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**Datasheet for the decision  
of 27 March 2012**

**Case Number:** T 1867/11 - 3.2.07

**Application Number:** 02079511.8

**Publication Number:** 1302405

**IPC:** B65D 25/10, B65D 81/07

**Language of the proceedings:** EN

**Title of invention:**

Collapsible container with integrally supported dunnage

**Applicant:**

BRADFORD COMPANY

**Headword:**

-

**Relevant legal provisions:**

EPC Art. 56, 76(1)

**Keyword:**

"Disclosure of document - with respect to inventive step not limited to the specific embodiment if person skilled in the art can derive further information"

"Inventive step (no) (main request, auxiliary requests 1-7; 9)"

"Auxiliary request 8 - violation of Article 76(1) EPC - not admitted"

**Decisions cited:**

-

**Catchword:**

-



Case Number: T 1867/11 - 3.2.07

**D E C I S I O N**  
of the Technical Board of Appeal 3.2.07  
of 27 March 2012

**Appellant:**  
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**Decision under appeal:** Decision of the Examining Division of the  
European Patent Office posted 19 January 2011  
refusing European patent application  
No. 02079511.8 pursuant to Article 97(2) EPC.

**Composition of the Board:**

**Chairman:** H. Meinders  
**Members:** H.-P. Felgenhauer  
E. Kossonakou

## Summary of Facts and Submissions

I. The appellant (applicant) has filed an appeal against the decision of the examining division refusing the European Patent application No. 02 079 511.8.

It requested that the decision under appeal be set aside and that a patent be granted:

on the basis of the main request as filed at the oral proceedings; or one of auxiliary requests 1 to 7, as filed with letter dated 27 February 2012; or auxiliary request 8, as filed with letter dated 19 March 2012; or auxiliary request 9, as filed at the oral proceedings.

II. Claim 1 according to the main request reads as follows:

"A reusable and returnable container for supporting a product thereon during shipment and subsequently being returned generally empty of product for reuse, the container (60, 90, 130) comprising a frame having a top member (64, 94, 143, 147), a bottom member (62, 92, 140, 146) and plurality of support members (66, 87, 96, 98, 100, 102, 132, 134, 136, 138), the support members (66, 87, 96, 98, 100, 102, 132, 134, 136, 138) configured for being movable between an erected position extending between the top member (64, 94, 143, 147) and the bottom member (62, 92, 140, 146) for spacing the top member (64, 94, 143, 147) above the bottom member (62, 92, 140, 146) to support product placed in the container (60, 90, 130) and a collapsed position for collapsing and reducing the height of the frame for

return, the top member (64, 94, 143, 147) and the bottom member (62, 92, 140, 146) being aligned in both the erected position and the collapsed position, a plurality of adjacent dunnage structures (82, 118, 152) coupled to the frame and supported thereby for engaging a plurality of products placed in the container (60, 90, 130) for shipment when the support members (66, 87, 96, 98, 100, 102, 132, 134, 136, 138) are in an erected position, wherein each dunnage structure (82, 118, 152) is a pouch for holding a product, the dunnage structures (82, 118, 152) operable for relaxing when the support members (66, 87, 96, 98, 100, 102, 132, 134, 136, 138) are moved to the collapsed position such that the dunnage structures (82, 118, 152) are generally positioned on the reduced height frame for return, the dunnage structures (82, 118, 152) remaining coupled to the frame in the collapsed position, whereby the container (60, 90, 130) provides reusable dunnage which is usable with the container when it is shipped and subsequently remains with the container when it is returned for being reused when the container is again shipped, characterised in that the support members (66, 87, 96, 98, 100, 102, 132, 134, 136, 138) extend between the top member (64, 94, 143, 147) and the bottom member (62, 92, 140, 146) in the collapsed position, and in that the dunnage structures (82, 118, 152) are coupled to the top member (64, 94, 143, 147) to remain with the frame in the erected and the collapsed positions".

