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**Datasheet for the decision
of 8 October 2013**

Case Number: T 2490/10 - 3.3.06

Application Number: 97301766.8

Publication Number: 798029

IPC: B01D53/14, B01D53/62, B01D53/96

Language of the proceedings: EN

Title of invention:
Apparatus and process for recovering basic amine compounds in
a process for removing carbon dioxide

Patent Proprietors:
The Kansai Electric Power Co., Inc.
MITSUBISHI HEAVY INDUSTRIES, LTD.

Opponents:
BASF SE
SHELL INTERNATIONALE RESEARCH MAATSCHAPPIJ B.V.

Headword:
Demister/KANSAI

Relevant legal provisions:
EPC Art. 123(2)
RPBA Art. 12(4), 13(1), 13(3)

Keyword:

Amendments - extension beyond the content of the application as filed (yes) (Main Request and 1st Auxiliary Request)
Admissibility of amended claims (2nd Auxiliary Request) filed after arrangement of oral proceedings (no) - Amended claim not clearly allowable - Further issues arising from the amendments and increasing complexity

Decisions cited:

Catchword:



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Case Number: T 2490/10 - 3.3.06

D E C I S I O N
of Technical Board of Appeal 3.3.06
of 8 October 2013

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(Patent Proprietors)

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Decision under appeal:

**Decision of the Opposition Division of the
European Patent Office posted on 8 October 2010
revoking European patent No. 798029 pursuant to
Article 101(3) (b) EPC.**

Composition of the Board:

Chairman: B. Czech
Members: P. Ammendola
U. Lokys

Summary of Facts and Submissions

I. This appeal is from the decision of the opposition division revoking European patent No. 0 798 029.

II. Claim 1 of the corresponding European patent application as filed reads:

"1. A process for absorption of carbon dioxide from a gas comprising the steps of:
(a) treating the gas by bringing it into contact with a basic amine compound to absorb the carbon dioxide; and thereafter
(b) removing any residue of said basic amine compound which is contained or has been entrained in the treated gas phase by treatment with a liquid aqueous phase;
characterised in that said removing step (b) comprises bringing the gas into contact with
(b1) said liquid aqueous phase at a temperature in the range 20 to 60°C to remove at least part of said residue into the bulk liquid phase; and thereafter
(b2) a demister operating at a temperature of 20 to 60°C."

Claim 1 as granted differs from that originally filed only in that the characterising part of the former reads:

"characterised in that said removing step (b) comprises the following steps:
(b1) bringing the gas into contact with said liquid aqueous phase at a temperature in the range 20 to 60°C to remove at least part of said residue into the bulk liquid phase; and
(b2) subsequently passing the gas through a demister operating at a temperature of 20 to 60°C."

III. During the opposition proceedings:

- the patent proprietors had filed, inter alia, a set of amended claims labelled as 2nd Auxiliary Request in which claim 1 differs from claim 1 as granted in that the former no longer comprises the term "*thereafter*" immediately preceding the definition of step "(b)" and comprises an additional final sentence reading:

"; and wherein the demister (6) is in a wire mesh form having a layer of glass wool."

IV. In the decision under appeal the opposition division found, inter alia, that the above-identified final sentence of claim 1 of the then pending 2nd Auxiliary Request referred to only some of the features of Example 1. Said features relating to the demister were isolated from Example 1 despite being interrelated with other features of said example. Since the conditions for generalisation were not met, the amended claim 1 infringed the requirements of Article 123(2) EPC.

V. On 15 December 2010 the patent proprietors (hereinafter appellants) filed notice of appeal and paid the appeal fee on the same day. With their statement setting out the grounds of appeal received at the EPO on 15 February 2011, the appellants filed one set of amended claims labelled Main Request and a single claim labelled 1st Auxiliary Request.

Claim 1 of the Main Request is identical to that of the 2nd Auxiliary Request considered by the opposition division (see points II and III above).

