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**Datasheet for the decision
of 27 May 2015**

Case Number: T 0595/11 - 3.2.04

Application Number: 05075618.8

Publication Number: 1579759

IPC: A01J7/02, A01J5/08

Language of the proceedings: EN

Title of invention:

A method of milking a dairy animal

Patent Proprietor:

Lely Enterprises AG

Opponent:

DeLaval International AB

Headword:

Underpayment of appeal fee/Lely Enterprises AG

Relevant legal provisions:

EPC Art. 100(a), 54, 100(b), 111(1), 14(4), 122
EPC R. 6(3), 103

Keyword:

Recognition of legitimate expectations (yes)
Appeal deemed to have been filed and admissible (yes)
Sufficiency of disclosure - claim 1 of the main request (yes)
Novelty - claim 1 of the main request (yes)
Remittal to the first instance for further prosecution

Decisions cited:

G 0002/97, J 0014/94, T 0642/12, G 0001/03, T 1021/12

Catchword:

1. When deciding on the possible consequences of the Office's failure to meet its obligation to check a fee payment, the merely conjectural possibility of a real, but otherwise in itself not necessarily decisive setback (here the non-occurrence of an immediate success) for a party is more preferable than a certain decisive loss of all rights for another party, in particular when for a long time none of the parties expected the latter, see Reasons 1.13

2. Fee payment is not an issue of admissibility of the appeal, but rather a precondition for the very existence of the appeal, i.e. its deemed filing, see Reasons 1.15



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Case Number: T 0595/11 - 3.2.04

D E C I S I O N
of Technical Board of Appeal 3.2.04
of 27 May 2015

Appellant:
(Patent Proprietor)

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Decision under appeal:

**Decision of the Opposition Division of the
European Patent Office posted on 12 January 2011
revoking European patent No. 1579759 pursuant to
Article 101(3)(b) EPC.**

Composition of the Board:

Chairman A. de Vries
Members: E. Frank
T. Bokor

Summary of Facts and Submissions

- I. The appeal lies from the decision of the opposition division, dated 8 December 2010 and posted on 12 January 2011 to revoke the European patent No. 1 579 759 pursuant to Article 101(3)(b) EPC.
- II. The opposition was filed against the patent as a whole and based on Article 100(a) in conjunction with Articles 52(1), 54, and 56, Article 100(b) in conjunction with Article 83, and Article 100(c) in conjunction with Article 123(2) EPC.

The opposition division held that the main request, submitted during the oral proceedings and based on claim 1 as granted, did not meet the requirements of the EPC, for lack of novelty of claim 1. In its decision the division considered the following prior art, amongst others:

E1 = US 5,881,669

E3 = US 2,616,809

E5 = US 4,222,346

- III. The appellant proprietor is Lely Enterprises AG, Bützenweg 20, CH-6300 Zug, Switzerland, a legal person registered in Switzerland. They filed a notice of appeal in Dutch on 11 March 2011, with a simultaneously filed English translation. A debit order for the payment of EUR 944 as appeal fee was enclosed with the notice of appeal. The latter stated that the debit order was for a reduced appeal fee under Article 14(4) and Rule 6(3) EPC. The statement of grounds of appeal was submitted on 20 May 2011.

IV. The file number of the appeal and the fact that it has been referred to the present Board was communicated to the parties with a Communication dated 18 March 2011 (EPO Form 3204) without any further comments. A copy of the grounds of appeal was sent to the respondent (opponent) on 1 June 2011 (EPO Form 3344) by the Registrar of the Board, also without any comments.

The respondent commented on the merits of the appeal with a letter dated 11 October 2011. The appellant filed new requests and detailed arguments on 22 March 2013, while stating that it is "waiting for the summons to oral proceedings". The respondent submitted with letter of 18 March 2014 arguments concerning the new requests of the appellant.

The Board summoned to oral proceedings with EPO Form 3011 dated 13 March 2015, to which both parties responded and indicated their language and translation requirements. A further communication of the Board pursuant to Article 15(1) RPBA was issued with a posting date of 24 April 2015, in which the Board commented on the substantive issues raised in the appeal and which were to be discussed in the upcoming oral proceedings set for 27 May 2015.

