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Datasheet for the decision of 28 November 2013

Case Number: T 2357/12 - 3.3.05

Application Number: 01202177.0

Publication Number: 1146022

IPC: C04B18/14, C04B28/02, C04B26/26, C22B7/04

Language of the proceedings: EN

Title of invention:
Process for processing stainless steel slags

Patent Proprietor:
Trading and Recycling Company Sint Truiden

Opponent:
Harsco Minerals Canada Corporation

Headword:
Universal succession

Relevant legal provisions:
EPC R. 22(3), 84(2), 142(1)(a), 152(9)
EPC Art. 112(1), 117(1)

Keyword:
Admissibility of opposition - transfer of opponent status (yes) - prerequisites and effects of universal succession
Evidence - evaluation of evidence
- probative force of private documents in inter partes proceedings
Referral to the Enlarged Board of Appeal - (no)

This datasheet is not part of the Decision.
It can be changed at any time and without notice.

Decisions cited:
G 0004/88, G 0003/97, G 0002/04, J 0005/81, T 0349/86,
T 0475/88, T 0659/92, T 0870/92, T 0353/95, T 0670/95,
T 0019/97, T 0298/97, T 1137/97, T 0656/98, T 0711/99,
T 0074/00, T 0015/01, T 0136/01, T 0413/02, T 1091/02,
T 0085/03, T 0229/03, T 0261/03, T 0956/03, T 0006/05,
T 0724/05, T 1421/05, T 1206/06, T 1514/06, T 1697/07,
T 0384/08, T 0960/08, T 1877/08, T 0022/09, T 1032/10,
T 1957/10, T 0184/11

Catchword:
1."Universal succession" as an exception to Rule 22(3) EPC is a concept of procedural law under the European Patent Convention and is to be construed autonomously by the EPO, independent from national law [cf. reasons 7, 10 to 12].
2. Under the case law of the Boards of Appeal, the main considerations for acknowledging that a universal succession has taken place are legal certainty as to the person of the successor and the need to avoid a legal vacuum [reasons 8, 9].
3. Under that case law, the transfer of all assets of an enterprise, immediately followed by its dissolution as a legal entity, may constitute a universal succession [reasons 13 to 15].

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Case Number: T 2357/12 - 3.3.05

D E C I S I O N
of Technical Board of Appeal 3.3.05
of 28 November 2013

Appellant: (Patent Proprietor)	Trading and Recycling Company Sint Truiden Industriezone 25 3880 Sint Truiden (BE)
Representative:	Van Reet, Joseph Gevers Intellectual Property House Holidaystraat 5 1831 Diegem (BE)
Respondent: (Opponent)	Harsco Minerals Canada Corporation 350 Poplar Church Road Camp Hill, PA 17011 (US)
Representative:	Jones Day Rechtsanwälte, Attorneys-at-Law, Patentanwälte Prinzregentenstrasse 11 80538 München (DE)
Decision under appeal:	**Interlocutory decision of the Opposition Division of the European Patent Office posted on 9 October 2012 concerning maintenance of the European Patent No. 1146022 in amended form.**

Composition of the Board:

Chairman:	G. Raths
Members:	G. Glod
	P. Guntz
	H. Engl
	C. Vallet

Summary of Facts and Submissions

I. The appeal lies from the interlocutory decision of the Opposition Division, dated 9 October 2012, to allow the transfer of the opposition against European patent 1 146 022 from "Excell Materials Inc." to "Harsco Minerals Canada Corporation" to be recorded. The Opposition Division further confirmed the Respondent's Representative's power of representation.

II. European patent application No. 01 202 177.0 "Process for processing stainless steel slags" was filed on 17 October 1997 by "Trading and Recycling Company Sint Truiden" (the Patent Proprietor, and hereinafter "the Appellant"). The notice to grant European patent 1 146 022 was published on 2 August 2006.

III. By letter dated 2 May 2007, Excell Materials Inc. (the Opponent, and hereinafter the "Respondent") lodged an opposition against the above patent.