The claim of the 1st Auxiliary Request differs from claim 1 as granted only in that the following

additional features are inserted at the beginning of step (a):

"treating the gas by supplying the gas to a carbon dioxide adsorption unit in a carbon dioxide removal tower and"

and in that it comprises an additional final sentence reading:

"; and

(b3) collecting a mist which contains the amine; wherein the demister (6) is built of wire mesh form having a glass wool layer installed on the downstream side of the carbon dioxide removal tower".

VI. The board summoned the parties to oral proceedings to be held on 8 October 2013.

VII. With a letter dated 9 August 2013, the appellants filed a further amended single claim labelled 2nd Auxiliary Request which reads as follows:

"1. A process for the absorption of carbon dioxide from an exhaust gas comprising the steps of:

(a) supplying the gas to a carbon dioxide absorption unit in a carbon dioxide removal tower and bringing it into contact with 30% by weight of a monoethanolamine aqueous solution at a vapour/liquid ratio of 2 at 60°C to absorb the carbon dioxide into the solution; and thereafter:

(b) bringing the exhaust gas into vapour-liquid contact with water at a temperature of 45°C in an amine recovering unit to recover part of the monoethanolamine into the water phase;

(c) passing the exhaust gas from the carbon dioxide removal tower through a demister (6) at a temperature of 45°C to collect the mist which contains the monoethanolamine and discharge it into the atmosphere; and wherein the demister (6) is built of stainless wire mesh form having a glass wool layer of 200mm in thickness, the demister being installed at a horizontal part located on the downstream side of the carbon dioxide removal tower."

VIII. At the oral proceedings, objections under Article 123(2) EPC to the respective claims 1 according to the Main and 1st Auxiliary Requests were extensively dealt with. Opponent 2 (hereinafter Respondent 2) disputed the admissibility into the proceedings of the 2nd Auxiliary Request, whereas Opponent 1 (hereinafter Respondent 1) disputed the admissibility of both the 1st and 2nd Auxiliary Request, *inter alia* in view of their late filing.

IX. The appellants requested that the decision under appeal be set aside and that the patent be maintained on the basis of the Main Request or the 1st Auxiliary Request submitted with the statement of grounds of appeal, or on the basis of the 2nd Auxiliary Request submitted with the letter dated 9 August 2013.

The respondents both requested that the appeal be dismissed.

X. As relevant here, the parties' arguments can be summarised as follows:

The **appellants** argued that the amendment consisting in the insertion of features further qualifying the demister added at the end of claim 1 of the Main

Request complied with Article 123(2) EPC. In particular, they held that, contrary to the finding of the opposition division, this more specific definition of the demister was directly and unambiguously disclosed, albeit by implication only, by the following two passages in the application as published (as EP 0 798 029 A2), which correspond to identically worded passages in the application as filed:

a) the passage at page 4, lines 6 to 8, reading: "*The demister ... may be of conventional form, such as two-stepwise inclined plate form, wave form, teardrop form or wire mesh form and more preferably in the wire form composed of fine fibrous layer*" (hereinafter this passage is referred to as the **general demister description**)

and

b) the subsequent description of Example 1, at lines 45 to 47 of the same page 4, reading: "*An exhaust gas from the carbon dioxide removal tower was passed through a demister, which was built of stainless wire mesh form having a glass wool layer of 200mm in thickness and was installed at a horizontal part located on the downstream side of the carbon dioxide removal tower, at 45°C.*" (hereinafter this passage is referred to as the **exemplified demister description**).

At the oral proceedings, the appellants acknowledged that these descriptions were not according to the standard use of language in this technical field and provided a limited level of detail as regards the demister construction. Nevertheless, in their opinion, the skilled person reading these two passages in combination would reasonably conclude that the demister

actually used by the inventors when carrying out the process described in Example 1 (i.e. the sole example illustrating the invention) had to be a demister of conventional design in which a stainless wire mesh merely supported the glass wool layer. Thus, the demister used represented an embodiment of the group of demisters identified as more preferable in the general demister description. This amounted to a direct and unambiguous disclosure of the use of demisters according to the definition added at the end of claim 1 of the Main Request.