The respondent stated by a letter dated and filed 23 April 2015 that it had become aware of the fact that the notice of appeal had been filed in Dutch and a reduced appeal fee paid, though the appellant-proprietor was a Swiss company and thus not entitled to do so. The respondent stated that the appeal is not valid and that the underpayment of the appeal fee means that the appeal fee was not paid in time. It requested to reject the appeal as inadmissible. This letter of the respondent was sent to the appellant on 29 April

2015, with a comment of the Board that the issue will be taken up in the upcoming oral proceedings.

The appellant responded to the substantive comments of the Board and the arguments of the respondent on 6 May 2015, and in a separate letter of 12 May 2015 dealt with the payment of the appeal fee. It also paid an amount of EUR 372, corresponding to 20% of the appeal fee applicable at the time of payment.

Oral proceedings were duly held on 27 May 2015.

- V. The appellant requests that the Board apply the principle of good faith to the effect that the appeal is deemed to be filed. It further requests that the decision under appeal be set aside and that the patent be maintained in an amended form on the basis of claims of a main request filed in the oral proceedings before the opposition division held 8 December 2010, or on the basis of second to fourth auxiliary requests filed with letter dated 22 March 2013.

The respondent (opponent) requests that the appeal be rejected as inadmissible, or at least be dismissed. Should one of the auxiliary requests be admitted, they also request apportionment of costs.

Both parties request remittal to the first instance if any of the claim requests is found allowable.

- VI. The wording of claim 1 of the main request corresponds to that of claim 1 as granted and reads as follows:

" A method of milking animals and cleaning at least a part of a milking device (1) for milking animals, such as cows, the method comprising the following steps:

- connecting at least one teat cup(4) to a teat of an animal to be milked,
- milking the animal,
- cleaning at least a part of the milking device (1) that has come into contact with the animal and/or with the milk from the animal with steam, and
- a further cleaning step comprising treating with a fluid at least that part of the milking device (1) that has been treated with steam, characterized in that the very first cleaning step comprises cleaning and/or disinfecting said part of the milking device (1) with steam."

VII. The appellant argued as follows:

Deemed filing of the appeal:

While it is accepted that the appellant made an error in using the Dutch language, it was nevertheless entitled to the fee reduction, and merely should have filed the appeal in Italian. The error was not noted by anyone for four years, and the EPO issued substantive communications, leading the appellant, the respondent and third parties into the belief that no loss of rights had occurred and that the appeal was in good order. The case is similar to J14/94, where the principle of good faith was applied for the benefit of the party omitting a fee payment. The same should be applied in the present case. Otherwise, an outcome based strictly on the applicable rules would be clearly inequitable, given the totality of the facts and the already invested efforts of all parties to the proceedings. An appellant is entitled to be informed of a loss of rights, if any, in good time, so that he can choose to act accordingly. By not being so informed, he

also lost the opportunity to request re-establishment of rights.

Sufficiency of disclosure:

The opposition division's decision is followed in that a technical advantage of claim 1 is a relative advantage to be compared to prior art methods, i.e. is a question of the assessment of inventive step.

Novelty:

E5 describes a preceding cleaning step comprising cleansing liquid mixed with blow out air and a subsequent cleaning step with blow out air of a back flush sequence, treating the milk line and claw by means of the control valve 12 of figures 9 and 10. However, even if steam was mentioned once in column 4 at line 18 of E5, the skilled person would not consider steam as technically meaningful for the cleansing liquid in the context of a valve 12 as in the figure 9 and 10 embodiment: steam mixed with blow out air would not result in a preceding cleaning step vigorously passing droplets of liquid through the milk line and claw. Nor does the skilled person derive a certain temperature or pressure from E5 so that water droplets were somehow formed in valve 12 as steam condensed. E5's abstract again refers to the valve as in the figure 9 and 10 embodiment, in its mention of a liquid "solution". Thus, since steam cannot be considered disclosed in E5 as the cleansing liquid of the back flush sequence of the valve according to figure 9 and 10, E5 does not directly and unambiguously disclose a preceding (i.e. first) cleaning step with steam and a subsequent (i.e. further) cleaning step with blow out air. Moreover, E5 also gives no clue to any

modification of valve 12 such that a first step with "steam" and a further step with blow out air would be contemplated by the skilled person. Finally, back flush in the valve of figures 9 and 10 is initiated by provision of blow out air of about two seconds. This must be considered a cleaning step, since it is also common ground that a further cleaning step is performed when blow out air continues to pass through valve 12 through the milk line and claw after the droplets of liquid have been blown through the system. Therefore, E5 does not disclose the use of steam, but rather blow out air for the very first cleaning step. In summary, a further cleaning step with blow out air, if steam was used for the first cleaning step is not derivable from E5. In any case E5 does not disclose a first cleaning step with steam as the very first one.