Claim 1 according to auxiliary request 1 differs from claim 1 according to the main request in that the features of the entering clause defining "a frame having a top member (64, 94, 143, 147), a bottom member

(62, 92, 140, 146) and plurality of support members (66, 87, 96, 98, 100, 102, 132, 134, 136, 138)" have been amended to read "a frame having a top member (64, 94, 143, 147), a bottom member (62, 92, 140, 146) and plurality of support members (66, 87, 96, 98, 100, 102, 132, 134, 136, 138) hingedly connected to the top member (64, 94, 143, 147)" and in that the characterising feature "the support members (66, 87, 96, 98, 100, 102, 132, 134, 136, 138) extend between the top member (64, 94, 143, 147) and the bottom member (62, 92, 140, 146) in the collapsed position" has been amended to "the support members (66, 96, 98, 100, 102, 132, 134, 136, 138) are hingedly connected to the bottom member (62, 92, 140, 146) and extend between the top member (64, 94, 143, 147) and the bottom member (62, 92, 140, 146) in the collapsed position".

Claim 1 according to auxiliary request 2 differs from claim 1 according to the main request in that the characterising feature "the support members (66, 87, 96, 98, 100, 102, 132, 134, 136, 138) extend between the top member (64, 94, 143, 147) and the bottom member (62, 92, 140, 146) in the collapsed position" has been amended to read "the support members (66, 87, 96, 98, 100, 102, 132, 134, 136, 138) extend between the top member (64, 94, 143, 147) and the bottom member (62, 92, 140, 146) in the collapsed position, and in that the support members (66, 87, 96, 98, 100, 102, 132, 134, 136, 138) are foldable between the top and bottom thereof to lower the top member (64, 94, 143, 147) to the bottom member (62, 92, 140, 146)".

Claim 1 according to auxiliary request 3 reads as follows:

"A reusable and returnable container for supporting a product thereon during shipment and subsequently being returned generally empty of product for reuse, the container (60) comprising a frame having a top member (64), a bottom member (62) and plurality of support members (66), the support members (66) configured for being movable between an erected position extending between the top member (64) and the bottom member (62) for spacing the top member (64) above the bottom member (62) to support product placed in the container (60) and a collapsed position for collapsing and reducing the height of the frame for return, the top member (64) and the bottom member (62) being aligned in both the erected position and the collapsed position, a plurality of adjacent dunnage structures (82) coupled to the frame and supported thereby for engaging a plurality of products placed in the container (60) for shipment when the support members (66) are in an erected position, wherein each dunnage structure (82, 118, 152) is a pouch for holding a product, the dunnage structures (82) operable for relaxing when the support members (66) are moved to the collapsed position such that the dunnage structures (82) are generally positioned on the reduced height frame for return, the dunnage structures (82) remaining coupled to the frame in the collapsed position whereby the container (60) provides reusable dunnage which is usable with the container when it is shipped and subsequently remains with the container when it is returned for being reused when the container is again shipped, characterised in that the support members (66) extend between the top member (64) and the bottom member (62) in the collapsed position, and in that the support members comprise legs

(66), the legs (66) being hinged along their length to fold into a collapsed position, and in that the dunnage structures (82) are coupled to the top member (64) to remain with the frame in the erected and the collapsed positions".

Claims 1 of auxiliary requests 4 - 7 are use claims, directed to the use of the reusable and returnable container according to claims 1 of the main request and of auxiliary requests 1 - 3, respectively.

Claim 1 according to auxiliary request 8 reads as follows:

"A reusable and returnable container for supporting a product thereon during shipment and subsequently being returned generally empty of product for reuse, the container (60, 90, 130) comprising a frame having a top member (64, 94, 143, 147), a bottom member (62, 92, 140, 146) and plurality of support members (66, 96, 98, 100, 102, 132, 134, 136, 138), the support members (66, 96, 98, 100, 102, 132, 134, 136, 138) configured for being movable between an erected position extending between the top member (64, 94, 143, 147) and the bottom member (62, 92, 140, 146) for spacing the top member (64, 94, 143, 147) above the bottom member (62, 92, 140, 146) to support product placed in the container (60, 90, 130) and a collapsed position for collapsing and reducing the height of the frame for return, the top member (64, 94, 143, 147) and the bottom member (62, 92, 140, 146) being aligned in both the erected position and the collapsed position, a plurality of adjacent dunnage structures (82, 118, 152) and a support structure (80, 114) (64, 94, 143, 147), the dunnage structures (82,

