion of said module" and "lower portion of said

module". In particular, the feature "locking pins 110, suitably supported in the lavatory subassembly 20, which spring into forward and aft receptacles 115 disposed in a top roller rail or slide 120 and a bottom roller rail or slide 125 disposed on the module subassembly 25 (see FIGS. 3-5)" (see EP-A, column 4, lines 41-47) merely discloses that locking pins (i.e. first or second locking means) engage into a top (i.e. upper) or bottom lower rail, but there is no disclosure that said locking pins fulfil the broader purpose of "securing an upper portion of said module" or of "securing a lower portion of said module". Thus EP-A does not disclose said features (b) and (c) of claim 1.

Feature (f) of claim 1 of the main request is likewise not disclosed in the application as filed. The term "third locking means" is not as such disclosed in EP-A, nor does EP-A provide a basis for the use of this broad term in present claim 1. The Respondent's allegation that an obvious error occurred in feature (f) of claim 1 of EP-A and that this feature should actually read "third locking means for securing said module when it is out of said lavatory" (instead of "second locking means for securing said module when it is out of said lavatory") cannot be accepted by the Board. For there is no indication that an obvious error has occurred since the wording of claim 1 of EP-A is clear and since "third locking means" are not mentioned anywhere in EP-A, such that the mentioned correction, i.e. the replacement of "second locking means" by "third locking means" in feature (f) of claim 1 of EP-A, would not be obvious. Further, the description of EP-A (see in particular column 4, line 53-column 5, line 4) does not support the use of the general term "third locking

means" either, given that a specific embodiment of the invention is illustrated, comprising "a latching system 145" including "a latch 150". Finally, the general feature "for securing a lower portion of the module" in said feature (f) likewise cannot be derived from EP-A, given that solely the far more specific feature "the additional latching system 145 comprises a latch 150 which may be received in a recess 155 formed in the lower portion of the lavatory door 30" (see EP-A, column 5, lines 1-4) is disclosed.

In conclusion it appears that the application as filed discloses specific embodiments of the invention without providing sufficient basis in the description and in the claims for the kind of generalizations as implied by said features (b), (c) and (f) of claim 1 of the main request, this claim thus violating Article 123(2) EPC.

3. Since claim 1 of the first and second auxiliary requests also includes the above mentioned features (b), (c) and (f) (these are features (c), (d) and (g) in claim 1 of the first and second auxiliary requests) it likewise does not meet the requirements of Article 123(2) EPC.
4. The Board takes the view that, contrary to the Respondent's opinion, the objections raised against claim 1 of the third auxiliary request on the basis of Article 100(c) EPC and of Article 123(2) EPC are to be taken into account since this does not amount to the introduction of a fresh ground of opposition. The ground of opposition pursuant to Article 100(c) EPC was introduced into the proceedings by the Opposition

Division according to Article 114(1) EPC and objections related thereto were directed against granted claim 1 and granted method claim 20 (see summons to the oral proceedings dated 5 March 2009: see annex, page 1). Claim 1 of the third auxiliary request is identical to claim 17 of the main request which is an amended claim based on claim 18 of the granted patent. In the impugned decision amended claim 1 of the main request and particularly said features (b), (c) and (f) were regarded as meeting the requirements of Article 123(2) EPC (see decision, pages 5 and 6). These features are the same features (b), (c) and (f) which are included in amended claim 17 of the main request, and which were already included in claim 18 of the granted patent. The decision clearly states that claim 17 "relates to an airplane with a stowable module lavatory assembly comprising all features of independent claim 1" (decision page 6, last paragraph) and that therefore it complies with Article 123(2) EPC (decision page 7, first paragraph). From the mentioned facts it necessarily ensues that in the decision the ground of opposition based on Article 100(c) EPC (which applies to features (b), (c) and (f) already present in granted claim 1) and the requirements of Article 123(2) EPC (which must be met in respect of the amendments made to granted claim 18) were indeed duly taken into account, particularly in respect of claim 17. This obviously holds irrespectively of whether claim 17 is regarded as dependent on claim 1 or as an independent claim, for this does not alter the essence of the above reasoning. Therefore, in conclusion, as present claim 1 of the third auxiliary request is identical with claim 17 of the main request, the Board decides that it is the Appellants' legitimate right to raise objections based

- on Article 100(c) and Article 123(2) EPC against claim 1 of the third auxiliary request, as this does not amount to the introduction of a new ground of opposition.
5. On account of the reasons given above (see point 4) it follows that there is no necessity for the question posed by the Respondent to be referred to the Enlarged Board of Appeal, for in the Board's judgement the ground of opposition pursuant to Articles 100(c) and the question of whether the requirements of Article 123(2) EPC were met were clearly considered in the impugned decision and particularly in relation to claim 17 of the main request.