Furthermore, the figure 1 embodiment of E1 does not disclose the use of steam with the closed rinsing circuit. For the open circuit of figure 1 no further cleaning step is derivable. In the pre-rinsing and subsequent rinsing steps as in figure 2 of E1 no steam is used. Finally, no multiple cleaning steps are derivable from E3.

Thus, the method of claim 1 of the main request is novel over E1, E3, and E5.

VIII. The respondent argued as follows:

Deemed filing of the appeal:

No legitimate expectation arose in the present case. Fee payment is an issue of admissibility of the appeal, and admissibility is not decided until the final decision. In this manner also no legitimate expectation

could have arisen that the appeal is admissible, no matter how much time has passed. This was even more so, as it was not possible to define exactly after how long time legitimate expectations are possibly established. T 642/12 made it clear that the Office had no obligation to warn the affected party. The present case was anyway different from J 14/94, where the Office not only overlooked the missed payment, but actually accepted further payments as well. Recognising the appeal would imply that the Respondent has an obligation to monitor the correctness of the fee payments of the other party, given that the respondent would be treated worse if he were not taking any action. No adverse effect to the parties or eventually to third parties was apparent from the mere fact that the appeal was believed to be valid, because the appeal itself was anyway not yet decided.

Sufficiency of disclosure

The advantage which is alleged by the patent concerns the usage of fluids and energy. Since claim 1 contains no features which limit the energy or fluid usage in carrying out the claimed method, then the alleged advantage is not necessarily realised by the terms of claim 1. Thus, the invention according to claim 1 has been insufficiently disclosed.

Novelty:

By means of the control valve 12 in figures 9 and 10 of E5, a first and further cleaning step is performed. Since column 4, lines 14 to 15 of E5 describes that the back flush valve provides the back flush input with a mixture of blow out air and cleansing liquid, and according to column 4, line 18, the cleansing liquid

may also be "steam", E5 discloses a first cleaning step with steam and a further cleaning step with a (gaseous) fluid, viz. blow out air, as is required by method claim 1 of the patent. This general disclosure is also derivable from E5's abstract. The cleaning effect of vigorously passing droplets of liquid through the milk line and claw was inevitably obtained, when water droplets were formed as steam condensed in the valve 12's valve chamber due to the temperature and pressure in the system. The skilled person could however readily modify the nature of valve 12 of figures 9 and 10, therefore E5 in any case disclosed a suitable valve structure for a back flush sequence comprising a first cleaning step with steam followed by a further cleaning step with blow out air. Two seconds of blow out air at the beginning of the back flush sequence was not long enough to achieve cleaning, but rather served for the liquid droplets to be caught up by the air stream in the chamber of control valve 12. To conclude, E5 disclosed a very first cleaning step comprising cleaning with "steam", and a further cleaning step treating with blow out air the milk line and claw that has been treated with "steam" before.

E1 also necessarily teaches a first cleaning step with steam as a pre-rinsing step, which is followed by a further rinsing step with water. Finally, in E3 either water or steam may be used and not necessarily simultaneously, which also implied a first and further cleaning step.

Therefore, the method of claim 1 of the main request is not novel over E1, E3, or E5, respectively.

Reasons for the Decision

1. Deemed filing of the appeal
 - 1.1 Pursuant to Article 108 EPC, second sentence, the notice of appeal shall not be deemed to have been filed until the fee for appeal has been paid. Article 8 RFees, first sentence stipulates that the time limit for payment shall in principle be deemed to have been observed only if the full amount of the fee has been paid in due time. In the present case, the time limit for filing the notice of appeal and thereby the time limit for paying the appeal fee expired on 22 March 2011. A reduced appeal fee pursuant to Rule 6(3) EPC was paid on 11 March 2011, and a full appeal fee was paid on 12 May 2015 (see points II and VI above).
 - 1.2 The appellant does not dispute that the filing of the notice of appeal in Dutch language did not entitle it to benefit from the fee reduction. Instead it is contended that the EPO must accept the late payment of the full appeal fee through the application of the principle of good faith.