IV. Subsequently, the Respondent underwent several corporate changes. These changes can be summarised as follows:

a) Dissolution of "Excell Materials Inc." and transfer of all assets and liabilities to its sole shareholder "3191285 Nova Scotia Company" on 1 October 2007.
b) Amalgamation of "3191285 Nova Scotia Company" and "Harsco Metals Canada Inc." to form the amalgamated company "3230907 Nova Scotia Company" in January 2009.
c) Change of name from "3230907 Nova Scotia Company" to "Harsco Minerals Canada Corporation" on 8 January 2010.

d) Amalgamation of "Harsco Minerals Canada Corporation" and "Harsco Canada Corporation Société Harsco Canada" to form the amalgamated company "Harsco Canada Corporation Société Harsco Canada" on 15 April 2011.

V. On 17 December 2008 the Opposition Division summoned the parties to attend oral proceedings on 20 October 2009. By letter dated 20 August 2009, still filed in the name of Excell Materials, the Respondent's former Representative, Dr. Thomas Fritzsche, responded to the summons and requested inter alia that Mr. Nick Jones be heard as a witness. In reaction to this letter the summons to attend oral proceedings was cancelled on 3 September 2009 because additional time was needed to assess the Opponent's request.

VI. By fax of 27 November 2009, the Appellant drew the Opposition Division's attention to the fact that Excell Materials Inc. had been dissolved in October 2007 and requested that the opposition be rejected as inadmissible. Subsequently, the Appellant also questioned the Respondent's Representative's power of representation.

VII. By letter of 31 May 2010, the Respondent requested that the transfer of opponent status from "Excell Materials Inc." to "Harsco Minerals Canada Corporation" be recorded.

VIII. A new summons to attend oral proceedings on 17 November 2011 was sent on 6 April 2011.

IX. On 17 November 2011 the Opposition Division took the contested interlocutory decision within the meaning of

Article 106(2) EPC (cf. above I.). The decision was issued in writing on 9 October 2012.

X. By letter of 14 November 2012, the Appellant appealed the Opposition Division's decision of 17 November 2011 in its entirety. The grounds of appeal were submitted by letter of 19 February 2013.

XI. The Appellant focused on the first of the four corporate changes described above under point IV(a), i.e. the dissolution of Excell Materials Inc. and the transfer of all assets and liabilities to its sole shareholder "3191285 Nova Scotia Company" on 1 October 2007. The Appellant mainly argued that the transactions of 1 October 2007 could not be qualified as a universal succession but rather had to be seen as a contractual transfer of individual assets. In addition to the time lag between the liquidating distribution of all assets and the liquidation of Excell Materials Inc., there was no causal relationship between the two events, and the distribution of assets was not unconditional.

XII. By letter of 24 June 2013, the Respondent replied that the events of 1 October 2007 had to be seen as a universal succession in law. Even if the Board came to a different conclusion, all assets of Excell Materials Inc. (including the assets in the interests of which the opposition was filed) would still have been transferred to 3191285 Nova Scotia Company on 1 October 2007, i.e. on the same day that Excell materials Inc. was liquidated. Even if one took the view that there was a - rather theoretical - time lag between the transfer of assets to 3191285 Nova Scotia Company and the liquidation of Excell Materials Inc., it would have been practically impossible to request the transfer of opponent status during that precise period, i.e. after

the transfer of assets but still before liquidation. In any case, Section 278 of the Delaware General Corporation Law allowed Excell Materials Inc. to continue the opposition proceedings until the transfer of opponent status was requested.

XIII. In a communication of 26 July 2013 the Board drew the parties' attention to the fact that the case at hand differed from the one decided in T 353/95 by the fact that the request to transfer opponent status had been submitted before a decision on the admissibility of the opposition was taken. Thus, even if the alleged "upstream merger" was not to be considered a case of universal but rather of singular succession, the requested change of parties could still come into effect in time as a result of the Transferee's request that it be registered as the new Opponent and as a result of the submission of adequate evidence regarding the transfer of assets.