118, 152) being supported by the support structure (80, 114) for engaging a plurality of products placed in the container (60, 90, 130) for shipment when the support members (66, 96, 98, 100, 102, 132, 134, 136, 138) are in an erected position, wherein each dunnage structure (82, 118, 152) is a pouch for holding a product, the dunnage structures (82, 118, 152) operable for relaxing when the support members (66, 96, 98, 100, 102, 132, 134, 136, 138) are moved to the collapsed position such that the dunnage structures (82, 118, 152) are generally positioned on the reduced height frame for return, the dunnage structures (82, 118, 152) remaining coupled to the frame in the collapsed position, whereby the container (60, 90, 130) provides reusable dunnage which is usable with the container when it is shipped and subsequently remains with the container when it is returned for being reused when the container is again shipped, wherein the support structure comprises elongated flexible elements (80, 114), the flexible elements (80, 114) operably flexing when the support members (66, 96, 98, 100, 102, 132, 134, 136, 138) are moved to the collapsed position to relax the dunnage structures (82, 118, 152) therebetween, characterised in that the support members (66, 96, 98, 100, 102, 132, 134, 136, 138) extend between the top member (64, 94, 143, 147) and the bottom member (62, 92, 140, 146) in the collapsed position, and the support structure is coupled to the top member (64, 94, 143, 147), the elongated flexible elements (80, 114) extending between the opposite sides of the top member (64, 94, 143, 147), whereby the dunnage structures (82, 118, 152) are coupled to the top member (64, 94, 143, 147) to remain with the frame in the erected and the collapsed positions".



Claim 1 according to auxiliary request 9 differs from claim 1 according to auxiliary request 8 in that the feature "the flexible elements (80, 114) operably flexing when the support members (66, 96, 98, 100, 102, 132, 134, 136, 138) are moved to the collapsed position to relax the dunnage structures (82, 118, 152) therebetween" has been omitted.

III. The following documents, considered in the decision under appeal, are referred to:

D1 DE-A-4 138 507

D4 JP-U-6-59230 (1994) with its translation into English.

IV. With respect to the examination of inventive step in the impugned decision D1 is referred to as constituting the closest prior art. The solution to the technical problem, shortening of the time required for return shipment of the container, by keeping the dunnage structures at all times coupled to the container has been considered obvious considering i.a. the teaching of D4 (reasons, no. 3)).

V. In its annex to the summons to oral proceedings the Board indicated inter alia that in the examination of inventive step D1 needs, as has been done in the impugned decision, to be considered as representing the closest prior art.

It has further been indicated that according to D1 the dunnage structure is removed from the frame during

loading / unloading, and that in this respect it appears to be necessary to take into consideration that the container according to D1 can be quite large which requires loading / unloading with exterior devices as referred to in D1.

Furthermore it has been stated that the structure of the container of D1 appeared to be such that, as it is the case for the container according to claim 1, the dunnage structure can be left remaining coupled to the frame if this should be desired, depending on the circumstances of the use of such a container. If this is the case the dunnage structure would remain with the frame in the erected as well as in the collapsed state of the container.

VI. The submissions of the appellant can be summarized as follows:

Document D1 is not suitable as closest prior art in the examination of inventive step. The reason is that although this document discloses a reusable and returnable container which is provided with a plurality of dunnage structures for engaging a plurality of products placed in the container, the essence of this disclosure is directed towards the use of a loading- / unloading device to load and unload the container. Operating this loading- / unloading device to unload a container leads to the successive removal of pouches of the dunnage structure from the container to allow removal of the products stored therein. This unloading leads at the end to the entire dunnage structure being separated from the empty container which then is ready for being collapsed.

D1 thus neither discloses nor does otherwise give any indication concerning the approach taken with the container of the claims 1 of all requests according to which the dunnage structures remain with the frame in its collapsed position.