The Board concurs with the appellant that this principle, also referred to as the principle of the protection of legitimate expectations, is applicable in the proceedings before the EPO, and also in appeal proceedings (G 2/97 of 12 November 1998, OJ EPO 1999, 123, point 1 of the Reasons). In the present case it has to be examined if a legitimate expectation of the appellant existed that the EPO should have warned him significantly earlier of the deficiency, namely the use of the wrong language and the only partially paid appeal fee.

1.3 The Board also concurs with the appellant that the Office had a duty to examine the appeal for such formal requirements, and to call the attention of the appellant to any deficiencies. This duty is not merely a question of good faith on the part of the EPO, but indeed a legal duty. This is implied by Rule 101 EPC, which explicitly concerns the compliance of the appeal with Article 108, i.e. also implies the examination of payment of the correct appeal fee, among other criteria. The Board notes that in practice, this duty of the Office is performed by the Registrars of the Boards, pursuant to Article 2 (1) of the Decision of the Presidium of the Boards of Appeal dated November 2007 concerning the transfer of functions to the Registrars of the Boards of Appeal (Supplementary publication to OJ EPO 1/2015, page 66), analogously to the entrustment of certain duties to the formalities officers of the first instance departments. The duty to examine the correct fee payment, including the entitlement for fee reduction is also apparent from the Guidelines, see Part A (entitled "Guidelines for Formalities Examination"), Chapter XI. 9. in the version in force from April 2010 and thus applicable for the present appeal at the time of filing.

1.4 It is another matter that there is no general legitimate expectation that this examination of the correct fee payment and a possible warning of the appellant should take place *before the expiry of the applicable time limit*, as found by Enlarged Board of Appeal in G2/97, and also followed by the present Board (in a different composition) in case T 642/12 of 11 January 2013, cited by the respondent. Therefore, the present case is not comparable with that underlying T 642/12, where non-entitlement to the appeal fee reduction of the Swiss registered appellant-proprietor

filing the notice of appeal in Dutch was noted by the respondent-opponent shortly after expiry of the time limit under Article 108 EPC. The question remains, however, if the EPO can be expected to perform this check within a reasonable time frame, and whether this time frame has been observed in the present case. As the respondent correctly argued, if the Board were to proceed under the assumption that such legitimate expectations of the appellant do exist, than they must have been established at some point of time.

1.5 The respondent further argued that it is simply not possible to define exactly from which point in time the expectations could have arisen, and this demonstrates that they indeed did not arise. The Board accepts that the EPC and its implementing legal framework indeed do not prescribe some fixed and well-defined time limit for performing the formalities check of the appeal. However, looking at the whole procedural legal framework and the established practice at the Boards of Appeal, the Board finds the proposition that this check need not be done within a reasonable time frame, but at any time after the filing of the appeal, to be unacceptable as well as unequitable.

1.6 While the Board is aware that currently appeals may be pending for several years before they are decided on their merits, the Board does not see herein any reason for the EPO not to perform the required formal checks as soon as possible after the filing of the appeal, if not before than certainly relatively shortly after the expiry of the applicable time limits, when it can be expected that potential appellants will have performed all necessary procedural acts and therefore the complete formal check of the appeal by the Registrar - including the check of the correct fee payment - can be

done efficiently. This is particularly so in light of the fact that the payment of the correct appeal fee is first and foremost in the interest of the Office, given that the very functioning of the Office is dependent on the fees paid by the parties. It is also an issue that normally can be checked without any great difficulty, quite independent from the substantive merits or other procedural issues of the appeal. Given that it is also a precondition for the legal existence of the appeal, it is in the common interest of all parties, and also that of the Office, to identify any issues that at this early stage could potentially cause loss of rights and thus would make further efforts unnecessary.

1.7 The question remains whether in the present case the Board needs to define the exact time frame within which the payment of the fee needs to be checked and the party be warned. The Board considers this not to be necessary. It holds that this may be a question of days, weeks or even months, depending on the individual circumstances. The argument that any time frame should be such that a warning can be expected in time for the appellant to be able to file a request for re-establishment of rights, appears persuasive. However, the issue need not be decided now, as the Board is confident that whatever this expected time frame might be, it is certainly shorter than the four whole years that have passed in the present case between the expiry of the time limit for filing the appeal (and for paying the full appeal fee) and the time when the Office first made the appellant aware of this issue.

