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**Datasheet for the decision
of 21 December 2021**

Case Number: T 0325/18 - 3.2.07

Application Number: 06828008.0

Publication Number: 1996488

IPC: B65D88/16

Language of the proceedings: EN

Title of invention:

CONTAINER ASSEMBLY

Patent Proprietor:

Direct Barrels Pty Ltd

Opponent:

Wine & Tools

Headword:

Relevant legal provisions:

EPC Art. 100(a), 56
RPBA 2020 Art. 13(2)

Keyword:

Amendment after summons - exceptional circumstances (no)
Inventive step - (yes)

Decisions cited:

T 0423/15

Catchword:



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Case Number: T 0325/18 - 3.2.07

D E C I S I O N
of Technical Board of Appeal 3.2.07
of 21 December 2021

Appellant: Wine & Tools
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 11 December
2017 rejecting the opposition filed against
European patent No. 1996488 pursuant to Article
101(2) EPC.**

Composition of the Board:

Chairman V. Bevilacqua
Members: G. Patton
R. Cramer

Summary of Facts and Submissions

- I. European patent No. 1 996 488 B1 (hereinafter "the patent") relates to a container assembly for maturing wine.
- II. An opposition was filed against the patent as a whole and was based on Article 100(a) EPC (lack of inventive step) and Article 100(b) EPC (insufficiency of disclosure).

The dispute on the ground for opposition based on Article 100(b) EPC was settled in a first appeal with decision T 423/15, dated 8 July 2016, whereby the case was remitted to the Opposition Division for further prosecution.

The Opposition Division then found that the only remaining ground for opposition, based on Article 100(a) EPC, did not prejudice the maintenance of the patent because the subject-matter of claim 1 of the then main request (patent as granted) involved an inventive step.

The opponent lodged an appeal within the prescribed period and in the prescribed form against the above decision of the Opposition Division rejecting the opposition and maintaining the patent as granted.

- III. The proceedings were interrupted under Rule 142 EPC from 24 July 2019 until 1 July 2021.
- IV. In a communication pursuant to Article 15(1) RPBA 2020 annexed to the summons to oral proceedings sent on 8 July 2021, the Board provided its preliminary,

non-binding opinion to the parties. Both parties reacted, the opponent by letter dated 9 July 2021 and the patent proprietor by letters dated 7 September 2021 and 16 December 2021.

Oral proceedings were held on 21 December 2021. For matters that arose during the oral proceedings, in particular the issues discussed with the parties and their requests, reference is made to the minutes.

The order of the present decision was announced at the end of the oral proceedings.

V. The opponent (hereinafter "appellant") requested

that the decision under appeal be set aside and that the patent be revoked.

At the end of oral proceedings the patent proprietor (hereinafter "respondent") requested as its final request

that the decision under appeal be set aside and that the patent be maintained in amended form on the basis of the claims of the **fifth auxiliary request**, filed on 31 October 2014.

VI. Claim 1 thereof reads as follows (the feature numbering (a) to (k) used by the parties was added by the Board):

"Use for maturation of wine of a container assembly moveable by forklift and suitable for the maturation of wine comprising,

(a) a rigid container (21) having a body the walls of

which are moulded from oxygen permeable polyethelene,

- (b) a neck (23) with an open mouth extending from an upper wall of the container body and,
- (c) an outlet (42) for draining wine from the container arranged near a bottom wall of the container.

characterised in that,

- (d) a frame (22) is provided for supporting the container (21) and bracing walls of the container against bulging,
- (e) the frame comprising a stacking structure which facilitates stacking of container assemblies one atop the other.
- (f) the container (21) is generally flat sided,
- (g) the walls of the container having a volume to surface area to thickness ratio chosen to control oxygen permeation into the wine at a rate suitable for maturation of the wine,
- (h) the container (21) has an upper wall shaped to allow substantially all air to flow out of the container through the neck (23) when the container is filled to the level of the bottom of the neck,
- (i) the container being shaped to allow substantially all liquid in the container to drain through the outlet (42) when it is opened,
- (j) whereby the container has a bottom wall which slopes downwardly towards the outlet (42), and
- (k) whereby the frame has an access opening (48) below the container for allowing entry of the tynes of a forklift."

