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**Datasheet for the decision
of 28 September 2017**

Case Number: T 1775/14 - 3.3.03

Application Number: 06789966.6

Publication Number: 1920005

IPC: C08L63/00, C08L63/02,
C08L51/04, C09J163/00,
C09J163/02

Language of the proceedings: EN

Title of invention:

EPOXY COMPOSITIONS HAVING IMPROVED IMPACT RESISTANCE

Patent Proprietors:

Henkel AG & Co. KGaA
Henkel Ireland Limited

Opponents:

PPG Industries, Inc.
THE DOW CHEMICAL COMPANY
Huntsman Advanced Materials (Switzerland) GmbH
Sika Technology AG

Relevant legal provisions:

EPC Art. 123(2)
RPBA Art. 12(4)

Keyword:

Late-filed requests - submitted with the statement of grounds
of appeal - abuse of procedure (no)

Amendments - extension beyond the content of the application
as filed (yes)

Decisions cited:

G 0002/10, G 0001/15



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Case Number: T 1775/14 - 3.3.03

D E C I S I O N
of Technical Board of Appeal 3.3.03
of 28 September 2017

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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 7 July 2014
revoking European patent No. 1920005 pursuant to
Article 101(3) (b) EPC.**

Composition of the Board:

Chairman D. Semino
Members: O. Dury
R. Cramer

Summary of Facts and Submissions

I. The appeal by the patent proprietors lies against the decision of the opposition division posted on 7 July 2014 revoking European patent No. 1 920 005, which was granted in respect of European patent application No. 06 789 966.6, filed as international application PCT/US2006/033013 and claiming priority from US 60/711029 (hereinafter D3.6) and US 60/760941 (hereinafter D3.7).

II. The claims of the application as filed which are relevant to the present decision read as follows:

"1. A composition comprising:

A) at least one epoxy resin;

B) rubber particles having a core-shell structure;

C) at least one auxiliary impact modifier/toughening agent; and

D) at least one heat-activated latent curing agent."

"7. The composition of Claim 1 comprising from about 5 to about 25 weight percent of said rubber particles having a core-shell structure."

"8. The composition of Claim 1 wherein said rubber particles have a core comprised of a diene homopolymer, diene copolymer or polysiloxane elastomer."

"18. The composition of Claim 1 wherein said at least one auxiliary impact modifier/toughening agent is selected from the group consisting of epoxy-based prepolymers obtained by reacting one or more amine-terminated polymers with one or more epoxy resins."

"19. The composition of Claim 1 wherein said at least one auxiliary impact modifier/toughening agent is selected from the group consisting of reaction products of isocyanate-terminated prepolymers and hydroxyl-containing epoxides."

"20. The composition of Claim 1 wherein said at least one auxiliary impact modifier/toughening agent is selected from the group consisting of reaction products of isocyanate-terminated prepolymers and compounds having one or more phenolic, benzyl alcohol, aminophenyl or benzylamino groups per molecule."

"21. The composition of Claim 1 wherein said at least one auxiliary impact modifier/toughening agent is selected from the group consisting of polystyrene-1, 4-polybutadiene- polymethylmethacrylate block copolymers."

"22. The composition of Claim 1 wherein said at least one auxiliary impact modifier/toughening agent is selected from the group consisting of adducts of dimeric fatty acids with epoxy resins."

"23. The composition of Claim 1 wherein said at least one auxiliary impact modifier/toughening agent is a polymeric or oligomeric material having a glass transition temperature below -30C and containing one or more functional groups selected from the group consisting of epoxy groups, carboxylic acid groups, amino groups and hydroxyl groups."

III. Four notices of opposition against the patent were filed, in each of which the revocation of the patent in its entirety was requested.

IV. The contested decision was based *inter alia* on a main request filed with letter of 11 April 2013, which is the sole request defended in opposition proceedings which is relevant for the present decision.

