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**Datasheet for the decision  
of 11 May 2021**

**Case Number:** T 0738/16 - 3.2.03

**Application Number:** 06809173.5

**Publication Number:** 1984133

**IPC:** B22D41/02, F27D1/10, F27D1/16

**Language of the proceedings:** EN

**Title of invention:**

PROCESS FOR THE PRODUCTION OF A WEAR LINING FROM A PARTICULATE  
REFRACTORY MATERIAL FOR CASTING LADLES AND POURING BOXES,  
TOGETHER WITH THE WEAR LINING MADE IN THIS WAY

**Patent Proprietor:**

Sibelco Nordic AS

**Opponents:**

Müller-Boré & Partner  
VESUVIUS GmbH

**Headword:**

**Relevant legal provisions:**

RPBA Art. 13(1), 13(3)  
EPC Art. 123(2), 123(3), 111(1)  
RPBA 2020 Art. 11

**Keyword:**

Late-filed auxiliary requests - adjournment of oral proceedings would have been required (no) - request clearly allowable (yes) - admitted (yes)  
Amendments - allowable (yes)  
Remittal - special reasons for remittal - (yes)

**Decisions cited:**

T 1704/06

**Catchword:**



**Beschwerdekammern**

**Boards of Appeal**

**Chambres de recours**

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Case Number: T 0738/16 - 3.2.03

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.03**  
**of 11 May 2021**

**Appellant:** Sibelco Nordic AS  
(Patent Proprietor) N-6146 Aheim (NO)

**Representative:** Protector IP AS  
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0166 Oslo (NO)

**Respondent:** Müller-Boré & Partner  
(Opponent 1) Grafinger Strasse 2  
81671 München (DE)

**Representative:** Müller-Boré & Partner  
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**Opposition withdrawn:** VESUVIUS GmbH  
(Opponent 2) Gelsenkirchener Strasse 10  
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**Representative:** Debled, Thierry  
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Intellectual Property Department  
Rue de Douvrain, 17  
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**Decision under appeal:** **Decision of the Opposition Division of the  
European Patent Office posted on 25 January 2016  
revoking European patent No. 1984133 pursuant to  
Article 101(3) (b) EPC.**

**Composition of the Board:**

<b>Chairman</b>	G. Patton
<b>Members:</b>	B. Miller
	E. Kossonakou

## **Summary of Facts and Submissions**

- I. European patent No. 1 984 133 B1 (the "patent") relates to a process for the production of a wear lining for casting ladles and pouring boxes.
- II. Two oppositions were filed against the patent, based on the grounds of Article 100(b) and (c) EPC and of Article 100(a) EPC together with Articles 54 and 56 EPC.

The opposition division decided to revoke the patent, since it came to the conclusion that the subject-matter of claim 1 of the patent as granted did not meet the requirements of Article 123(2) EPC. The opposition division further concluded that the amendment in claim 1 of auxiliary request 1 filed during the oral proceedings before the opposition division did not meet the requirements of Article 123(3) EPC.

This decision was appealed by the patent proprietor (the appellant). Opponent 2 (Vesuvius GmbH) withdrew its opposition during the opposition proceedings. Opponent 1 (Müller-Boré & Partner) is therefore the sole respondent in these appeal proceedings. However, the respondent has neither filed any requests nor submitted any arguments in the appeal proceedings.

- III. With the summons to oral proceedings, the Board sent a communication pursuant to Articles 15(1) and 17(2) of the Rules of Procedure of the Boards of Appeal (RPBA 2007) indicating to the parties its preliminary opinion of the case.

- IV. With a letter dated 15 April 2021 the respondent confirmed that it would not attend the oral proceedings.
- V. Oral proceedings were held on 11 May 2021 by videoconference without objection by a party and with the appellant as the sole participant pursuant to Rule 115(2) EPC and Article 15(3) RPBA 2020. During the oral proceedings the appellant filed a fourth auxiliary request.

At the end of the oral proceedings, the appellant stated that it maintained the fourth auxiliary request as the sole request and withdrew all higher ranking requests.