As to the admissibility of the 1st Auxiliary Request into the appeal proceedings, the appellants maintained that it must be possible and appropriate for a party becoming aware of the reasons given for an adverse decision to consider alternative options for defending the commercial interests associated with its patent and thus to file at the very beginning of the appeal proceedings a request comprising only one claim manifestly resulting from the incorporation of a further feature of Example 1 into claim 1 of the Main Request.

In the opinion of the appellants the sole claim of the 1st Auxiliary Request also complied with Article 123(2) EPC for the reasons indicated above with regard to claim 1 of the Main Request. The amended wording used being even more similar to that used in the exemplified demister description, it was immediately apparent that it defined the same group of conventional demisters to which the demister of Example 1 also belonged and which the general demister description identified as preferably applicable in the process of the invention. In addition, the skilled reader of the exemplified demister description would immediately realise that the

glass wool layer did not have to have a thickness of "200 mm" and that the wire mesh did not have to be a "stainless" wire mesh. The further added features concerning installation "*on the downstream side of the carbon dioxide removal tower*" found a basis in Example 1 and Figure 1 and amounted to a design option generally applicable in the process of the invention.

As to the admissibility of the 2nd Auxiliary Request filed two months before the date of the oral proceedings, the appellants argued that the submission of a single claim more narrowly based on the example of the invention raised no issues that the board or the respondents could not reasonably be expected to deal with without adjournment of the oral proceedings.

The **respondents** considered that the fact that the demister in Example 1 of the original application was built of wire mesh form having a glass wool layer as a structural feature was strongly interrelated with the other structural and operational features of that example and thus that the exemplified demister description did not (explicitly or implicitly) disclose that (any) demisters built of wire mesh form having a glass wool layer would generally be suitable for use in the process of the invention.

They argued that the appellants' line of reasoning was based on the combination of two passages in the description that were unclear and too vague to justify any direct and unambiguous conclusion as to their technical meaning and hence also as to their possible correlation. In particular, on the one hand, the wording in the general demister description did not imply the presence of a wire mesh and, on the other hand, the exemplified demister description lacked essential information (e.g. as to the number and the

spatial positioning of the wire mesh layer(s) and of the glass wool layer(s)) and thus allowed no sound conclusion as to whether the specific demister actually used by the inventors in carrying out the process described in Example 1 was indeed of a construction in which a stainless wire mesh supported a glass wool layer, as alleged by the appellants, or of another construction.

Finally, the fact that the general demister description suggested the use of (possibly conventional) demisters composed of fine fibrous layers being in an obscure "*wire form*" did not justify any prediction as to whether the substantially different demisters of Example 1 "*built of stainless wire mesh form having a glass wool layer*" were generally applicable or rather only useful in combination with certain operational and structural features of the process and the apparatus.

Hence the skilled reader of the application as filed could not directly and unambiguously conclude that the demister of Example 1 was a particular embodiment of the group of allegedly conventional demisters identified as more preferable in the general demister description. Thus the combination of the two cited passages provided no direct and unambiguous disclosure of the general suitability of demisters in wire mesh form having a layer of glass wool for the process of the invention.

As to the admissibility of the 1st Auxiliary Request into the proceedings, Respondent 2 noted that the opposition division had, in a communication sent to the parties in preparation for the opposition oral proceedings, already expressed the preliminary opinion that the features of Example 1 appeared strongly

interrelated and hence at least some of them could not be isolated and incorporated into claim 1 without violating Article 123(2) EPC. Thus the appellants should and could have filed claims reflecting all their further fallback positions in respect of this objection already in preparation for the hearing in opposition proceedings. Hence the board should exercise its discretion under Article 12(4) RPBA in not admitting this request.

In the respondents' opinion the claim of the 1st Auxiliary Request also did not meet the requirements of Article 123(2) EPC, for substantially the same reasons as indicated in respect of claim 1 of the Main Request. In particular, the above-mentioned consideration that any combination of the vague and incomplete exemplified demister description (which allowed no sound conclusion as to the construction of the specific demister actually used in Example 1) with the obscure and differently worded general demister description did not allow the exemplified demister description, let alone just a part thereof, to be considered as the definition of a group of demisters that were generally applicable, i.e. freely combinable with all conceivable variants of the process of the patent in suit as defined by the other features given in claim 1.