This understanding of the disclosure of D1 is moreover in line with the acknowledgment of the content of this document in documents US-A-6 648 142 and US-A-7 878 345.

Consequently, although the invention, namely the subject-matters of claims 1 according to all requests, appears to be based on a straightforward approach, due to the lack of any indication or hint concerning the dunnage structures to remain with the container in the collapsed position, the subject-matters concerned cannot be considered as suggested by D1.

This applies likewise in case D4 is additionally considered since the dunnage structures, which according to this document remain with the container in its collapsed position, are coupled to movable sidewalls and thus in a manner different from the one according to which the dunnage structures are coupled to a top member of the container as defined by the claims 1 of the application and as disclosed by D1.

Concerning the container according to claim 1 of auxiliary request 8 the amended features were originally disclosed in claim 12 of the divisional application.

Concerning the container according to claim 1 of auxiliary request 9 it needs to be taken into account that there is no reason for the skilled person to consider the teachings of documents D1 and D4 together, to achieve the result that the elongated flexible elements supporting the dunnage structures according to D4 are used instead of the rigid rods provided in the container according to D1.

VII. Oral proceedings before the Board were held on 27 March 2012.

## **Reasons for the Decision**

### 1. *Procedural matters*

As indicated by the Board at the beginning of the oral proceedings the question of whether the subject-matters of the claims 1 of the main request and of the auxiliary requests 1 - 7 and 9 involve an inventive step or not is a decisive one for the present case. Consequently the main request and auxiliary requests 1 - 7 and 9 have been discussed with respect to inventive step with the proviso that issues regarding clarity (Article 84 EPC) and the original disclosure of the claims (Article 123(2) EPC) would need to be addressed once inventive step were established. The auxiliary request 8 was discussed for admissibility in connection with Article 76(1) EPC.

2. *Subject-matter of claims 1*

2.1 *Claim 1 according to the main request*

The subject-matter of this claim concerns a reusable and returnable container for supporting a product thereon during shipment and subsequently being returned for reuse generally empty of product.

The container comprises a frame having a top member, a bottom member and a plurality of support members.

The support members are configured for being movable between an erected position extending between the top member and the bottom member for spacing the top member above the bottom member to support a product placed in the container, and a collapsed position for collapsing and reducing the height of the frame for return, the top member and the bottom member being aligned in both the erected position and the collapsed position.

In the collapsed position the support members extend between the top member and the bottom member.

Furthermore dunnage structures coupled to the top member of the frame and supported thereby are provided for engaging a product placed in the container for shipment when the support members are in an erected position. Each dunnage structure is a pouch for holding a product.

The dunnage structures are operable for relaxing when the support members are moved to the collapsed position such that the dunnage structures are generally

positioned on the reduced height frame for return, the dunnage structures remaining coupled to the frame in the collapsed position.

The container according to claim 1 thus provides reusable dunnage structures which are usable with the container when it is shipped and which remain with the container when it is returned for being reused. Due to the references to the use or handling claim 1 likewise concerns the handling of the container in use.

2.2 *Claims 1 according to auxiliary requests 1 - 3*

Claims 1 according to auxiliary requests 1 - 3 differ from claim 1 according to the main request by the definition of the support members. These are further defined as hingedly connected to the bottom member, as foldable between the top and the bottom thereof and as comprising legs, the legs being hinged along their length to fold into a collapsed position, respectively.

2.3 *Claims 1 according to auxiliary requests 4 - 7*

Claims 1 according to auxiliary requests 4 - 7 are directed to the use of a reusable and returnable container as defined by the claims 1 according to the main request and auxiliary requests 1 - 3.

2.4 *Claims 1 according to auxiliary requests 8 and 9*

Claim 1 according to auxiliary request 9 defines, in addition to claim 1 of the main request, that a support structure comprising elongated flexible elements is provided, which supports the dunnage structures.

Claim 1 according to auxiliary request 8, in addition to claim 1 of auxiliary request 9, defines that the flexible elements are operably flexing when the support members are moved to the collapsed position to relax the dunnage structures therebetween.