Claim 1 of said main request read as follows (additions as compared to claim 1 of the application as filed are indicated in **bold**, deletions in ~~strikethrough~~):

"1. A composition comprising:

A) at least one epoxy resin;

B) rubber particles having a core-shell structure, **wherein**

(i) the composition comprises from about 5 to about 25 weight percent of said rubber particles having a core-shell structure; and/or

(ii) said rubber particles have a core comprised of a diene homopolymer, diene copolymer or polysiloxane elastomer;

C) at least one auxiliary impact modifier/toughening agent **which does not have a core-shell structure and which is selected from the group consisting of epoxy-based prepolymers obtained by reacting one or more amine-terminated polymers with one or more epoxy resins; and polyurethanes, selected from reaction products of isocyanate-terminated prepolymers and hydroxyl-containing epoxides or reaction products of isocyanate-terminated prepolymers and compounds having one or more phenolic, benzyl alcohol, aminophenyl or benzylamino groups per molecule,** and

D) at least one heat-activated latent curing agent."

V. The following documents were *inter alia* cited in the contested decision:

D2.3: WO 96/17880

D2.5: US 6 776 869

D4.3: WO 2008/016889

In that decision the opposition division *inter alia* held that the main request fulfilled the requirements of Article 123(2) EPC but lacked novelty over documents D2.3, D2.5 and D4.3. It was in particular concluded that D4.3 was a valid prior art document because none of the priorities (D3.6 and D3.7) claimed by the patent in suit were valid.

VI. The patent proprietors (appellants) appealed the above decision. With the statement setting out the grounds of appeal the appellants requested that the decision be set aside and the patent be maintained in amended form according to any of the main request filed with letter of 11 April 2013 or auxiliary requests 1 to 4 filed therewith.

Claim 1 of auxiliary request 1 differed from claim 1 of the main request in that:

- the term "about" used twice to define the range of the amount of rubber particles B) was deleted;
- in feature C) the expression "**or reaction products of isocyanate-terminated prepolymers and compounds having one or more phenolic, benzyl alcohol, aminophenyl or benzylamino groups per molecule**" was deleted.

Claim 1 of auxiliary request 2 differed from claim 1 of the main request in that:

- the term "about" used twice to define the range of the amount of rubber particles B) was deleted;
- in feature C) the expression "**and polyurethanes, selected from reaction products of isocyanate-terminated prepolymers and hydroxyl-containing epoxides or reaction products of isocyanate-terminated prepolymers and compounds having one or more phenolic, benzyl alcohol, aminophenyl or benzylamino groups per molecule**" was deleted.

VII. In their reply to the statement of grounds of appeal each of respondents 1 to 4 (opponents 1 to 4) requested that the appeal be dismissed.

VIII. Issues to be discussed at the oral proceedings were specified by the Board in a communication.

IX. During the oral proceedings before the Board, which were held on 28 September 2017 in the absence of respondent 3 as announced by letter of 5 September 2017, the appellants withdrew the main request and auxiliary requests 3 and 4.

X. The appellants' arguments, insofar as relevant to the decision, may be summarised as follows:

Auxiliary requests 1 and 2 - Admittance

- (a) In view of the file history during the opposition proceedings, auxiliary requests 1 and 2 were a *bona fide* reply to the contested decision. Since those requests had been filed at the earliest opportunity

and further aimed at overcoming all the objections put forward by the respondents, it was not justified not to admit those requests to the proceedings.

Auxiliary request 1 - Article 123(2) EPC

- (b) The combination of features according to claim 1 was derivable *inter alia* from the combination of claims 1, 7, 8, 18 and 19 as originally filed. Considering that the patent in suit was based on US priority documents and on a US-PCT application the skilled person would understand that the original set of claims was worded in accordance with American practice but that multiple dependency of the dependent claims was contemplated. In that respect, it was derivable from the application as filed as a whole that all the compositions being claimed were adhesive as shown e.g. by the fact that the expressions "adhesive composition" and "composition" were indifferently used.
- (c) Considering the application as filed as a whole the skilled person would understand that original claim 19 was limited to reaction products being "polyurethanes" as indicated in the corresponding passage at the bottom of page 21 of the application as filed.
- (d) The combination of features now defined in claim 1 was derivable from the application as filed as a whole, in particular from the information provided therein regarding the amount of rubber particles having a core-shell structure B), the nature of the core thereof and the nature of the auxiliary impact

modifier.