Thus, the legal status of the transaction of 1 October 2007 could be left open.

XIV. By letter of 28 October 2013 and during the oral proceedings the Appellant contested this point of view, arguing that case T 353/95 should be read in the light of the findings in case T 413/02. There, the Board had held that in cases of single succession the initial party continued to have the same rights and obligations in the proceedings until sufficient evidence proving the transfer had been submitted. Thus, the status of the original Opponent continued to apply until the point in time when the registration of the new Opponent was requested and sufficient evidence of the transfer was provided.

Therefore, the opposition proceedings had lapsed on 1 October 2007 when Excell Materials Inc. had ceased to exist.

XV. During oral proceedings on 28 November 2013, the Appellant questioned the Respondent's evidence regarding the transfer of opponent status, claiming that only public registration documents and not private documents could be submitted against the other party in inter partes proceedings. If the Board decided to dismiss the appeal, a question dealing with the probative force of private documents should be referred to the Enlarged Board of Appeal. Asked explicitly, the Appellant said it was not contesting the identity of the signatories of the documents submitted by the Respondent in evidence, such as the "Written Consent in Lieu of Sole Stockholder's Meeting" presented by the Respondent with letter of 31 May 2010. During the oral proceedings, the Appellant’s Representatives said they intended to raise an objection under Rule 106 EPC with a view to filing a petition for review under Article 112a EPC should the Board not be willing to make the referral. The Appellant was given ample opportunity to be heard on this issue and its other requests. Thus, no objection was raised.

XVI. The Appellant requested that the decision under appeal be set aside and that the lapse of the opposition proceedings be acknowledged and - as an auxiliary request - that the following question be referred to the Enlarged Board of Appeal:

In inter partes proceedings and relating to a transfer of opponent status, is a private document opposable to third parties for establishing the transfer of opponent

status from a publicly registered extinguished company to its successor?

The Respondent requested that the appeal be dismissed, and that the new auxiliary request not be admitted or, if admitted, be rejected.

Reasons for the Decision

Admissibility of the Appeal

1. The appeal as filed on 14 November 2012 fulfilled the requirements of Articles 106 to 108 EPC and is therefore admissible.

Transfer principles

2. It is well-established case law of the Boards of Appeal, that opponent status cannot be freely transferred. In general, the case law on the transfer of party status distinguishes between two kinds of situation where the transfer of opponent status is potentially allowable (cf. below 3 and 4) and all other situations where it is not (cf. below 5).

3. The first kind concerns cases referred to as "universal succession":

   The procedural position of opponent can, as implicitly acknowledged in Rule 84(2) EPC (Rule 60(2) EPC 1973), be transferred to its heirs, and accordingly the universal legal successor's accession to opponent status is admissible (G 4/88 [points 4 and 6 of the reasons]). Cases of conversion/transformation or amalgamation/merger, where the Opponent only changes its legal form or is completely merged into another

legal or natural person, the resulting entities thus being universal legal successors of the Opponent, fall within this first category (e.g. T 475/88 [1] in the case of a merger). The change of party may in these cases - upon request and production of evidence by either party - be recorded with retro-active effect as from the effective date of the legal succession. The party concerned only has to indicate that a change of name has happened (T 6/05 [1.8]). Acts performed before the Opponent's new name was registered remain valid (T 15/01 [12], T 6/05 [1.8, 1.9]).

4. The second kind concerns cases referred to as "transfer of business assets" or "singular succession":

An opposition pending before the EPO may also "*be transferred or assigned to a third party as part of the opponent's business assets together with the assets in the interests of which the opposition was filed*" (G 4/88 [order], G 2/04 [2.2.2]). In these cases, the change of opponent status only comes into effect *ex nunc* when the record of the transfer is requested by the new Opponent (T 1032/10 [1.2.5 second paragraph]) and sufficient evidence is provided (see T 870/92 of 8 August 1997 [3.1]. This has been confirmed in many later decisions, such as T 956/03 [4], T 1421/05 [3.3, 3.4]; T 1137/97 [4] and T 1032/10 [1-3]). Until that point in time (T 870/92 of 8 August 1997 [2, 3.1], T 136/01 [1.4.10], T 413/02 [3, third paragraph]) or if the new Opponent fails to provide sufficient evidence (T 659/92 [3.3], T 74/00 [9 to 14], T 85/03 of 7 December 2004 [2.2.5], T 229/03 [3, 4]), the former Opponent remains party to the proceedings, holding all procedural rights and obligations (see also T 1032/10 [1.2.5], T 184/11 [2.1]). Acts performed, before the relevant point in time, by the former