Both respondents argued that the appellants' 2nd Auxiliary Request was not admissible under Article 13(3) RPBA because it gave rise to a number of objections which the respondents could not be expected to deal with without adjournment of the oral proceedings. In particular, having regard to the clarity (Article 84 EPC) of the claim, it was questionable:

i) whether the "*vapour/liquid ratio*" indicated in step "(a)" was a weight or a volume ratio;

ii) whether the "*exhaust gas*" mentioned at the beginning of step "(b)" was the initial gas or that resulting from step "(a)";

iii) whether the "*exhaust gas from the carbon dioxide removal tower*" mentioned at the beginning of step "(c)" was that resulting from step "(a)" or that resulting from step "(b)";

iv) whether the product discharged into the atmosphere at the end of step "(c)" was the "*exhaust gas from the carbon dioxide removal tower*" mentioned at the beginning of the same step or the "*mist*" collected in the demister; and

v) how the structural feature defined by the wording "*installed at a horizontal part*" was to be understood.

Moreover, claim 1 according to the 2nd Auxiliary Request also appeared to be objectionable under Article 123(3) EPC since step "(b)" of this claim, unlike step "(b1)" of granted claim 1, did not require contacting the amine-containing gas with the "*bulk*" of a liquid aqueous phase and thus allowed for the use e.g. of sprayed water only.

Reasons for the Decision

Main Request

1. Allowability of the amendments
 - 1.1 Article 123(2) EPC prohibits amendments of a European patent which result in the extension of its subject-matter beyond the content of the application as filed. It is established case law of the boards of appeal that this content encompasses only what is directly and unambiguously disclosed in the application as filed, either explicitly or implicitly.
 - 1.2 In the present case the opposition division had found that the amendment consisting in the inclusion of the narrower demister definition

"wherein the demister (6) is in a wire mesh form having a layer of glass wool"

into claim 1 of the then pending 2nd Auxiliary Request (identical to claim 1 according to the present Main Request) involved an intermediate generalisation (by isolation of the features *"glass wool layer"* from the remainder of the features described in Example 1) which was not allowable considering the disclosure of the application as filed.
 - 1.3 The appellants disputed this finding, referring to both the general demister description and the exemplified demister description comprised in the application as filed, as well as to the common general knowledge of the person skilled in the field of demisters (see above, Section X of the Facts and Submissions).

1.3.1 In particular, at the oral proceedings, the appellants acknowledged that both the general demister description reading "*may be.... more preferably in the wire form composed of fine fibrous layer*" (emphasis added) and the exemplified demister description reading "*built of stainless wire mesh form having a glass wool layer*" (emphasis added) were worded in a way differing from the standard use of language in the technical field concerned.

1.3.2 Nevertheless, the appellants maintained that the wording added to claim 1, although corresponding only in part to the exemplified demister description, was implicitly disclosed by the latter. It would be apparent to the skilled reader that the demister used in (the sole) Example 1 of the invention in the patent application was a conventional demister comprising a wire mesh supporting a glass wool layer. Therefore, and considering also the similarity in wording of the two demister descriptions and that the only exemplified demister was to be understood to illustrate the form disclosed as more preferable in the general demister description, the skilled person would necessarily conclude that in the general demister description the unusual phrasing "*more preferably in the wire form composed of fine fibrous layer*" implicitly also referred to the same group of conventional demisters comprising a mesh supporting a glass wool layer that was exemplified by the demister of Example 1.

1.3.3 In the opinion of the appellants the group of conventional demisters implicitly disclosed by the combination of the two demister descriptions could be defined by those features of the exemplified demister description which would appear essential to the skilled reader, i.e. by the wording added to claim 1.