(e) In view of the application as filed as a whole, the wording in feature C) of operative claim 1 "at least one auxiliary impact modifier/toughening agent ... and which is selected from the group consisting of ... and ..." was to be read as being limited to compositions comprising either one or the other of both alternatives mentioned therein for the auxiliary impact modifier but not the combination thereof.

(f) For those reasons, the requirements of Article 123(2) EPC were met.

Auxiliary request 2 - Article 123(2) EPC

(g) The same arguments as for auxiliary request 1 were valid.

XI. The respondents' arguments, insofar as relevant to the decision, may be summarised as follows:

Auxiliary requests 1 and 2 - Admittance

(a) The novelty objections over D2.5 and D4.3 retained by the opposition division against the then pending main request were already on file from the beginning of the opposition proceedings and the opposition division had indicated in its preliminary opinion that D2.5 was novelty destroying. Although an additional novelty objection over D2.3 was raised later in writing by respondent 4 and was retained by the opposition division during the oral proceedings, the same line of argumentation was followed and the same subject-

matter was objected to as in respect of D2.5. Therefore, the factual situation did not change during the oral proceedings and the appellants could not have been surprised by the decision taken in respect of novelty. In view of the above, the appellants should have submitted auxiliary requests 1 and 2 already during the first instance proceedings, at the latest during the oral proceedings before the opposition division.

- (b) The term "about", which was present in many dependent claims in connection with ranges, had been objected to throughout the proceedings. There was no reason why said deficiency had not been overcome.
- (c) The appeal proceedings were not to be used to start a new case. In particular, operative auxiliary requests 1 and 2 were not convergent with the requests defended during the opposition proceedings and their admission would extend the scope of discussion.
- (d) For those reasons auxiliary requests 1 and 2 should not be admitted to the proceedings.

Auxiliary request 1 - Article 123(2) EPC

- (e) In the original set of claims the dependent claims only depended on claim 1 and not on each other. Therefore, the combination of claims 1, 7, 8, 18 and 19 contemplated by the appellants was not directly and unambiguously supported by the original set of claims. The fact that the application on which the patent in suit was based

was filed in the US should not play a role.

- (f) The passage at page 14, line 32 to page 15, line 2 was specifically directed to "adhesive" compositions. Considering that operative claim 1 was not limited to adhesive compositions, said passage of the application as filed could not provide a valid support for the amendment of operative claim 1 concerning the amount of rubber particles B) (i).
- (g) The wording of original claim 19, which was not limited to reaction products being "polyurethanes", did not provide a valid support for the amendment made in respect of the second alternative for component C) according to claim 1.
- (h) Although most of the features mentioned in claim 1 were possibly disclosed in the application as filed, there was no direct and unambiguous support for their specific combination.
- (i) The wording of operative claim 1 "at least one auxiliary impact modifier/toughening agent ... and which is selected from the group consisting of ... and ..." was to be read as including the simultaneous presence of both alternatives of auxiliary impact modifier mentioned therein.
- (j) For those reasons, the requirements of Article 123(2) EPC were not met.

Auxiliary request 2 - Article 123(2) EPC

- (k) The same arguments as for auxiliary request 1 were valid.

XII. The appellants requested that the decision under appeal be set aside and the patent be maintained in amended form on the basis of the claims of auxiliary requests 1 or 2 filed with the statement of grounds of appeal.

The respondents requested that the appeal be dismissed.

Reasons for the Decision

1. Following the withdrawal during the oral proceedings before the Board of the main request and of auxiliary requests 3 and 4 filed with the statement of grounds of appeal, the sole requests to be dealt with in this decision are auxiliary requests 1 and 2 filed with the statement of grounds of appeal.
2. In claim 1 of the main request dealt with in the contested decision, three alternatives are mentioned for feature C), namely
 - epoxy-based prepolymers obtained by reacting one or more amine-terminated polymers with one or more epoxy resins;
 - polyurethanes, which are reaction products of isocyanate-terminated prepolymers and hydroxyl-containing epoxides; and
 - polyurethanes, which are reaction products of isocyanate-terminated prepolymers and compounds having one or more phenolic, benzyl alcohol, aminophenyl or benzylamino groups per molecule.

Those three alternatives will be hereinafter referred to as features C1), C2) and C3), respectively.