Opponent are valid - provided the former Opponent is still in existence and able to act. Acts performed by the new Opponent are invalid, and may have to be repeated once the change of parties has come to effect (T 1514/06 [2.4, 2.5]).

5. Apart from these two exceptions (cf. above 3 and 4), the bundle of procedural rights related to "opponent status" is not freely transferable:

"*The opponent does not have a right of disposition over his status as a party. If he has met the requirements for an admissible opposition, he is an opponent and remains such until the end of the proceedings or of his involvement in them. He cannot offload his status onto a third party*" (G 3/97 [2.2]).

A valid transfer of opponent status always follows the transfer of the relevant business assets (T 298/97 [7.1], T 711/99 [2.1.5(f)]). As the Enlarged Board of Appeal held in G 4/88 [6]:

"... *in such a situation* [where the opposition has been filed in the interest of the Opponent's business or part of that business], *the opposition constitutes an inseparable part of those assets.*"

Even when transferring all the shares of a subsidiary, the parent company is not free to assign opponent status to the former subsidiary on whose behalf it filed the opposition (G 2/04 [order]).

Effects and prerequisites of universal succession

6. The case law of the Boards of Appeal regarding "universal successions" (cf. above 3) has confirmed

(cf. T 6/05 [1.7]) that "*in the case of transfer of the opposition by way of universal succession, the universal successor automatically acquires the bundle of procedural rights of his predecessor and hence party status from the date on which the merger became effective and not only once sufficient evidence to this effect has been produced*". In cases of universal succession, there can be only one (legal) person who has rights and obligations, allowing it to be established unambiguously and without any legal uncertainty, at any point in time in the proceedings, who in fact is the Opponent with party status, regardless of the date when sufficient evidence to this effect is filed (T 6/05 [1.6.3-1.6.4.]).

7. The concept of "universal succession" does not appear in the EPC and, when the EPC entered into force, was known in only some EPO member states' jurisdictions (e.g. Germany and Switzerland), and was unknown or played no significant role in others (e.g. England and France).

Rule 22(3) EPC (which in line with the principle of equal treatment of the parties is applied mutatis mutandis to the transfer of opponent status; see e.g. T 229/03 [5] and T 1091/02, [2.5.1]) states that a transfer of a European patent application has effect vis-à-vis the European Patent Office only at the date when and to the extent that the documents providing evidence of the transfer have been produced. "Universal succession" as applied in the case law of the Boards of Appeal was considered an exception to that rule. It is thus a concept of the procedural law of the European Patent Convention, and therefore has to be construed autonomously (T 15/01, reasons 9).

8. When looking at the reasons why the jurisprudence of the Boards of Appeal rejects free transferability of opponent status (cf. above 5) and has developed the distinction between cases where the change in party status comes into effect *ex tunc* (cf. above 3) and cases where it only comes into effect *ex nunc* in line with Rule 22(3) EPC (cf. above 4 and 6 et seq.) the main ones given in most decisions are firstly certainty as to the person acquiring the relevant assets and liabilities (T 1032/10 [2.1], T 19/97 [5], T 1957/10 [2], T 1137/97 [4], T 1421/05 [3.7], T 956/03 [4, 7]) and secondly the procedural "vacancy" that would arise if a party ceased to exist due to a merger (T 15/01 [10, 11]) because non-existent persons can no longer be parties to proceedings under the EPC (T 353/95 of 25 October 2000 [2], T 15/01 [9]).

