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**Datasheet for the decision
of 30 May 2017**

Case Number: T 2175/16 - 3.3.10

Application Number: 10709097.9

Publication Number: 2411350

IPC: C07C1/24, C07C15/46

Language of the proceedings: EN

Title of invention:
DEHYDRATION OF 1-PHENYL ETHANOL

Patent Proprietor:
Lyondell Chemical Technology, L.P.

Opponent:
Repsol, S.A.

Headword:

Relevant legal provisions:
RPBA Art. 11

Keyword:
Remittal to the department of first instance - fundamental
deficiency in first instance proceedings (yes)

Decisions cited:

T 0862/98, T 0004/00

Catchword:



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Case Number: T 2175/16 - 3.3.10

D E C I S I O N
of Technical Board of Appeal 3.3.10
of 30 May 2017

Appellant: Lyondell Chemical Technology, L.P.
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 25 July 2016
revoking European patent No. 2411350 pursuant to
Article 101(3) (b) EPC.**

Composition of the Board:

Chairman P. Gryczka
Members: R. Pérez Carlón
C. Schmidt

Summary of Facts and Submissions

- I. The appellant (patent proprietor) lodged an appeal against the decision of the opposition division to revoke European patent No. 2 411 350.
- II. Oral proceedings before the opposition division took place on 21 June 2016. According to Form 2309.1 of the minutes, the member of the opposition division acting as first examiner in those oral proceedings was S.H.
- III. The same name (S.H.) appears in form 3301 of the decision of the opposition division. However, form 2339, bearing the signatures of the members of the opposition division, is signed by a first examiner with the initials E.D.
- IV. The board informed the parties in a communication that it was minded to consider that a fundamental procedural violation had occurred, which justified setting aside the decision under appeal, remitting the case and refunding the appeal fee.
- V. The appellant withdrew its request for oral proceedings if the case were remitted to the opposition division.
- VI. The respondent (opponent) disagreed with the view of the board. It argued that a mere change in the composition of the division after the oral proceedings did not necessarily lead to a change in their outcome. In the present case, the decision announced at the end of the oral proceedings was the same as that in the written decision. It argued that the situation was comparable with the case at issue in T 4/00, in which the board, despite a procedural violation having occurred, decided that the outcome of the proceedings

would not have been different, and thus that the procedural violation was not substantial.

The respondent stated that it did not want oral proceedings if the board remitted the case to the opposition division.

VII. The final requests of the parties were the following:

- The appellant requested that the decision be set aside, the case remitted to the opposition division and the appeal fee reimbursed.
- The respondent requested that the appeal be dismissed.

Reasons for the Decision

1. The appeal is admissible.
2. Oral proceedings before the opposition division took place on 21 June 2016. According to Form 2309.1 of the minutes of those proceedings, the member of the division acting as first examiner during them was S.H.

The same name (S.H.) appears in Form 3301 of the decision of the opposition division.

However, Form 2339, which bears the signatures of the members of the opposition division, is signed by a first examiner with the initials E.D.

3. It is established case law that a signed written decision issued after oral proceedings should be taken by those members of the first instance who conducted

the oral proceedings, and no-one else. This principle applies also if the division delivers a decision orally during those proceedings. A change of composition of an opposition division between holding oral proceedings and issuing the written decision should be avoided and, if that is not possible, parties should be offered new oral proceedings (Case Law of the Boards of Appeal, 8th edition 2016, III.K.2.2.2).

4. In the present case, it is not disputed that the person who signed the decision of the opposition division as first examiner had not been the first examiner at the oral proceedings. Thus, a change in the composition of the opposition division took place between holding the oral proceedings, at the end of which a decision was given orally, and issuing the written decision.
5. In line with the findings in T 862/98 (see point 2.3 of the Reasons), this change of composition is considered to be a substantial procedural violation, which justifies that the decision under appeal be set aside, the case remitted to the opposition division and the appeal fee reimbursed (Article 11 RPBA).
6. The respondent argued that the present situation was not comparable with the facts underlying T 862/98, as in that case the division had not announced a final decision at the end of the oral proceedings. A mere change in the composition was not sufficient to constitute a procedural violation, which required such change to lead to a different outcome of the proceedings. In the present case, the decision had been taken before any change in the division occurred, and thus the proceedings' outcome did not change.

Although the decision to revoke the patent announced orally at the end of the oral proceedings corresponds to the one issued in writing, there is no guarantee that the reasoning leading to that conclusion, which is the basis for any appeal by an adversely affected party, accurately reflects the point of view of all three members who had taken part in the oral proceedings. For this reason, whether or not a decision was announced at the end of the oral proceedings or whether or not it was the same as the one issued in writing is irrelevant, as the procedural error affects the decision's reasoning, upon which any subsequent appeal necessarily hinges.

7. The respondent, relying on decision T 4/00, argued that the procedural violation was not substantial: the appellant needed to file an appeal in any case. However, T 4/00 dealt with a situation in which the formalities officer refused a request for correction of the minutes; the correctness of the minutes did not affect the reasoning of the written decision, and the procedural violation was for that reason not substantial. In the present case, however, the procedural violation affects the validity of the reasoning of the decision under appeal. This argument is thus rejected.

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.

3. The appeal fee is refunded.

The Registrar:

The Chairman:



C. Rodríguez Rodríguez

P. Gryczka

Decision electronically authenticated