1.8 Having thus established that the Office had a duty to inform the appellant within a reasonable time frame after expiry of the Article 108 time limit but did not do so, it remains to be decided what the consequences

should be. The Board considers that an objective observer relying on the duty of the Office to act as explained above would have concluded that the appeal has been examined for such formalities as the appeal fee, in particular in the light of the fact that the Board invited the respondent to comment on the appeal and itself issued a substantive communication without mentioning the issue of the appeal fee (see point VI). Thus the Board concludes that the legitimate expectations of the appellant (and possibly other parties) that the fee payment was in good order and would no longer be objected to, were indeed established. To this extent the Board follows the lines of argument relied on by decision J 14/94 of 15 December 1994 (OJ EPO 1995, 824) cited by the appellant, see No. 7 of the Reasons, last paragraph. The Board adds that the appellant has also demonstrated good faith on its part in that the missing fraction of the appeal fee was ultimately paid.

- 1.9 The Board adds that as far as possible, the consequences of the non-observance of the duty should not be to the detriment of any party, i.e. it is not merely the legitimate interests of the appellant that must be protected in an inter partes case. To that extent, the Board concurs with the respondent. The problem is that the failure of the Office to check correct fee payment and issue a warning in good time cannot be remedied in the present case without at least one party suffering some disadvantage or detriment. Here the Board can only strive to find what it considers to be an equitable balance of the consequences to either party.
- 1.10 The respondents argue that the recognition and acceptance of the appeal fee and thereby the deemed

filing of the appeal affect them adversely. Whether or not the respondents have been put in an objectively worse position depends on a comparison of their present procedural situation and the situation which could have been expected to arise if the Office had lived up to its duty and noted the fee problem in time. It seems realistic to assume that appellants could and would have then filed a request for re-establishment of rights, which might or might not have been successful. It is also conceivable, that if the Office had carried out its duty diligently, it might even have done the check and warned the appellant *before* the expiry of the time limit, given that the appeal was filed and the fee was paid eleven calendar days before the applicable time limit, so that re-establishment would not have been necessary at all. At any rate, it is indeed possible that recognising the appeal now after discovery of the error may have put the respondents in the worse position of being prevented from immediately achieving their obvious and legitimate goal, the failure of the appeal. But considered in the broader perspective it is also possible that they might not have gained anything, so that they still would have had to deal with the appeal on its merits and accept its outcome.

- 1.11 The respondents suggest that the Board should (implicitly, at least from now on) adhere closely to the letter of the law, and should reject the appeal as inadmissible, absent a timely and fully paid appeal fee. The Board is of the opinion that such an outcome would also not be equitable. The negligence of the Office has already indisputably put the appellant in a situation that is significantly worse, in that previously available remedies - a request for the re-establishment of rights under Article 122 EPC - are no

longer available. If the Board were to now deem the appeal not filed because of the deficient appeal fee, this would undoubtedly and most certainly be to the detriment of the appellant. This certain worsening of the appellant's position must be weighed against the possible, conjectural worsening of the respondents' position, even if accepting that the preconditions for such a situation undisputedly were created by the appellant themselves.

- 1.12 Against this background, absent any other obvious solution of the issue before it, the Board must choose between a possible and a certain adverse effect, where it also must consider that the possible, but nevertheless conjectural adverse effect is the prevention of an immediate success of the respondent's case (i.e. the revocation becoming final), while the certain adverse effect is the immediate loss of the appeal. Here the question arises whether and how far the Board should take it into consideration that this situation was created by an error of the appellant in the first place, and the respondent is, so to say, completely innocent. The Board finds this proposition problematic. The duty of the Office to check the appeal is first and foremost designed to discover such errors. This is a duty not only towards the appellant, but towards all parties and the public, because it is in the common interest of all that such errors are discovered in time. Against this background, there can be no expectation that the adverse consequences of an failure of the Office to discover an error, once made, should be limited to certain parties only. It may appear equitable that the adverse effect should possibly be limited to the party which made the error in the first place. But it is questionable if here the appellant genuinely contributed to the Office's

failure, the apparently missing or erroneous check of the appeal. This check had to be done in any case, quite independent of the error made by appellant. Thus it cannot be said that the Office's failure was caused by the appellant, and therefore it cannot be expected that the adverse consequences of this failure should exclusively affect the appellant.

