

Internal distribution code:

- (A) [-] Publication in OJ
- (B) [-] To Chairmen and Members
- (C) [-] To Chairmen
- (D) [X] No distribution

**Datasheet for the decision
of 11 May 2016**

Case Number: T 1782/11 - 3.2.05

Application Number: 98309250.3

Publication Number: 0916891

IPC: F17C13/04, F17C13/02, F17C5/06

Language of the proceedings: EN

Title of invention:
Gas control device and method of supplying gas

Patent Proprietor:
Air Products and Chemicals, Inc.

Opponent:
L'AIR LIQUIDE SOCIETE ANONYME POUR L'ETUDE ET
L'EXPLOITATION DES PROCEDES GEORGES CLAUDE

Headword:

Relevant legal provisions:
EPC 1973 Art. 100(c)
RPBA Art. 12(4)

Keyword:

Amendments - added subject-matter - main request (yes)
Late-filed requests - auxiliary requests withdrawn before the
opposition division (not admitted)
Prohibition of reformatio in peius

Decisions cited:

G 0009/92, G 0004/93

Catchword:



Beschwerdekammern
Boards of Appeal
Chambres de recours

European Patent Office
D-80298 MUNICH
GERMANY
Tel. +49 (0) 89 2399-0
Fax +49 (0) 89 2399-4465

Case Number: T 1782/11 - 3.2.05

D E C I S I O N
of Technical Board of Appeal 3.2.05
of 11 May 2016

Appellant: Air Products and Chemicals, Inc.
(Patent Proprietor) 7201 Hamilton Boulevard
Allentown, PA 18195-1501 (US)

Representative: James Stones
Beck Greener
Fulwood House
12 Fulwood Place
London WC1V 6HR (GB)

Respondent: L'AIR LIQUIDE SOCIETE ANONYME POUR L'ETUDE ET
(Opponent) L'EXPLOITATION DES PROCEDES GEORGES CLAUDE
75 Quai d'Orsay
75321 Paris Cedex 07 (FR)

Representative: Emmanuel Jaime De Cuenca,
L'AIR LIQUIDE S.A.
Direction Propriété Intellectuelle
75 Quai d'Orsay
75321 Paris Cedex 07 (FR)

Decision under appeal: **Interlocutory decision of the Opposition**
Division of the European Patent Office posted on
10 June 2011 concerning maintenance of the
European Patent No. 0916891 in amended form.

Composition of the Board:

Chairman M. Poock
Members: P. Lanz
G. Weiss

Summary of Facts and Submissions

- I. The appeal by the patent proprietor is against the interlocutory decision of the opposition division holding that granted claim 1 of European patent EP-B-916 891 went beyond the content of the application as filed and that the documents submitted as auxiliary request met the requirements of the European Patent Convention.
- II. During the opposition proceedings, the opponent had raised the grounds for opposition according to Articles 100(a) (lack of novelty and lack of inventive step), 100(b) and 100(c) EPC 1973.
- III. The appellant (patent proprietor) requested, as a main request, that the decision under appeal be set aside and the case be remitted to the department of first instance to consider outstanding objections to the claims of the main request. As an auxiliary measure, it requested that the patent be maintained in amended form on the basis of the claims filed together with the statement setting out the grounds of appeal as first and second auxiliary requests. As further auxiliary measure, it requested that the patent be maintained in the form considered allowable by the opposition division.

The respondent (opponent) requested that the appeal be dismissed or, as an auxiliary measure, that the patent be revoked.

- IV. By letter dated 31 March 2016, the appellant withdrew its request for oral proceedings and informed the board that it would not attend oral proceedings.

- V. In its communication pursuant to Article 15(1) of the Rules of Procedure of the Boards of Appeal (RPBA) dated 11 April 2016, the board set out its preliminary view that claim 1 as granted went beyond the content of the application as filed, that the appellant's first and second auxiliary requests could be held inadmissible and that the respondent's request for revocation of the patent was to be rejected in view of the prohibition of *reformatio in peius*.
- VI. By letter dated 14 April 2016, the respondent announced that it would not attend the oral proceedings.
- VII. Oral proceedings were held before the board of appeal on 11 May 2016 in absence of both parties.
- VIII. Independent claim 1 as granted (main request) reads as follows:

"A gas control device for use with a cylinder of compressed gas comprising a discrete "primary" module (152) comprising a body (154) having:
a main gas flow path (155) through the body, said path having a high pressure gas delivery inlet and a low pressure gas delivery outlet,
a high pressure gas filling path through the body, said path having a high pressure gas filling inlet (161) and a high pressure gas filling outlet,
input connecting means (156) for mounting and supporting the body (154) on a cylinder (111) of compressed gas and connecting the cylinder to the said body with both the high pressure gas delivery inlet and the high pressure gas filling outlet communicating with the gas cylinder to allow flow of gas from the cylinder into the said high pressure gas delivery inlet or flow

of gas from the high pressure gas filling outlet into the cylinder, pressure reducing means (166) in the main gas flow path (155) for providing at the said low pressure gas delivery outlet gas at a selected pressure substantially lower than that in the cylinder (111), a high pressure main gas flow path shut-off valve (164) in the main gas flow path (155), and output connecting means (170) communicating with the said low pressure gas delivery outlet; characterized in that the high pressure main gas flow path shut-off valve (164) is upstream of the pressure reducing means (166) to selectively open and sealingly close said flow path (155) and there is a high pressure gas filling path shut-off valve (160) in the high pressure gas filling flow path to selectively open and sealingly close said flow path, and provided that, when said output connecting means (170) is not adapted to directly mount on the primary module a discrete secondary module (252) having a gas flow path inlet with the primary module low pressure gas delivery outlet in communication with said secondary module gas flow path inlet, the high pressure gas filling path is discrete from the main gas flow path (155) and the high pressure gas delivery inlet and the high pressure gas filling outlet separately communicate with the gas cylinder (111)."

IX. Compared with the main request, claim 1 of the first auxiliary request is amended as follows:

"... characterized in that the high pressure main gas flow path shut-off valve (164) is upstream of the pressure reducing means (166) to selectively open and sealingly close said flow path (155) and there is a high pressure gas filling path shut-off valve (160) in

the high pressure gas filling flow path to selectively open and sealingly close said flow path, and ~~provided that, when said output connecting means (170) is not adapted to directly mount on the primary module a discrete secondary module (252) having a gas flow path inlet with the primary module low pressure gas delivery outlet in communication with said secondary module gas flow path inlet,~~ the high pressure gas filling path is discrete from the main gas flow path (155) and the high pressure gas delivery inlet and the high pressure gas filling outlet separately communicate with the gas cylinder (111)."

- X. Compared with the first auxiliary request, claim 1 of the second auxiliary request contains following modification:

"... output connecting means (170) communicating with the said low pressure gas delivery outlet for connecting the main gas flow path directly or indirectly to apparatus for utilising the gas;"

- XI. The arguments presented by the appellant in writing are essentially as follows:

The passage *"provided that, when said output connecting means (170) is not adapted to directly mount on the primary module a discrete secondary module (252) having a gas flow path inlet with the primary module low pressure gas delivery outlet in communication with said secondary module gas flow path inlet"* inserted during the examination proceedings did not imply a technical relationship between the connectability of the primary module to the secondary module on the one hand and a separate communication of the high pressure gas delivery inlet and the high pressure gas filling outlet

on the other hand. This "proviso" merely introduced an additional technical feature when the output connecting means were not adapted to directly mount a second discrete module on the primary module in order to ensure that the claimed subject-matter was patentable over the prior art. Original claim 12 explicitly referred to a direct or indirect connection of the main gas flow path to the apparatus using the gas. The clearly and unambiguously implied alternative to this option was that the output connecting means was not adapted to mount a secondary module. Moreover, the passage of the description of the published application (cf. paragraphs [0099] to [0108]) relating to Figures 9a to 9d, which illustrated the communication of the high pressure gas delivery inlet and the high pressure gas filling outlet with the gas cylinder, stated that the arrangements were relevant whether or not this device was suitable for use in a modular system. It was implicit that said modular system was that one in which a secondary module was mounted on the primary module in accordance with certain aspects of the invention. Hence, it was also implicit that if the gas control device of Figures 9a to 9d was not suitable for use in a modular system, the output connecting means was not adapted to directly mount a secondary module. Finally, it was explained in paragraphs [0106] and [0107] that the arrangement shown in Figure 9d, in which the high pressure gas filling path was discrete from the main gas flow path and the high pressure gas delivery inlet, and the high pressure gas filling outlet separately communicated with the gas cylinder, was an inventive feature independent of modularity. Furthermore, any of the systems of filling shown in Figures 9a to 9d, could be used with other features of the invention such as modularity, to provide embodiments in one or more aspects of the invention.

Having regard to the above, the requirement that the output connecting means not being adapted to directly mount a secondary module was contained within the content of the application as filed.

XII. The respondent's written submissions may be summarised as follows:

The "proviso" introduced into claim 1 a technical relationship between the connectability of the primary module to a secondary module on the one hand, and a separate communication of the high pressure gas delivery inlet and the high pressure gas filling outlet on the other hand. Such a relationship was not disclosed in the application as filed. Moreover, original claim 12 was silent on a secondary module and on the output connecting means being adapted to directly mount on the primary module such a secondary module. Also the description as filed did not disclose a primary module on which no secondary module could be directly mounted. References to the modularity of the system were of no assistance in that respect. Granted claim 1 thus went beyond the disclosure of the application as filed.