3. *Disclosure of D1*

3.1 It is undisputed that D1 discloses a reusable and returnable container for supporting a product thereon during shipment and subsequently being returned generally empty of product for reuse (cf. claims 1, 12, 14; column 8, lines 22 - 67; figures 6, 7 showing the container in its erected and its collapsed position).

The container comprises a frame having a top member, a bottom member and a plurality of support members (cf. column 8, lines 22 - 46; figures 6, 7: frame comprising tube elements 11, 12 and 13).

The support members (vertical tubes 12) are configured for being movable between two positions or states, namely an erected position extending between the top member and the bottom member (cf. figures 6, 7: hinges 17, 18 and the - not further addressed - hinges at the lower end of tubes 12) for spacing the top member above the bottom member to support a product placed in the container (cf. column 6, line 20 - column 7, line 16; figures 1 - 3) and a collapsed position for collapsing and reducing the height of the frame for return, the top member and the bottom member being aligned in both the erected position and the collapsed position (cf. figures 6, 7).

Furthermore a dunnage structure is provided which is coupled to the frame and supported thereby for engaging a product placed in the container for shipment when the support members are in an erected position (cf. claims 1, 12, 16; column 6, line 20 - column 7, line 16; column 7, lines 45 - 52; figures 6, 7 in combination with figures 3a) - 3c); figures 9, 10).

D1 thus discloses a reusable and returnable container which provides reusable dunnage which is usable with the container when it is shipped and which is returned for being reused when the container is again shipped (cf. column 3, lines 46 - 51).

- 3.2 It is further undisputed that D1 discloses with respect to the loading- / unloading of containers, i.e. their respective dunnage structures, the use of loading- / unloading devices, for which different types are referred to (column 7, line 45 - column 8, line 21; column 9, line 43 - column 11, line 47; figures 9, 10).

These loading- / unloading devices have, irrespective of the particular type, in common that for loading or unloading of a container a respective portion of the dunnage structures, each forming a pouch to be filled with a product or to be emptied, is positioned outside the container. Consequently using one of these loading- / unloading devices leads to the dunnage structures being successively (pouch after pouch) moved into the container when it is loaded and correspondingly out of the container when it is unloaded. Thus when a container is completely emptied and thus ready to be collapsed prior to return shipment, the associated



dunnage structure is completely outside of the container.

4. *Features distinguishing the container according to claim 1 (main request) over the container of D1*

It is undisputed that, based on the disclosure of D1 as indicated above, the container according to claim 1 of the main request is distinguished from the container of D1 by the feature that the dunnage structures remain with the frame and thus with the container in the collapsed position.

In combination with this distinguishing feature claim 1 defines that the dunnage structures are coupled to the container irrespective of whether the container is erected or collapsed.

The distinguishing feature thus relates to the use or handling of the container.

5. *Effect of the distinguishing feature / objective technical problem with respect to D1*

The Board agrees with the appellant that the distinguishing feature leads to the return shipment and consequently the handling of the container being facilitated in that the dunnage structure remains with the container, not only in the erected position as disclosed in D1, but also in its collapsed position.

The objective technical problem based on this effect can be seen as to facilitate the handling of the known

container and its associated dunnage structures for return shipment.

The Board wishes to emphasize that this problem concerns the use or handling of the container since, as indicated above, no structural difference of the container according to claim 1 has been established over the container disclosed in D1.

6. *Solution of the problem*

The Board has no doubt that the above identified problem is, as asserted by the appellant, solved in that the container according to claim 1 is used or handled such that the dunnage structures are coupled to the top member such as to remain with the frame in the collapsed position.

7. *Obviousness*

7.1 According to claim 1 the container and the dunnage structures coupled thereto can be handled such that its support members, and consequently the container itself, can be erected and collapsed.

The container of D1 can likewise be erected (figures 6, 9 and 10) or collapsed (figure 7).

D1 discloses that, as indicated in point 3.1 above, the dunnage structures are coupled to the erected container.

According to the disclosure given by D1 the dunnage structures are outside of the container when it is collapsed as the result of unloading the container with

a loading- / unloading device as indicated above (point 3.2).