- VI. Claim 1 of the fourth auxiliary request reads as follows (amendments compared to claim 1 as originally filed indicated in bold):

"Process for the production of a wear lining for casting ladles and pouring boxes used in foundry practice by introducing - e.g. in the gap between a mould inserted into the casting ladle or pouring box and its more permanent lining - a pourable mass consisting of a **suitable** granular or particulate refractory material

**e.g. magnesite, silica, olivine and alumina**

that has a low heat conductivity and **contains** a binder ~~in the form of at least comprising~~

4-4,5 wt% of sodium silicate or potassium silicate

**calculated on the total pourable mass,**

and an

**10 - 12 wt%, ester or a mixture of esters calculated on the weight of the Na/K silicate**

capable of converting the said silicate into a silica-containing gel that binds the particulate refractory material into a solid substance, characterized in that the binder consisting of the said silicate and ester is added to the particulate refractory material **in one mixing step** simultaneously with the delivery of the latter to the required position to be lined."

VII. The appellant's arguments, as far as relevant for this decision, can be summarised as follows.

The fourth auxiliary request *prima facie* addressed all objections concerning Article 123(2) and (3) EPC. Hence, it should be admitted into the appeal proceedings.

Claim 1 of the fourth auxiliary request was based on claim 1 as originally filed in combination with the teaching of the application as originally filed on page 6, lines 24 to 27, and page 15, lines 9 to 16.

## **Reasons for the Decision**

### 1. Applicable Rules of Procedure of the Boards of Appeal

The appeal was filed before the entry into force of the revised version of the Rules of Procedure of the Boards of Appeal (RPBA 2020) on 1 January 2020. In accordance with the transitional provisions laid down in Article 25 RPBA 2020, the RPBA 2020 are applicable to appeals already pending on the date of entry into force as well as to appeals filed thereafter (Article 25(1) RPBA 2020).

The first summons to attend oral proceedings was sent with a letter dated 16 July 2019, thus before the entry into force of the RPBA 2020. Therefore, Article 13(2) RPBA 2020 did not apply at the oral proceedings on 11 May 2021, in accordance with Article 25(1) and (3) RPBA 2020. Rather, Article 13 RPBA 2007 applied in this respect, see Article 25(3) RPBA 2020, second sentence.

2. Admissibility of the main request

2.1 The main request was filed during the oral proceedings before the Board. Pursuant to Article 13(1) RPBA 2007, any amendment to a party's case after it has filed its grounds of appeal may be admitted and considered at the Board's discretion.

When exercising its discretion, the Board considers, *inter alia*, the complexity of the amendment to the party's case and the ability of the amendment to overcome the outstanding objections, see Case Law of the Boards of Appeal, 9th Edition, 2019, Chapter V.A. 4.5.1 b).

In the present case, it is immediately apparent that the amendment to the party's case in the form of the set of claims according to the fourth auxiliary request is suitable to overcome the objections raised in the contested decision and by the Board in the communication pursuant to Articles 15(1) and 17(2) RPBA 2007.

The Board therefore decided to admit this request into the appeal proceedings when exercising its discretion pursuant to Article 13(1) and (3) RPBA 2007.



2.2 Although the respondent was not present at the oral proceedings, the principle of the right to be heard pursuant to Article 113(1) EPC is observed, since that article affords only the opportunity to be heard and, by absenting itself from the oral proceedings, a party gives up that opportunity (see T 1704/06, not published in OJ EPO, points 7.2 to 7.6 referring to Article 15(3) RPBA 2007 equivalent to Article 15(3) RPBA 2020; see also Case Law of the Boards of Appeal, *supra*, III.C.5, 5.1 and III.B.2.7, 2.7.3.b).

3. Article 123(2) EPC

3.1 Claim 1 of the fourth auxiliary request is based on claim 1 of the application as originally filed (reference is made in this regard to the corresponding A-publication WO 2007/052135 A1, the "application"), with several amendments as indicated in point VI above, which will be addressed individually in the following.

3.2 With respect to the choice of granular or particulate refractory material, it has been specified that this material can be "e.g. magnesite, silica, olivine and alumina". The addition of this optional feature is based on the disclosure on page 3, lines 26 to 30, of the application. The term "suitable" added to specify the granular or particulate refractory material does not add any new technical teaching to the skilled person.