- 1.13 Weighing up the legitimate interests of both sides and also that of third parties, and considering the overall circumstances of the present case, the Board concludes that the original error might have had serious and inequitable consequences through the Office's failure to discover it. Therefore, it is equitable that the Office' failure is made good and the error is now allowed to be remedied, as far as possible. Seeing that some adverse effect is inevitable, the Board considers that the **possibility** of a real, but otherwise in itself not necessarily decisive setback (here the non-occurrence of an immediate success) for a party is more preferable than a **certain** decisive loss of all rights for another party, in particular given the fact that for a long time none of the parties did expect the latter. Put differently, a merely possible injury obviously is less serious than certain death. Therefore in the present case the Board accepts, through the application of the principle of protection of legitimate expectations, that the appeal fee has been timely and fully paid. The Board considers that in this manner overall, least harm is done to all parties. The Office has not suffered any loss either, as the fees were eventually paid in full. It is also satisfactory that in the end the appeal can be decided on its merits.

1.14 The Board also rejects the further arguments of the respondent against the application of the good faith principle. One such argument is that now a further burden or obligation is put on parties, namely to itself check correct fee payment by the other party. This is rejected. The obligation of the Office to check the appeal fee remains, and it is to be expected that the Office lives up to its obligation for all cases in the future. The "burden" on a respondent is true only to the extent that any party should always be vigilant in order not to miss unexpected benefits or advantages. However, this is not a burden, let alone an obligation, but merely a possibility for a party. This possibility - and to this extent the burden or obligation - was not created by this decision, but existed also before, as demonstrated by the cited case T 642/12, where the present Board acted on an indication from the respondent. A genuine new obligation of the respondent would come into existence only if any examination and objection by the Board concerning an appeal fee in the future would be conditional on an explicit objection coming from the respondent. Otherwise the present decision does not create any binding precedent on any Board to always apply the principle of good faith in comparable circumstances in the same manner as the present Board did.

1.15 A further argument of the respondent is that admissibility is usually not decided until the final decision, and also for this reason no legitimate expectations could have been established. The Board concurs with the first part of this statement. However, fee payment is not an issue of admissibility of the appeal, but rather a precondition for the very existence of the appeal, i.e its deemed filing (see also Schulte: Patentgesetz mit EPÜ, Kommentar, 8th

edition, §73, 85 at page 1012, referring to the similar German view on the legal nature of the appeal fee, further see Singer-Stauder: *Europäisches Patentübereinkommen, Kommentar*, 6th edition, Art. 108, 27 at page 840). If the appeal fee is not paid, the appeal need not be examined at all for admissibility and even less on its merits. Otherwise, it plays no role in the merits of the case, and also has no bearing on those issues that normally affect the admissibility of an appeal, such as timeliness, substantiation, party status or even competence of the deciding body. In fact, an appeal fee may even be reimbursed (see Rule 103 EPC), further demonstrating that an appeal fee *per se* is not indispensable for the delivery of justice. Therefore, in order to avoid any misunderstanding, the Board emphasises that the present finding in no way affects the established jurisprudence of the Boards that the issue of admissibility of an appeal can be expected to be raised *ex officio* and at any stage of the proceedings.

- 1.16 The respondent raised in its letter of 23 April 2015 the objection that the notice of appeal was filed in Dutch so that the notice of appeal should be deemed not to have been filed pursuant to Article 14(4) EPC, last sentence. The parties did not argue this issue in any further detail either in writing or during the oral proceedings. The Board considers that the use of Dutch and the underpayment of the appeal fee are essentially closely related errors, and their effects in the proceedings are also very similar. The use of Dutch apparently only served to achieve the entitlement to a fee reduction. As with late payment of the fee, it stands in no relation to the admissibility or the merits of the appeal. Given that the English translation was provided at the same time, no practical

difficulties were caused either for the Office or for the respondent (the intention to prevent such practical language difficulties would appear to be the main reason why a document is deemed not filed if no translation is filed in time, Article 14(4) EPC, last sentence). The Board therefore considers that there is no reason to treat this issue differently from the issue of the fee payment, and concludes that the principle of protection of legitimate expectations as outlined above also applies to the language of the notice of appeal, and accepts that the notice of appeal is not invalid because of the use of a wrong language.

1.17 The Board is satisfied that the further admissibility criteria of a valid appeal are fulfilled. The Board concludes that the appeal is deemed to have been filed and admissible.

2. *Insufficiency of disclosure*

2.1 The Board follows the opposition division's finding under point 2 of its decision, that the method steps of the claimed invention can readily be carried out by the skilled person based on the features of claim 1, i.e., by taking a known cleaning process, and putting the steam cleaning and/or disinfecting step at the very beginning of the cleaning steps. This has not been, in fact, disputed by the respondent.