Auxiliary requests 1 and 2 - Admittance

3. The respondents requested that auxiliary requests 1 and 2 not be admitted to the proceedings because they should have been filed in first instance proceedings.
- 3.1 Considering that auxiliary requests 1 and 2 were submitted together with the appellants' statement of grounds of appeal, they were filed pursuant to Article 12(2) RPBA and underlie the stipulations of Article 12(4) RPBA according to which the Board has the power to hold inadmissible requests which could have been presented in the first instance proceedings.
- 3.2 In that respect, the question has to be answered whether there are objective reasons why the appellants could have been expected to present their requests in the first instance proceedings (see Case Law of the Boards of Appeal of the EPO, 8th edition, 2016, IV.E.4.3.2.c) so that those requests should have already been filed at that stage.
- 3.3 In view of the amendments made in claim 1 of each of operative auxiliary requests 1 and 2 as compared to the main request refused by the opposition division (deletion in feature C) of either feature C3) or of both features C3) and C2)) and in view of the appellants' argumentation in that respect (section V.2 of the statement of grounds of appeal), it is clear that those requests were filed in reply to the contested decision and aimed at overcoming the novelty objections over D2.3 and D2.5 retained by the opposition division against the then operative main

request. Since the appellants further argued in the statement of grounds of appeal that D4.3 was not a valid prior art because claim 1 benefited from the priority date of D3.6, as was already argued during the first instance proceedings, auxiliary requests 1 and 2 are a *bona fide* reaction to the contested decision.

3.4 However, the novelty objection over D2.5 was already raised in the notice of opposition of respondent 2 (section 6). Therefore, the appellants were well aware of that objection from the beginning of the opposition procedure and could have been expected either to show that the objection was not valid or to overcome it by amending their requests accordingly.

3.4.1 In that respect, in auxiliary requests 1 and 2 dealt with in the contested decision the appellants tried to overcome the novelty objection against D2.5, which was directed to compositions comprising feature C3) for component C), by either

- *inter alia* deleting features C2) and C3) mentioned for component C) in claim 1 of the main request then pending (see claim 1 of auxiliary requests 1 and 2 dealt with in the decision) or
- by combining feature C3) with an amended definition of the rubber particles B) using a product-by-process feature (see claim 2 of auxiliary request 1 dealt with in the decision).

In view of the above, the auxiliary requests submitted during the oral proceedings before the opposition division and on which the contested decision was based constituted already *bona fide* attempts to overcome the novelty objection over D2.5 retained by the opposition

division against the then pending main request.

- 3.4.2 Further considering that the novelty objection in respect of D2.3 retained by the opposition division against the then pending main request was also directed to the embodiments being claimed comprising alternative C3) for component C), it is clear that said auxiliary requests 1 and 2 aimed at overcoming the novelty objections over both D2.3 and D2.5.
- 3.4.3 Under those circumstances it cannot be concluded that the appellants have not tried to overcome the novelty objections over D2.5 and D2.3 during the first instance proceedings and that they first tried to deal with said objections in their statement of grounds of appeal. Besides, in both attempts made during the oral proceedings before the opposition division, the appellants tried to eliminate the embodiment of feature C) which was held by the opposition division to be anticipated by D2.5 and D2.3 (namely compositions comprising feature C3)), which is a similar line of defence to that now used in appeal in respect of operative auxiliary requests 1 and 2.
- 3.4.4 In view of the above, the Board concludes that the submission of operative auxiliary requests 1 and 2 together with the statement of grounds of appeal does not constitute a change of line of defence in respect of novelty over D2.3 and D2.5 which should have been submitted in first instance proceedings.
- 3.5 Regarding the objection of lack of novelty over D4.3, the embodiments of operative claim 1 objected to either during the opposition or the appeal proceedings are those wherein component C) corresponds to the first alternative C1) and not alternative C3) as in D2.5 and

D2.3. In operative auxiliary requests 1 and 2 the appellants do not address the issue of novelty with respect to D4.3 by way of amendments but maintain the same line of argumentation as during the opposition proceedings, namely that priority is valid and D4.3 is not a piece of prior art. Under those circumstances, the fact that the novelty objection over D4.3 was raised at the beginning of the opposition proceedings has no bearing on the admittance of these requests, contrary to the respondents' view.