The decisions referring to "universal succession" or "singular succession following a transfer of business assets" assume that in the first kind of situation it is clear that there is only one Transferee possessing all the assets (T 670/95 [IV; 2], T 1421/05 [4.9.3], T 6/05 [1.6.3-1.6.4.], T 1957/10 [2]), and that it is appropriate to aim – as Rules 142(1)(a) and 152(9) EPC do in the case of a natural person's death – at uninterrupted continuation of the proceedings (T 15/01 [11]), whereas in the second kind of situation it must first be established whether the relevant assets have been transferred or have remained with the original Opponent (T 298/97 [7.4 to 7.6], T 724/05 [4], T 1421/05 [3.7, 4.9.1], T 384/08 [32 to 34]) who – while not having ceased to exist – is able to pursue the proceedings (T 1032/10 [1.2.4]) until this has been clarified (T 670/95 [2], T 6/05 [1.6.4]).

Legal certainty, therefore, seems mainly to derive from

the fact that within the first kind of situation only one potential Transferee exists (T 475/88 [1], T 6/05 [1.6.4]), and the former Opponent normally no longer exists (T 349/86 of 29 April 1988 [4]). Within the second kind of situation, in contrast, there is uncertainty due to the fact that either several potential Transferees exist (T 298/97 [7.4 to 7.5], T 1877/08 [1.3 to 1.5]) or the former Opponent stays in business alongside the Transferee (T 298/97 [7.4, 7.6], T 1137/97 [3], T 6/05 [1.6.4 last paragraph], T 960/08 [3.c]).

9. Other aspects which, under national law, are traditionally linked with the concept of universal succession (direct and instantaneous assumption, under the law, of all assets and all liabilities) seem not to play such an important role in the case law of the Boards of Appeal regarding the transfer of opponent status. Therefore, some transactions which under national law could be considered as universal succession tend to be handled as cases of "singular succession" by the Boards of Appeal, especially if the Transferor *continues* to exist after transferring parts of its business, whereas the interpretation of "universal succession" by the Boards of Appeal may be broader than in national law in other cases, especially in such cases where the Transferor *ceases* to exist after transferring its business assets.

Different types of cases

10. This autonomous concept developed in the case law of the Boards of Appeal may be illustrated by the following typology of cases:

(i) Succession by law where all assets remain united

(death, conversion/transformation, amalgamation/ merger).
(ii) Succession by law where parts of an enterprise form new legal entities or are immediately merged with other entities (de-merger, spin-off, secession merger).
(iii) Transfer of all assets of an enterprise whose legal entity is subsequently dissolved.
(iv) Transfer of all assets of an enterprise whose legal entity continues to exist.
(v) Transfer of all shares of a subsidiary company.
(vi) Transfer of a part of the assets of an enterprise, forming a business unit, where the opposed patent is related to that business unit.
(vii) Transfer of other single assets.

11. Whereas the situations under (ii) would be considered to be cases of universal succession under national (e.g. German) law, the continued existence of the former Opponent and the fact that it is not possible to decide at first sight to which of the resulting legal entities the part of the enterprise to which the opposed patent is assigned might result in applying the rules of singular succession under the procedural law of the EPC (see e.g. T 136/01 [1.4.7], T 1514/06 [1.1 - 1.4], T 1032/10 [1.2.4]). The situations under (i) are clearly cases of universal succession (T 349/86 of 29.04.88 [4]; T 475/88 [1], T 670/95 [1]), whereas the situations under (vi) are clearly cases of singular succession that may lead to a valid change in opponent status. The situations under (v) and (vii), finally, do not give rise to a transfer of opponent status.

12. As set out above, the question whether or not the situations under (iii) and (iv) would be considered cases of universal succession under *national* law is not decisive.

13. When applying the above-mentioned rules and considerations of EPC case law, in the case of a transfer of all assets, no uncertainty arises as to the person who acquired the relevant part of the enterprise and the concomitant procedural rights. It may be left open whether this aspect is sufficient to apply the rules regarding a universal succession to cases as set out under (iv) above, since the case at hand falls into category (iii) where the former Opponent has ceased to exist. Thus, here, no doubts arise from a co-existence of two potential Opponents, but a vacancy in opponent status might lead to additional procedural problems.