Reasons for the Decision

1. *Prohibition of reformatio in peius*

In its decisions G 9/92 and G 4/93 (OJ EPO 1994, 875, Headnote I) the Enlarged Board of Appeal concluded that if the patentee was sole appellant against an interlocutory decision maintaining its patent in amended form as in the present case, neither the board of appeal nor the non-appealing opponent (as party to

the proceedings as of right under Art. 107, second sentence, EPC 1973) could challenge maintenance of the patent as thus amended. In view of that, a review of the opposition division's decision on the compliance of the auxiliary request with the requirements of the EPC is outside the scope of the present appeal proceedings. Thus, the respondent's request for a revocation of the patent in suit has to be rejected.

2. *Main request, added subject-matter*

2.1 In the impugned decision, the opposition division held that the following feature of claim 1 as granted went beyond the content of the application as filed:

"provided that, when said output connecting means (170) is not adapted to directly mount on the primary module a discrete secondary module (252) having a gas flow path inlet with the primary module low pressure gas delivery outlet in communication with said secondary module gas flow path inlet, the high pressure gas filling path is discrete from the main gas flow path (155) and the high pressure gas delivery inlet and the high pressure gas filling outlet separately communicate with the gas cylinder (111)"

As to the reasoning, the appealed decision (cf. Reasons 2.3) essentially refers to the application documents as originally filed which did not disclose a "proviso" implying a technical relationship between the connectability of the primary module to a secondary module on the one hand, and a separate communication of the high pressure gas delivery inlet and the high pressure gas filling outlet on the other hand.

2.2 The board concurs with the opposition division's finding that the "proviso" introduces a causal link between the features of the connectability of the primary module to a secondary module on the one hand, and a separate communication of the high pressure gas delivery inlet and the high pressure gas filling outlet on the other hand. In fact, neither output connecting means not adapted to directly mount on the primary module a discrete secondary module, nor a dependency of providing a separate communication of the high pressure gas delivery inlet and the high pressure gas filling outlet on the connectability of the primary module to a secondary module are derivable from the application documents as filed.

In particular, the feature of original claim 12 referring to a direct or indirect connection of the main gas flow path to the apparatus using the gas does not imply the technical teaching that the connecting means are not adapted to directly mount on the primary module a secondary module. The same is true for the reference to the modularity of the device in the description of Figures 9a to 9d (cf. page 45, line 21 to page 48, line 26 of the application as filed); the statement that the gas control devices of Figures 9a to 9d do not necessarily have to be suitable for use in a modular system does not allow any definite conclusion on the nature of the output connecting means. In contrast, the original description, page 39, lines 23 and 24, explicitly states that all input and output connecting means are standardised, which suggests that the output connecting means are in principle adapted to directly mount on the primary module a discrete secondary module.

Regarding the causal link between the features of the connectability of the primary and the secondary modules on the one hand and the separate filling circuit on the other hand, particular reference is made to the original application, page 48, lines 11 to 15 ("*There is a totally separate filling circuit 659, with a shut-off valve 660 instead of the check valve 608 in the filling circuit. This provides an inventive feature independently of modularity.*"). This statement makes clear that granted claim 1, making the provision of a separate filling circuit dependent on the design of the primary module, is in contradiction to the original teaching emphasising that the feature of a separate filling circuit is independent of the modular design of the device.

For these reasons, the board concludes that claim 1 as granted goes beyond the content of the application as filed, Article 100(c) EPC 1973.

3. *First and second auxiliary requests, admissibility*

3.1 Claim 1 of the first auxiliary request is identical to claim 1 of an auxiliary request filed during the opposition proceedings (cf. point 4 and annex I of the minutes of the oral proceedings). Furthermore claim 1 of the second auxiliary request now on file is largely based on this auxiliary request of annex I and differs therefrom only in that it explicitly spells out the previously implicit aspect of a direct or indirect connection between the output connecting means and the apparatus for utilising the gas. It appears from the minutes that the auxiliary request of annex I was submitted during the oral proceedings before the opposition division (cf. point 4) and subsequently replaced with a different auxiliary request (cf. point

9 and annex III of the minutes), thereby effectively withdrawing the auxiliary request of annex I.

3.2 Under Article 12(4) RPBA, a board of appeal has the discretion to refuse the admission of requests which could have been presented or were not admitted in the first-instance proceedings. According to the established jurisprudence of the boards of appeal, this applies all the more to requests that were filed and subsequently withdrawn during the first-instance proceedings, since such a course of events clearly shows that these requests could have been presented in those proceedings (cf. Case Law of the Boards of Appeal of the European Patent Office, 7th edition, 2013, IV.E. 4.3.2. c)). Moreover, the withdrawal of the request has prevented the department of first instance from giving a reasoned decision *inter alia* on the admissibility of the auxiliary request of annex I (cf. points 4 and 9 of the minutes), thereby compelling the board either to give a first ruling on this issues or to remit the case to the department of first instance.

Since the first and second auxiliary requests presently on file are *de facto* identical to the withdrawn auxiliary request of annex I, they are not admitted into the appeal proceedings under Article 12(4) RPBA.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



N. Schneider

M. Poock

Decision electronically authenticated