3.6 Regarding the respondents' objection related to the presence of the term "about" in some dependent claims of operative auxiliary requests 1 and 2, it is conspicuous that said objection could have been removed in a straightforward manner by merely deleting that term during the oral proceedings before the Board. Although it is correct that said deficiency could have been overcome earlier during the appeal proceedings, such an amendment of the operative requests could have been expected by the respondents and would neither have complicated the case, nor changed the scope of discussion. Therefore, that objection did not convince.

3.7 Under these circumstances, the Board finds no reasons not to admit auxiliary requests 1 and 2 to the proceedings pursuant to Article 12(4) RPBA.

Auxiliary request 1 - Amendments

4. Claim 1

The subject-matter of claim 1 corresponds to claim 1 as originally filed with the following amendments:

- feature B) was limited by addition of feature(s) (i) and/or (ii) (hereinafter features B)(i) and B)(ii), respectively);
- feature C) was limited by addition of "which does not have a core-shell structure" and the more specific definition of the agent to be selected among two alternatives, namely "epoxy-based prepolymers obtained by reacting one or more amine-terminated polymers with one or more epoxy resins" and "polyurethanes, selected from reaction products of isocyanate-terminated prepolymers and hydroxyl-containing epoxides" (i.e. features C1) and C2)).

4.1 The appellants argued that the combination of features now being defined in claim 1 was derivable from the combination of claims 1, 7 (feature B)(i)), 8 (feature B)(ii)), 18 (feature C1)) and 19 (feature C2)) as originally filed.

4.1.1 However, each of original claims 7, 8, 18 and 19 was only dependent on original claim 1. Therefore, the combination of claims 1, 7, 8, 18 and 19 cannot be held to be directly and unambiguously derivable from the original set of claims. In particular, the original set of claims can neither provide a valid support for the combination of features B)(i) and B)(ii) nor of features C1) and C2)). Nor can it provide a valid basis for the combination of all those features together.

4.1.2 In that respect, the appellants argued that it should be taken into account that the patent in suit was based on US priority documents and on a US-PCT application so that, although the original set of claims was worded in accordance with American practice, the skilled person would understand that multiple dependency of the

dependent claims was contemplated.

However, for the assessment of Article 123(2) EPC, the question to be answered is whether or not the subject-matter of an amended claim extends beyond the content of the application as filed, i.e. whether after the amendment the skilled person is presented with new technical information (see G 2/10, OJ EPO 2012, 376, point 4.5.1 of the Reasons and Case Law, *supra*, II.E.1 and 1.2.1).

Therefore, the question whether the amended claims are based on an application filed in the US or in Europe cannot play a role. Besides, in the present case, there is no doubt that the combination of claims 7, 8, 18 and 19 provides new technical information as compared to the subject-matter of each of those claims on its own. For that reason, the appellants' argument did not convince.

4.1.3 Also, the wording of original claim 19 is not identical to feature C2) now present in claim 1 because its subject-matter is not limited to reaction products being "polyurethanes". Therefore, original claim 19 *per se* does not provide a valid support for the amended feature C2) now present in claim 1.

4.1.4 For those reasons, the appellants' arguments based on the claims only did not succeed.

4.2 In addition the appellants considered that the combination of features now defined in claim 1 was derivable from the application as filed as a whole.

4.2.1 For the assessment of Article 123(2) EPC in the case of multiple amendments being made, as is the case here,

the question has to be answered whether the specific combination of features now being defined in operative claim 1 emerges from the application as filed, whereby the description is not to be viewed as a reservoir from which features pertaining to separate embodiments can be freely combined in order to artificially create a certain embodiment (Case Law, *supra*, II.E.1.4.1).

- 4.2.2 In that respect, the appellants argued that feature B) (i) corresponded to the broadest range for the amount of core-shell particles B) disclosed in the application as filed in a general manner (page 14, lines 32-33), which would, thus, apply to any embodiment.

However, said passage of the application as filed is limited to "adhesive composition" (page 14, line 32), which is not reflected in the wording of operative claim 1. Further considering that other uses, different from "adhesive" compositions, were explicitly mentioned in the application as filed for the compositions being claimed (see e.g. page 36, lines 2-23), the passage at page 14, lines 32-33 does not provide a valid support for feature B) (i) at the present level of generality.