Present case

14. The Board, therefore, agrees with the Opposition Division's finding that, although there is no genuine concept of "universal succession" under the law of the State of Delaware, the case at hand is to be considered one of universal succession under EPC case law. The execution of the Plan of Liquidation and the dissolution of the original Opponent Excell Materials Inc. on 1 October 2007 had the effect that its parent company 3191285 Nova Scotia Company as legal successor acquired Excell's legal status with all rights and liabilities, while Excell Material Inc. ceased to exist as a legal person.

15. In view of the considerations laid out above, the four main arguments brought forward by the Appellant do not lead the Board to a different conclusion.

(i) Although the documents submitted on 31 May 2010 ("Certificate of Dissolution", "Written Consent in Lieu of Sole Stockholder's Meeting" and "Plan of Complete

Liquidation") suggest that both the transfer (via liquidating distribution) and the dissolution took place on the day of the "Adoption of the Plan of Liquidation", the so-called "Effective Date", i.e. 1 October 2007, there may have been a time lag between the transfer of all assets of Excell Materials Inc. and its subsequent dissolution; but, since the decisive aspect is legal certainty regarding the owner of the relevant business assets, any such time lag is in fact non-prejudicial. Independently of whether this time lag did not exist at all, was limited to a "logical second" or lasted several days at the end of September 2007, one thing is clear:

As from 1 October 2007, when Excell Materials Inc. was dissolved, 3191285 Nova Scotia Company was the sole successor in respect of all its rights and obligations, whereas Excell Materials Inc. ceased to exist.

(ii) The Appellant claims there is no evidence of any causal relationship between the dissolution of Excell Materials Inc. and the distribution of its assets. Yet, from the above-cited documents, handed in on 31 May 2010, it seems clear that the dissolution of the company and the distribution of all its assets to the sole stockholder (according to point 3 of the "Plan of Complete Liquidation") were part of a consistent plan resulting in what the Opponent calls an "upstream-merger". As set out above, the fact that the dissolution of the company and the transfer of all its assets may or may not be separated by a logical second or longer does not adversely affect the assumption that the transactions as a whole amount to a case of universal succession. It is not a precondition that the relevant legal consequences derive causally by operation of law from one single legal act.

(iii) The Appellant further alleges that the assets were not transferred unconditionally. Its sole justification for this argument is a reference to the legal opinion given by attorney-at-law Benjamin Straus on 6 May 2010 (submitted on 4 August 2010).

The Opposition Division has already dealt with this argument (points 27 to 30 of the decision of 9 October 2012), stating that limiting liability of the Transferree to the financial value of the assets being taken over is common in business law and no obstacle to a universal succession. The Opposition Division further pointed to the wording of the "Plan of Complete Liquidation", referring not only to "all known obligations" but also to "estimated and contingent liabilities, obligations of or claims against" Excell and, in section 3, to "remaining liabilities, known or unknown". Furthermore, the Opposition Division stated that limiting the liability to the stockholder's pro rata share under Section 282 of the Delaware General Corporation Law did not have any effect in the case at hand, where the parent company 3191285 Nova Scotia Company was the sole stockholder and therefore had to assume the entire liability.

The Appellant has failed to show that the Opposition Division was mistaken. The appeal lacks any reasoning in this respect. An error is also not obvious to the Board.

Therefore, the Board sees no reason to come to a different conclusion from the Opposition Division.

(iv) The Board does not follow the Appellant 's argument that the Respondent, when making its claim on

the basis of Section 278, actually argued that Excell Materials Inc. retained the right to continue the opposition proceedings even though it had transferred its assets to 3191285 Nova Scotia Company.