 6. The Board of Appeal decision T 514/04 cited by the Respondent is not relevant to the present decision since in the Board's view there is no doubt that in the present case the Opposition Division found in the impugned decision that the ground of opposition according to Article 100(c) EPC did not prejudice the maintenance of the patent with claim 17 of the main request and that claim 17 met the requirements of Article 123(2) EPC, whereby these objections were clearly discussed during the opposition proceedings. In addition, in case T 514/04 the question was posed whether a ground of opposition raised against a claim to a process equally applied to a claim to a product produced by said process. This is very different from the present case where claims 1 and 17 of the main request both belong to the same category and virtually include the same subject-matter, claim 17 differing from claim 1 only in that the stowable module lavatory assembly of claim 1 is installed in an airplane. Hence

T 514/04 has no bearing on the present case since it concerned an objectively different situation.

Finally, the Board notes in passing that there appears to be no basis in G 10/91 for the general assumption that a ground of opposition raised against an independent claim may not subsequently be raised by the opponent against another independent claim, falling within the scope of the opposition, since otherwise a new ground for opposition would thereby be introduced. T 514/04 does not mention and elucidate the relevant passages in G 10/91 which support this assumption. Actually, G 10/91 appears to regard a new ground for opposition as being a "ground for opposition not covered by the statement pursuant to Rule 55 (c) EPC" (1973) (see G 9/91, reasons, points 15 and 16; G 10/91 and G 9/91 relate to consolidated proceedings), no indication being given in that decision which would justify the inference that this should be construed far more broadly as meaning any ground of opposition in respect of a specific given claim which was not covered by the statement pursuant to Rule 55(c) EPC 1973 (see in this respect T 1523/08, point 2.1 of the reasons). The Board takes the view that, as the present case abundantly demonstrates, the aforementioned assumption cannot be generally valid, but rather depends on the nature of each specific case under consideration.

7. For the reasons given above (i) the request for referral of the question to the Enlarged Board of Appeal is rejected and (ii) the objections raised by the Appellants under Articles 100(c) and 123(2) EPC relating to features (b), (c) and (f) of claim 1 of the main request (see point 2) likewise apply to claim 1 of

- the third auxiliary request. Hence claim 1 of the third auxiliary request contravenes Article 123(2) EPC.
8. The Board, exercising its discretionary power pursuant to Article 13(1) RPBA (Rules of Procedure of the Boards of Appeal), decided not to admit the fourth and fifth auxiliary requests to the appeal proceedings. Claim 1 of these requests poses substantial questions relating to Article 123(2) EPC and therefore their admission to the appeal proceedings would not be compatible with the requirements of procedural economy, particularly at a late stage of the proceedings. In effect, feature (e) of claim 1 is essentially based on a specific embodiment of the invention described in EP-A (column 4 line 53-column 5, line 4). However, several technical features described in the same paragraph of EP-A (see for instance "a latch 150 which may be received in a recess 155 formed in the lower portion of the lavatory door 30"; "interlocking surfaces 135, 140") have not been included in feature (e) and consequently a degree of generalization which extends beyond the content of the application as filed may result from this omission. Consequently, this discussion raises new issues which were never discussed heretofore in the proceedings and which could not be reasonably expected to be exhaustively and properly dealt with during the oral proceedings.
9. The Board dismissed the Respondent's objection pursuant to Rule 106 EPC. As conceded by the Respondent itself, the Board gave the Respondent enough opportunities to present its case such that the right to be heard according to Article 113(1) EPC was duly taken into consideration in particular concerning the issue of

whether admitting an objection under Article 100(c) or 123(2) EPC in respect of features (b), (c) and (f) of claim 1 of the third auxiliary request was equivalent to introducing a fresh ground of opposition in the appeal proceedings. The Board thus does not see that any procedural defect in the sense of Article 112a(2)(c) or 112a(2)(d) EPC taken in combination with Rule 104 EPC has occurred.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The request for referral of a question to the Enlarged Board of Appeal is rejected.
3. The patent is revoked.

The Registrar:

The Chairman:

A. Vottner

G. Pricolo