7.2 As referred to by the Board at the oral proceedings it is evident that the person skilled in the art does not understand the disclosure of D1 (cf. points 3.1 and 3.2) to be limited to the embodiment disclosed, namely to a container which is loaded and unloaded with the assistance of a loading- / unloading device. There is, contrary to the arguments of the appellant, no reason for such an assumption. The container is, in its general form as shown in figures 6 and 7, at least not so inextricably linked to the use of a loading- / unloading device that it cannot be used without such a device.

This is also derivable from the fact that the container of claim 1 is not distinguished by a structural feature from the one disclosed in D1.

Consequently the Board is of the opinion, as expressed at the oral proceedings, that the person skilled in the art starting from the container of D1 is not prevented from considering (further) possible uses for it as it will normally take possible uses of a disclosed element, such as the container, into account. In the present case this holds true in particular since it is evident that such a container can be used in various fields and for various types of products, as also indicated in D1, column 1, lines 8 - 31. Depending on the size of the products to be supported by the container it can have different dimensions without its structure being altered.

It is evident that, taking this understanding of the disclosure of D1 with respect to the container into account, loading and unloading will have to be performed with or without the assistance of a loading-/ unloading device, depending on the circumstances (i.a. concerning the size of the container and the size and weight of products to be supported).

Based on this understanding of the disclosure of D1 it is obvious that, in case circumstances permit the loading and unloading of this container without the assistance of the loading- / unloading device, the dunnage structures can remain coupled to the container, not only in its erected state as known from D1, but also in its collapsed state, as referred to by the distinguishing feature.

One reason is that the container of D1 is suited for the dunnage structures to remain therewith in the collapsed state, considering that the container of claim 1 is not distinguished from the container of D1 by any structural features. A further reason is that in case no such loading- / unloading device is used, it is no longer necessary to remove the dunnage structures successively from the container during unloading.

An incentive for actually doing so, namely to let the dunnage structures remain coupled to the container in its collapsed state lies in the apparent fact that removal of the dunnage structures under these circumstances would be disadvantageous for two obvious reasons. One is that the extra step of removal of the dunnage structures adds, together with the resulting necessity to couple it again to the erected container,

to the time and effort required for the entire handling of the container. A further incentive for leaving the dunnage structures on the container in its collapsed state is that then only one item, namely the container with the dunnage structures, instead of two separate items, namely the container and the dunnage structures, need be returned.

As can be derived from the above, the disadvantages of a removal of the dunnage structures from the container are evident from D1, as it is the case for the manner in which they can be avoided, that is to not remove the dunnage structures prior to collapsing the container in case circumstances permit it.

Since avoiding the disadvantages referred to above corresponds to the problem to be solved in view of D1 and since the obvious manner to avoid them as referred to above leads to the distinguishing feature and consequently to the solution according to claim 1, the subject-matter of claim 1 does not involve an inventive step in view of D1 (Article 56 EPC).

- 7.3 Concerning the above result, which has been discussed at the oral proceedings, the appellant argued that the disclosure of D1 needs to be assessed in a more limited sense, namely only in its entirety. This results in a disclosure of a container exclusively with the use of a loading- / unloading device. This means that the dunnage structures are necessarily removed from the container at the time the container is unloaded and collapsed.

Thus neither a disclosure is given concerning a handling of a container such that the dunnage structures remain coupled to the container in its collapsed state nor is any suggestion made in this direction.

- 7.4 This argumentation is based on an assessment of the disclosure of D1 which takes solely the wording and the figures of D1 into account and leaves out of consideration further information which the person skilled in the art can derive from D1 as indicated above (cf. point 7.2). This is e.g. the realisation that the container disclosed does not necessarily have to be handled by the loading- / unloading device since it is evident that in case the circumstances permit it, the container can be unloaded without the use of a loading- / unloading device, e.g. because the sides are open for access to the pouches.

Taking this into account it is evident that, as indicated above, the dunnage structures can remain coupled to the container not only while it is in its erected state but also in its collapsed state.

These considerations, based on a proper assessment of the disclosure of D1 and information for a skilled person derivable therefrom, are solely based on facts derivable from D1. Contrary to the argument of the appellant these considerations are independent of any knowledge of the application in suit and can thus not be considered as being - inadmissibly - based on hindsight.