The Respondent made it clear that the arguments as to the request for transfer of opponent status were submitted only as a precautionary measure in case the Board did not follow its main line of argument that a universal succession had taken place. In that case, Excell, according to Section 4 of the "Plan of Complete Liquidation", would have been obliged and, under Section 278 of the Delaware General Corporation Law, able to continue the opposition proceedings until the transfer of opponent status was requested with the EPO. Therefore, the auxiliary line of argument put forward by the Respondent cannot be seen as an admission that the transfer of assets and/or the liquidation of the company was incomplete, so that a universal succession could not be assumed to have occurred. On the contrary, to deliver precautionary arguments where the status of a party is under dispute is a widely acknowledged measure in the case law of the Boards of Appeal (see e.g. G 2/04 [3.2.6], where the Enlarged Board even allowed the filing of an auxiliary request in the name of a third person who might according to a possible alternative interpretation be considered the correct party to the proceedings).

Quality of evidence filed

16. The Appellant did not question the identity of the signatories and, thus, the authenticity of the documents filed by the Respondent on 31 May 2010, in particular the "Written Consent in Lieu of Sole Stockholder’s Meeting". Nevertheless, it questioned

whether a private document was opposable to third parties for establishing the transfer of opponent status from a dissolved publicly registered company to its successor. Whereas the liquidation of Excell Materials Inc. was apparent from a public register and, thus, opposable to third parties including the patentee, the transfer of assets was established only by private documents presented nearly three years after liquidation. Opposition proceedings being adversarial inter partes proceedings where the Patentee has the right to know the rightful Opponent, the Appellant (here: the Patentee) therefore contested the probative force of the documents submitted.

17. It is established case law of the Boards of Appeal that procedural facts have to be ascertained ex officio before a decision can be given (see e.g. T 384/08 [10]). The mere declaration by a party that it is the original Opponent's successor is not sufficient (T 670/95 [2], T 1697/07 [2.4], T 1206/06 [2]). Facts substantiating the transfer and evidence of facts have to be submitted by the respective party. Whereas public registers often enjoy public trust regarding the facts registered and other public documents may be more conclusive on formal questions, the identity of the issuer and the date and place of creation of a private document can be more easily contested. But neither kind of document provides irrefutable evidence of the correctness of a document's content. Furthermore, the accuracy of public registers is dependent on the accuracy of the information received by the authorities, handed in mostly in the form of private documents. Thus, there is no reason not to regard private documents as possible evidence, especially in a case like the one at hand where the Appellant neither contested the authenticity of the private document nor

provided contrary evidence reagrding its content. Correspondingly, in T 19/97 [4] the Board stated:

> "*Die ordnungsgemäße Parteistellung der Einsprechenden ist als allgemeine Verfahrensvoraussetzung von Amts wegen zu prüfen und betrifft die Zulässigkeit der weiteren Verfahrenshandlungen ... . Sind Verfahrenstatsachen von Amts wegen zu prüfen, reicht der bloße schlüssige Sachvortrag der Einsprechenden zum Nachweis nicht aus. Die Kammer muß vielmehr aufgrund der vorgelegten Beweismittel vom Vorliegen des behaupteten Sachverhalts überzeugt sein, ist aber nicht an bestimmte förmliche Beweismittel gebunden (Artikel 117 (1) EPÜ).*"

It was further held in T 261/03 [3.5.5] of 24 November 2005 that

> "*the requirements of Rule 20 EPC are complied with if the documents submitted ... are such as to render it credible to the competent organ of the EPO, evaluating the documents in a reasonable way and in the light of all the circumstances, that the alleged facts are true. The mere fact that another document might have been a more direct piece of evidence than the one submitted by the Appellant does not invalidate the proof actually offered (see T 273/02 of 27 April 2005, point 2.6).*"

18. In most cases, private documents seem to be the most direct pieces of evidence, whereas, as set out before, public registers normally have to rely on information submitted to the authorities in private documents. Therefore, it would make no sense not to admit them as potential means of evidence into proceedings before the European Patent Office.