3.3 Further, the composition of the binder has been limited in that it comprises:

- 4 - 4.5 wt% sodium silicate or potassium silicate  
calculated on the total pourable mass, and
- 10 - 12 wt% ester or a mixture of esters calculated  
on the weight of the Na/K silicate.

3.3.1 This limitation of the binder composition is based on the disclosure on page 6, lines 22 to 27, of the application as originally filed, which reads:

"The ester, which is suitably added to the particulate base immediately before the addition of the Na/K silicate, should be incorporated in an amount of 10-12%, calculated on the weight of the Na/K silicate, which should in turn represent at least 3.5-4.5% of the material."

The application therefore unambiguously discloses the amount of ester in combination with specific amounts of silicate.

The Board notes that the "material" mentioned in this passage of the application as originally filed is considered as being the total pourable mass.

3.3.2 According to established case law, the combination of end points for parametric ranges disclosed in an application does not generate a new technical teaching, see Case Law of the Boards of Appeal, *supra*, Chapter II.E.1.5.1).

Hence, the formation of the range of "4 - 4.5wt%" sodium silicate or potassium silicate from the two ranges disclosed in the application as filed (claim 1: at least 4 wt%; page 6, line 26: at least 3.5-4.5%) does not extend beyond the teaching of the application as filed.

3.3.3 The application further indicates in this context on page 6, lines 22 to 24, that the ester "is suitably added to the particulate base immediately before the

addition of the Na/K silicate". Since the mixing order is described only as being "suitable", this process feature is not considered as being essential and intrinsically linked to the amounts of the binder components indicated in the main sentence from lines 22 to 27 on page 6. Rather, it is regarded as a general disclosure on a preferred way to add the ester.

Hence, the omission of the suitable mixing order from the teaching on page 6 does not extend beyond the teaching of the application as filed.

3.4 Claim 1 has been further amended by the addition of the expression "in one mixing step":

"that the binder is added to the particulate refractory material **in one mixing step** simultaneously with the delivery of the latter to the required position to be lined."

Claim 1 therefore requires that the addition and mixing of the binder to the refractory material takes place at the same time as the delivery of the final mixture.

The process defined in claim 1 therefore corresponds to the teaching of the application on page 15, lines 9 to 16, where it is stated in similar wording that "the binder is in the form of sodium or potassium silicate and an ester, which are added to the particulate refractory material simultaneously with the delivery of this material to the position where the lining is to be formed".

Although the wording on page 15 of the application does not contain the expression "in one mixing step", its technical meaning is the same as that defined in claim

1 of the fourth auxiliary request, since it also explains that the addition of the binder, and hence its mixing into the the particulate refractory material, is done simultaneously and thus in one step with the delivery of the pourable mass.

The addition of the expression "in one mixing step" therefore does not extend beyond the teaching of the application as filed.

3.5 In summary, it can be concluded that the claims according to the fourth auxiliary request fulfil the requirements of Article 123(2) EPC.

4. Article 123(3) EPC

By limiting the amount of the silicate in the total pourable mass from "4 - 12 wt%" as defined in claim 1 as granted to "4 - 4.5 wt%" as defined in claim 1 of the fourth auxiliary request, the scope of protection of claim 1 has been limited compared to claim 1 as granted. The claims according to the fourth auxiliary request therefore also fulfil the requirement of Article 123(3) EPC.

5. Remittal of the case

The opposition division has not yet decided on the issues arising from the grounds of opposition pursuant to Article 100(a) and (b) EPC.

The Board indicated in its aforementioned communication pursuant to Article 15(1) RPBA 2007 that it considered it appropriate to remit the case to the department of first instance if it became necessary to evaluate these issues.

During the oral proceedings the appellant declared that it had no objections to the remittal of the case.

By taking into account these circumstances and the fact that the primary object of the appeal proceedings is to review the decision under appeal in a judicial manner (Article 12(2) RPBA 2020), the Board therefore concluded that special reasons exist which justify a remittal of the case under Article 11 RPBA 2020 and decided to remit the case in accordance with Article 111(1) EPC to the opposition division for further prosecution.

## Order

### For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the opposition division for further prosecution on the basis of the set of claims according to the fourth auxiliary request filed at the oral proceedings before the Board.

The Registrar:

The Chairman:



C. Spira

G. Patton

Decision electronically authenticated