- 4.2.3 Besides, feature B) (ii) effectively limits the nature of the core to some of the embodiments originally disclosed at two different passages of the application as filed, namely cores comprised of a diene homopolymer, diene copolymer (page 4, lines 26-27) or polysiloxane elastomer (page 5, line 10), whereby for the latter one additional alternative, namely polybutylacrylate was not taken up in the definition of the core in operative claim 1. It was not shown that the skilled person would have had any reason, upon consideration of the description as a whole, to

concentrate on the three alternatives now mentioned in feature B) (ii). In that respect, it is in particular derivable from the information provided in the application as filed that the examples thereof only exemplify a single, specific family of core, namely polybutadiene copolymers (see page 14, lines 17-21 for the nature of Kaneka Ace MX 120 or Kaneka Ace MX 156 which were used in examples 1-4 and 6-21; see also page 40, lines 18-20 for example 5). Therefore, those examples cannot constitute a pointer to feature B) (ii) at the present level of generality. For that reason, feature B) (ii) can only be arrived at by choosing arbitrarily three out of four alternatives disclosed in the description of the application as filed for the core material.

4.2.4 Features C1) and C2) are based on page 17, lines 4-9 and page 21, lines 24-32 of the application as filed, respectively. However, considering that the application as filed as a whole contained several other possible alternatives for component C) (page 23, line 20 to page 26, line 30, which comprises the subject-matter of original claims 20 to 23; examples: see Table 1, footnotes 4 to 11), it was not shown that the skilled person would have had any reason to concentrate on features C1) and/or C2) among all those possible alternatives. Therefore, feature C) as now defined in claim 1 can only be arrived at by choosing arbitrarily two out of the various alternatives disclosed in the description of the application as filed for the auxiliary impact modifier.

Besides, although the combination of different auxiliary impact modifiers was contemplated in the application as filed (page 26, lines 32-33), it was further not shown that the specific combination of C1)

and C2), which is now defined in operative claim 1, is directly and unambiguously derivable from the application as filed.

In that respect the appellants argued that the wording of operative claim 1 "at least one auxiliary impact modifier/toughening agent ... and which is selected from the group consisting of (C1) and (C2)" would be limited to compositions comprising either (C1) or (C2) but not their combination. However, such a reading is not in line with the literal wording of operative claim 1. Considering that it was also neither argued nor shown that such a reading would not make sense, that argument is rejected and claim 1 is read as encompassing compositions comprising components (C1) and (C2) either alone or in combination.

- 4.2.5 In view of the above, the specific combination of features B) (i) and/or B) (ii) together with features C1) and/or C2), which is now defined in operative claim 1, can only be arrived at after combining original claim 7 with several other passages of the description of the application as filed regarding the nature of the core (feature B) (ii)) and of the auxiliary impact modifier (features C1) and C2)). However, it was not shown that the description, including the examples, of the application as filed provided any pointer to such combinations of features. In particular, the combination of original claim 7 further limited to rubber particles having a core comprised of either a polysiloxane elastomer or a diene homopolymer together with an auxiliary impact modifier being either C1), C2) or a combination of C1) and C2) was not shown to be directly and unambiguously derivable from the application as filed.

- 4.3 For those reasons the subject-matter of operative claim 1 does not fulfil the requirements of Article 123(2) EPC and auxiliary request 1 is not allowable.

Auxiliary request 2 - Amendments

5. The subject-matter of claim 1 differs from that of claim 1 of auxiliary request 1 in that alternative C2) was deleted.
6. Considering that the analysis provided in sections 4.1.1, 4.1.2, 4.2.2, 4.2.3, 4.2.4 and 4.2.5 (in as far as they concern feature C1) and not its combination with feature C2)) above in respect of auxiliary request 1 remains valid, the combination of features now being defined in claim 1 of auxiliary request 2 is, for the same reasons, not directly and unambiguously derivable from the application as filed. Consequently, the subject-matter of operative claim 1 does not fulfil the requirements of Article 123(2) EPC and auxiliary request 2 is not allowable.
7. None of the appellants' requests being allowable, the appeal is to be dismissed.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



P. Martorana

D. Semino

Decision electronically authenticated