19. Accordingly, the Boards of Appeal have always accepted public and/or private documents as evidence of transfers of rights, whether by way of a universal succession or a single transfer of assets, e.g. extracts from commercial registers, contracts and letters in T 184/11 [2.2, 2.3], merger agreements in T 1032/10 [2.2], a spin-off agreement in T 1514/06 [1.2 to 2.3], letters and copies of an agreement in T 261/03 [3.2, 3.5.2, 3.5.3] of 24 November 2005, a declaration of a deputy civil-law notary in T 15/01 [4], a declaration of a notary public in T 6/05 [1.4], an asset purchase agreement in T 384/08 [19], excerpts of contracts, a lawyer's assurance and declarations by persons entitled to sign in T 19/97 [4], an assignment and an agreement in T 1877/08 [1.3, 1.4] and a transfer contract in T 724/05 [5 to 7]. In the absence of evidence to the contrary provided by the other party, even a statement signed by the party’s managing director was deemed to be sufficient in T 1137/97 [2, 3], whereas in T 426/06 [4, 5] the probative force of an arrangement as sole evidence was left open only because the factual basis of an alleged transfer of assets was not substantiated.

20. The level of proof required is credibility of the facts for which evidence is given, in the light of all circumstances (T 261/03 of 24 November 2005 [3.5.5], T 6/05 [1.5]).

Referral

21. When requesting a referral to the Enlarged Board of Appeal the Appellant argued that a point of law of fundamental importance within the meaning of Article 112(1) EPC has arisen.

To the Board, this does not seem to be the case. The question has not been raised in a significant number of cases and it is not to be expected that this will change in the future. Furthermore, the Board sees no requirement within the meaning of Article 112(1)(a) EPC to refer the question. As set out above, the Board has been able to come to a conclusion applying established principles. The Board has no doubt about the result and is not aware of any legal view points expressed either in national case law or in legal commentaries which might cast doubt on the conclusion reached (see J 5/81, OJ 1982, 155 [11], T 656/98, OJ 2003, 85 [2.1, 4.1, 6.4], T 384/08 [10]).

The effects of a singular succession following a transfer of business assets (obiter dictum)

22. Even if the transaction of 1 October 2007 were only to be considered a case of singular succession following a transfer of business assets, the transfer of opposition status from Excell Materials Inc. to 3191285 Nova Scotia Company and from there to Harsco Minerals Canada Corporation would have been effective as from 31 May 2010, when the request and sufficient evidence regarding the transfers were filed.

The right under Rule 22 EPC is not limited in time, and the period between the contractual transfer of opposition status and its registration at the EPO does not prevent registration even if the Transferee has in the meantime ceased to exist: the opposition proceedings are not terminated until so decided by the Opposition Division, as follows inter alia from Rule 84(2) EPC. Therefore, the reasoning of T 353/95 [page 3] cannot be interpreted to mean that opposition proceedings automatically lapse if a party ceases to

exist and, in consequence, loses its capacity to be a party to proceedings before the EPO. It is still up to the Opposition Division to terminate the proceedings in such a situation, if it does not exercise its discretion to continue them.

Thus, where – contrary to the situation in cases T 353/95 or T 22/09 [9] – a request to record the transfer of opponent status was made before a decision on the admissibility of the opposition was taken, the transfer – that had taken place before the Transferee ceased to exist – may still be recorded. Consequently, at the point in time when the Opposition Division took its interlocutory decision an Opponent existed and the opposition was admissible. Only such acts as were performed by the Representative of Excell Materials Inc. after this corporation had already ceased to exist and before the transfer of party status was recorded would have been invalid and, potentially, would need to be repeated (T 1514/06) had the transfer not qualified as an act of universal succession.

Power of representation of the Respondent's Representative

23. The Appellant did not provide any arguments with regard to the second point of the appealed decision, i.e. the Opposition Division's confirmation of the Respondent's Representative's power of representation. The Board does not see any reason why this part of the Opposition Division's decision could be challenged either, especially since the Board shares the Opposition Division’s view concerning the universal succession of the new Opponent.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar: The Chairman:

C. Vodz G. Raths

Decision electronically authenticated