8. *Auxiliary requests*

- 8.1 Claims 1 according to auxiliary requests 1 - 3 differ from claim 1 of the main request by the addition of features further defining the support structure.

These further definitions cannot, as admitted by the appellant, considered by themselves be regarded as distinguishing features over D1, nor do they contribute to further define the distinguishing feature referred to above (point 4).

The added features thus do not contribute to the subject-matter of these claims involving inventive step over D1 (Article 56 EPC).

- 8.2 The above result applies correspondingly with respect to the subject-matter of claims 1 according to auxiliary requests 4 - 7, which are formulated as use claims. The reason is that the formulation as use claims does not lead to a further distinguishing feature over D1 (cf. points 4 and 5 above) and that the use concerned is obvious in view of D1 (cf. points 7.2 and 7.3).

- 8.3 Claim 1 according to auxiliary request 8 lacks a disclosure in the parent application as filed since it defines an effect of the support structure comprising elongated flexible elements, namely that these flexible elements are **operably flexing** when the support members move to the collapsed position to relax the dunnage structures therebetween. As discussed during the oral proceedings such an effect of the flexible elements is disclosed in the parent application as originally filed

only for the embodiments of figures 1 - 3 showing containers in which the dunnage structures are not coupled to a top frame but instead to the upper ends of side walls which fold inwardly to collapse the container, so that the upper ends come closer together.

Since such a structure lies outside the structure of the container as defined by the present claims 1, in which the support members collapse without inward movement of the two opposite sides of the top member, this claim does not fulfil the requirement of Article 76(1) EPC.

For the above mentioned reason auxiliary request 8 has not been admitted into the proceedings.

In such a case an original basis in the divisional application, if at all present, cannot help.

- 8.4 Claim 1 according to auxiliary request 9 does not comprise the functional feature objected to above with respect to claim 1 of auxiliary request 8. The objection under Article 76(1) EPC thus does not apply.

As argued by the appellant the feature of this claim that the support structure comprises elongated flexible elements, constitutes a further distinguishing feature over D1.

Concerning the effect of this distinguishing feature the appellant argued that the flexible elements contribute to collapsing of the container and the remaining dunnage structures. It could give no further reason for this assumption and considering the fact



that the flexible elements extend between the two opposite sides of the top member, which do not move with respect to each other, whereby their flexibility apparently does not affect the collapsing of the container, this effect cannot be considered proven.

As agreed upon during the oral proceedings an effect based on this distinguishing feature can be seen in that the support structure comprising elongated flexible elements provides a flexible suspension for the dunnage structures and correspondingly for products supported by them.

Starting from the container of D1 the problem underlying this effect can be seen in providing a container in which products held in pouches of the dunnage structures are more or less protected against vibrations, shocks etc.

Trying to solve this problem which is undisputedly of general concern when products are transported, and considering the container according to D4 leads the skilled person to the subject-matter of this claim in an obvious manner, since according to D4 a support structure for dunnage elements is provided, which consists of thin support rods with a spring in the center (cf. the abstract and figure 4).

Since no inventive activity is required to replace the support structure according to D1 comprising rigid support rods 4 (cf. column 6, lines 20 - 27; figures 2, 3b) by the support structure of D4 comprising thin flexible support rods to provide a suspension for products in the dunnage structures, the distinguishing

feature concerned cannot lead to the subject-matter of claim 1 according to auxiliary request 9 involving inventive step.

For completeness' sake the Board points out that it has not been alleged by the appellant that a synergistic effect between this distinguishing feature and the other distinguishing feature considered above (the dunnage structures remaining coupled to the top member in the collapsed position) needs to be considered in the examination of inventive step. No reason is otherwise apparent to the Board that such an effect should be considered.

The subject-matter of claim 1 according to auxiliary request 9 thus does not involve an inventive step (Article 56 EPC) either.

## **Order**

**For these reasons it is decided that:**

The appeal is dismissed.

The Registrar:

The Chairman:

G. Nachtigall

H. Meinders