2.2 As to the respondent's argument that underlying advantages that are described in the patent but not expressed in the claim, in particular the saving of energy (cf. patent, paragraph 0005) cannot be realised by the features of claim 1, the Board adds that this does not relate to the question of whether or not the invention as defined by the features of present claim 1

can be put into practice in the sense of Article 100(b) respectively Article 83 EPC. The Board follows herein established jurisprudence, see G 1/03 (OJ, 2004, 413), Reasons 2.5.2. and further T1021/12, Reasons 3.3, that such non-claimed effects are not relevant to sufficiency, though they may need to be considered in the context of inventive step.

2.3 Thus, the subject-matter of claim 1 of the main request complies with the requirements of Article 100(b) EPC.

3. *Novelty*

3.1 Document E5 describes (see figures 1 and 2) a back flushing apparatus for cleaning milking equipment and milk lines. In particular, cleaning is achieved by means of a back flush timing and control system 13 (cf. E5, column 4, lines 35 to 39), which provides the necessary control signals to the milk flow back flushing valve 11 and the cleansing liquid control valve 12.

3.2 It is common ground that, by means of the control valve 12 (see E5, figures 9 and 10), in the back flush embodiment of figure 2 a preceding cleaning step in which cleansing liquid is mixed with blow out air is performed. In so doing, a vigorous scrubbing action is provided as the droplets of liquid are blown through the back flush input port 50 of the back flush valve 11 (see E5, figure 3), the milk input line 14, and the milking claw 102 by the blow out air, while the required amount of solution is reduced: cf. E5, column 6, line 60 to column 7, line 13, and column 10, lines 51 to 56.

3.3 It is also undisputed that, in a subsequent cleaning step, the flow of cleansing liquid is blocked by the control valve 12, and the "at all times" available blow out air of the control valve 12 continues to pass through the milk input line 14 and milking claw 102, thus aiding in voiding any residual liquid and also drying out the equipment: cf. E5, column 7, lines 27 to 50, and column 10, lines 11 to 13. In other words, E5 explicitly discloses that the back flush valve 11 is switched from its back flush position to its neutral position sometime after the control valve 12 has been switched to its shut off position by means of the timing and control system 13, so that the blow out air is used over a sufficient period of time to clean the milk line 14 and milking claw 12 until the back flush valve 11 reaches its neutral position. The parties agreed that such a subsequent cleaning step with blow out air can be considered a further cleaning step comprising treating with a (gaseous) fluid as in claim 1 of the patent.

3.4 Moreover, method claim 1 requires that the preceding, i.e. first, cleaning step is performed with steam. Although the Board acknowledges that E5 mentions "steam" once by way of example as "the cleansing liquid", this passage, in fact, relates to the introductory discussion of the invention in which it appears and which is explained generally in reference to figure 1: cf. E5, column 3, line 16 to column 4, line 30. Several types of cleansing liquids may also be used alone, for example, ordinary water, cf. E5, column 4, lines 22 to 34.

3.5 However, from this mention of steam in a general context the skilled person does not directly and unambiguously infer its use also in the specific

embodiment of figures 9 and 10 where it would be mixed with blow out air as advanced by the respondent. In the Board's view, it would not be technically meaningful for the skilled person to mix steam with blow out air in chamber 51a of the figure 10 embodiment of the liquid control valve 12. Rather, as argued by the appellant, the skilled person would understand from the nature of the specific valve construction disclosed, that the cleansing effect of vigorously passing droplets of liquid through the system and reducing the amount of solution required, would not be obtained by use of steam in the figure 2 back flush embodiment. Nor does E5 directly and unambiguously disclose that the use of steam as the cleansing liquid implies a certain temperature or pressure such that steam in E5 must condense, so as to form water droplets to be vigorously mixed with blow out air in the control valve 12 during the back flushing sequence as further argued by the respondent.

3.6 It follows from the foregoing that the use of steam as the cleansing liquid in column 4 at line 18 of E5 would not be contemplated by the skilled person in the context of the control valve 12 of the figure 9 and 10 embodiment. For this reason, the Board concludes that E5 does not clearly and unambiguously teach a first cleaning step with steam in E5 that is followed by a further cleaning step of blow out air, since such a subsequent cleaning step of the figure 2 back flush embodiment invariably stems from the use of liquid (and not steam) and blow out air beforehand: cf. E5, column 7, lines 27 to 37.