1.4 Questions as to the credibility of the unsupported allegations of the appellant that the use of a type of demister in which a mesh supports a glass wool layer was "conventional" and as to whether the wording added to claim 1 can be considered to refer to such a type of allegedly existing conventional demister need not be answered since, for the board, the appellants' reasoning necessarily implies that the the skilled person, taking into account the whole content of the application as filed, would derive therefrom that the particular type of demister used according to Example 1 was generally suitable for use in the process of the invention. Only in this case could it also be possible to consider that the application as filed disclosed as being generally applicable in the process of the invention (and thus freely combinable with the remaining features of original claim 1) the type of demister defined in claim 1 at issue, which, according to the appellants' reasoning, is implied by and finds a basis in the exemplified demister description.

1.4.1 The board notes further that in the present case, since claim 1 of the originally filed application mentions "a demister" without any further limitation as to its type or construction (see above, Section II of the Facts and Submissions) and since the general demister description starts with the wording "*The demister ... may be of conventional form*", it is plausible that any demister with a "*conventional form*" (in as far as this expression could mean the same as "a conventional demister") may be regarded as generally applicable in the process of the invention.

1.4.2 The board notes finally that the appellants consider the conventional nature of the specific demister used in Example 1 to be already apparent to the skilled

reader of the exemplified demister description *per se*. Moreover, they consider that the specific demister used in Example 1 had also necessarily to be one of those indicated in the general demister description as being more preferable (and thus necessarily also as generally applicable in the process of the invention), this latter consideration being evident in view of the similarity in the wording used in the two demister descriptions and because the demister of Example 1 was the sole example thereof given in the application as filed.

1.4.3 However, neither of these two considerations is found convincing for the following reasons:

- (a) Even assuming that the skilled person considered demisters with a "mesh supporting a glass wool layer" to be conventional, this is to be contrasted with the fact that the exemplified demister description:
- is not phrased in terms of what could be considered the standard use of language in the field of demisters,
 - does not qualify the used demister as being conventional, and
 - does not provide details as to its construction.
- Hence the skilled person would not, when reading the application as filed, conclude that the occurrence of a "*stainless wire mesh form*" and the presence therein of a "*glass wool layer*" corresponded to the construction characterising such an allegedly conventional type of demister. In particular, it is stressed that no information is given in Example 1 as to the dimensioning and/or number of the wire mesh layer(s), or to the

relative positioning of the wire mesh and the glass wool layers.

- (b) On the other hand, the difference in wording between the two demister descriptions, combined with the fact that the wording used therein is non-standard and obscure, does not allow it to be inferred whether or not the demister "*built of stainless wire mesh form*" actually used in Example 1 was in the "*wire form*" that is defined as more preferable in the general demister description. Finally, the simple fact that the application as filed contains a single demister example is also insufficient for concluding that this latter had necessarily to be an embodiment of such a more preferable "*wire form*".

1.4.4 The above considerations lead to the conclusion that the two demister descriptions *per se* or in combination do not allow it to be concluded that the particular type of demister used in Example 1 was implicitly disclosed in the original application to be generally applicable in the process of the invention. Considering that the type of demister defined by the wording added to claim 1 was, however, argued to be based on the description of such a particular demister, it is apparent to the board that the appellants' reasoning summarised at point 1.3 above must fail and that claim 1 of the Main Request now encompasses subject-matter that was not disclosed in the original application.

1.5 If only for this reason, the appellant has not convinced the board that amended claim 1 at issue meets the requirements of Article 123(2) EPC.

1.6 Hence, the appellants' Main Request is not allowable.

1st Auxiliary Request

2. Admissibility of the request
- 2.1 According to Respondent 2, this request was not admissible since the appellants could and should already have filed it during the opposition proceedings (see above, Section X of the Facts and Submissions).
- 2.2 The board notes that this request was filed with the statement setting out the grounds of appeal and consists of a single amended claim 1 which is similar to and can be considered to stem from the narrower claim 1 of the Main Request at issue. More particularly, claim 1 according to the 1st auxiliary request results from the incorporation into granted claim 1 of further features taken from the exemplified demister description, thereby further narrowing the claimed subject-matter. Claim 1 according to the 1st Auxiliary Request differs from claim 1 according to the Main Request in the indication that the demister is "*built of wire mesh form*" rather than "*is in wire mesh form*" and in the additional requirement concerning installation "*on the downstream side of the carbon dioxide removal tower*".
- 2.3 For the board, the filing of the 1st Auxiliary Request is a manifest attempt to overcome the reasons given in the decision under appeal for rejecting the then pending 2nd Auxiliary Request (identical to the present Main Request) by narrowing down the claimed subject-matter via the introduction of some further features of Example 1 that could be seen as being strictly interrelated with the ones isolated and incorporated into the claim previously. Thus this request is in line with and further develops the defensive strategy

already pursued by the appellants before the opposition division.