3.7 Nor does the skilled person glean from E5 that, in case of steam as the cleansing liquid, the control valve 12 and its operating sequence might be readily modified

such that a first cleaning step would be performed with steam only, which in turn would be followed by a further cleaning step with blow out air, as also argued by the respondent. In the view of the Board, the skilled person derives merely one modification of the control valve 12 from E5: If a cleansing liquid alone, such as water, is used, the blow out air input port 41 can be unscrewed from the valve housing and a plug can be inserted in its place, see E5, column 10, lines 57 to 65, and figures 9 and 10.

3.8 Furthermore, as argued by the appellant, the abstract of E5 also refers to the back flush operating sequence in figure 2 by means of the control valve 12 of figures 9 and 10, since it explicitly states that a cleansing "solution" mixed with air is forced through a portion of the milk line and out through the claw as a first cleaning step, followed by a further step of a blast of cleansing and drying air. Thus, also E5's abstract cannot form a basis of disclosure for a first cleaning step with steam in conjunction with a further cleaning step of blow out air, contrary to the respondent's view.

3.9 Summing up, the Board holds that, reading E5's overall disclosure contextually, a further cleaning step with blow out air which follows a first cleaning step with steam, cannot directly and unambiguously be derived from E5 by the skilled person.

3.10 Finally, due to the structure of the control valve 12 shown in figures 9 and 10 and its back flush operating sequence, it is undisputed that, prior to the valve 12 switching to a position to pass the cleansing liquid into the mixing chamber to perform a cleaning step, over a period of about two seconds only blow out air

flows into line 14 and claw 102: cf. E5, column 6, line 52 to column 7, line 8. However, in the Board's judgement, even if it were to be accepted that the initial step of providing blow out air is not a cleaning step, this does not imply for the skilled person that the subsequent back flush in the figure 2 embodiment of E5 is unequivocally a *very first* cleaning step, as is required by method claim 1 of the patent. As also found by the opposition division under point 3.2 of the impugned decision, E5 is silent about the period before the back flush starts.

- 3.11 To conclude, the method of claim 1 differs from E5's disclosure in that a further cleaning step comprising treating with a fluid at least that part of the milking device that has been treated with steam is provided, and in that the first cleaning step with steam is performed as the very first one.
- 3.12 The Board is also convinced that the remaining documents referred to in the written procedure are not more relevant than E5 discussed before the Board. E1 concerns a method for cleaning milk lines according to the figure 1 to 3 embodiments. It is common ground that the figure 3 embodiment (chlorine-water mixture, cf. E1, column 9, line 40) is not relevant. In the embodiment of figure 1, a closed and an open rinsing circuit can be utilized. In connection with the closed circuit steam is not addressed, but merely water of preferably between 40 °C and 50 °C, cf. E1, column 7, line 48. In case of the open circuit, hot water of roughly more than 75 °C or possibly steam is used: see E1, column 7, line 65 to column 8, line 12. However, no further cleaning step is disclosed. In the embodiment of figure 2, a pre-rinsing and a further rinsing step with water is disclosed, but, however, not with steam:

see E1, column 8, lines 31 to 47. Claim 6 of E1 also relates to the figure 2 embodiment (pre-rinsing temperature between 32 °C and 42 °C).

As regards further E3, to clean and sterilize the milk line 71 water and steam is used: see E3, e.g. figure 1, and column 8, lines 52 to 61. However, multiple cleaning steps are not derivable from E3, let alone that the very first cleansing step comprises cleaning with steam.

3.13 Therefore, the subject-matter of method claim 1 of the main request is novel over E1, E3, and E5, and thus complies with the requirements of Articles 100(a) and 54 EPC.

4. *Remittal to the opposition division*

The Board has considered all the opposition grounds decided by the opposition division in its decision and challenged in the appeal. However, the opposition division did not examine and decide the ground of inventive step also raised in opposition. The Board therefore considers it appropriate to exercise its discretion under Article 111(1) EPC to remit the case to the first instance, so that it may examine this remaining opposition ground for claim 1 of the main request. This is particularly so as a remittal is also requested by the parties .

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the department of the first instance for further prosecution.

The Registrar:

The Chairman:



G. Magouliotis

A. de Vries

Decision electronically authenticated