2.4 Moreover, the respondents had enough time to consider the relevant issues and comment on them. They did not mention in their replies to the grounds of appeal any difficulty in preparing their comments in respect of this request.

2.5 Hence the board decided to admit the 1st Auxiliary Request into the proceedings (Article 114(2) EPC and Article 12(4) EPC).

3. Allowability of the amendments

3.1 Claim 1 at issue comprises the wording

"demister (6) is built of wire mesh form having a glass wool layer"

which further specifies some constructional features of the "demister" only generally mentioned in claim 1 as granted. Compared to the demister-related wording of claim 1 according to the Main Request, the quoted wording is closer but still not identical to the exemplified demister description reading *"built of stainless wire mesh form having a glass wool layer of 200 mm in thickness"*. Hence the demister definition introduced into the claim at issue is directed to demister type variants (as regards the nature of the wire mesh form material and as to the thickness of the glass wool layer) of the demister defined in the exemplified demister description.

3.2 Also with regard to the compliance of this claim with Article 123(2) EPC, the appellants have argued in

essence as indicated at point 1.3 above, i.e. they were of the opinion that the combination of the two original demister descriptions allowed the demister used in Example 1 to be identified as an example of the type of allegedly conventional demister that was more preferably applicable in the process of the invention. Since the wording used was even more similar to that used in the exemplified demister description - except for the allegedly unnecessary limitations concerning the "*stainless*" nature of the wire mesh form and the "*200 mm*" thickness of the glass wool layer - it would be even more apparent that it related to/defined the same type of allegedly conventional demister exemplified in Example 1 and implicitly disclosed in the application as filed as being more preferable.

3.3 The board notes that this reasoning of the appellants is likewise based on the assumption that the particular demister used in Example 1 was implicitly disclosed in the original application as being generally applicable in the process of the invention. However, the board has found, for the reasons indicated in points 1.4.1 to 1.4.3, that this assumption is not correct.

3.4 Hence, as for claim 1 according to the main request (point 1.4.4 above), the board concludes that, despite the slightly different wording added to the claim at issue, the appellants' reasoning fails and also that the claim at issue encompasses subject-matter that was not disclosed in the original application.

3.5 If only for this reason, the amended claim according to the 1st Auxiliary Request does not meet the requirements of Article 123(2) EPC.

3.6 Consequently, the appellants' 1st Auxiliary Request is not allowable either.

2nd Auxiliary Request

4. Admissibility of the request

4.1 This request was filed after the arrangement of oral proceedings before the board (see above, Section VII of the Facts and Submissions).

4.2 The respondents disputed its admissibility into the proceedings, arguing that the amended claim wording raised a number of further issues under Article 84 EPC 1973 (lack of clarity) and Article 123(3) EPC (see above, Section X of the Facts and Submissions).

4.3 The board acknowledges that the additional issues under Article 84 EPC 1973 and Article 123(3) EPC invoked by the respondents arise from the amendments made to claim 1. For the board at least some of them (clarity issues i, iv and v and the objection under Article 123(3) EPC) are not *prima facie* irrelevant or without merit. Consequently, amended claim 1 is not clearly allowable. The number and type of the further issues raised by the amendments substantially increases the complexity of the case. Hence the board finds that neither the board itself nor the parties could reasonably be expected to deal with them at the oral proceedings.

4.4 Accordingly, the board decided not admit the late filed 2nd Auxiliary Request request into the proceedings (Article 114(2) EPC and Article 13(1) and (3) RPBA).

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



D. Magliano

B. Czech

Decision electronically authenticated