VII. The following documents considered in the opposition proceedings are relevant to the present decision:

- D1 : WO 2005/052114 A;
- D2 : US 4 909 387 A; and

D7 : US 4 648 521 A.

Appendix E: "Schutz IBCs by DSL Packaging", advertisement published before 20 July 2005; and Appendix G: "Schutz IBCs a hit with growing wineries", published in The Australian & New Zealand Grapegrower & Winemaker, January 2005, pages 72, 75-76.

VIII. The appellant essentially argued as follows (the arguments are discussed in more detail in "*Reasons for the Decision*" below where appropriate):

D1 as the closest prior art in combination with the teaching of D2

Starting from D1, Figures 1 to 3, taken as the closest prior art for claim 1, the only distinguishing features were features (d), (e), (f) and (k).

In case feature (j) was regarded as a distinguishing feature, it did not justify an inventive step as it was known from D2, Figure 3, for facilitating drainage.

In view of the distinguishing features (d), (e), (f) and (k) the problem to be solved was to modify the container of D1, Figures 1 to 3, in order to facilitate the use thereof, its handling and to optimise storage space while keeping the maturation properties.

The skilled person would consider D2, which disclosed all the structural features of claim 1 except for feature (g). The skilled person would therefore find all the distinguishing features in D2 for the combination with D1. D2 did not teach that the depression (56) allowed for losing the smallest useful

volume of contained liquid while not topping above the upper ring of the frame, as alleged by the respondent. Hence, in combining the teaching of D2 with the container of D1, the skilled person would not consider taking the features of the upper wall of the container of D2 to solve the problem posed. This was all the more true since D1 taught the advantages of the upper wall shape of Figures 1 and 3 for the maturation of wine. Hence, the skilled person would think of keeping the upper wall shape of the container of D1. In doing so, the skilled person would arrive at the claimed subject-matter in an obvious manner. Even if the skilled person was to implement the complete shape of the container of D2 in D1, they would arrive at the claimed subject-matter in an obvious manner since D2 could also be seen as disclosing features (b) and (h) of the upper wall shape of claim 1 as the volume of air contained in the raised portions (57) was negligible compared to the volume of the container (2) as a whole.

Thus, the subject-matter of claim 1 lacked an inventive step starting from D1.

D2 taken as the closest prior art in combination with the teaching of D1

D2 represented a suitable closest prior art for claim 1 since the container disclosed therein was utilised for the storage and the transportation of liquid goods, including in the grocery industry, and was made of polyethylene, rendering it suitable for the maturation of wine. D2 disclosed all features of claim 1 except for the maturation of wine and structural feature (g).

In case D2 did not disclose features (b) and (h) either, the objective technical problem on the basis of

all distinguishing features was to improve the use of the container of D2. The skilled person facing this problem would come across and consider the disclosure of D1 since the container (4) of the latter was made of polyethylene like that of D2. The skilled person would then immediately think of the use of the container of D2 for the maturation of wine as it was disclosed D1. The skilled person would all the more be motivated to look for the maturation of wine since appendices E and G disclosed IBC containers similar to that of D2 for that use, see appendix G, page 76, right-hand column, first paragraph. The skilled person would therefore incorporate the features of the container of D1 into that of D2 in view of better control of oxygen take-up for the maturation of wine. In doing so, he would arrive at the claimed subject-matter in an obvious manner as D1 also disclosed the structural distinguishing features.

Thus, the subject-matter of claim 1 lacked an inventive step starting from D2.

D1 taken as the closest prior art in combination with the teaching of D7 - admittance

The filing for the first time at the oral proceedings of an objection of lack of inventive step starting from D1 as the closest prior art in combination with the disclosure of D7, extended to further include as additional distinguishing features (d), (e), (f) and (k), was due to the misrepresentation of D7 put forward in the Board's communication dated 8 July 2021, point 7.1.13. D7 disclosed features (d), (e), (f) and (k) in addition to (j) in a straightforward manner, see the figures. Thus, D7 was highly relevant and the objection should be admitted into the proceedings.

IX. The respondent essentially argued as follows (the arguments are discussed in more detail in "*Reasons for the Decision*" below where appropriate):

D1 taken as the closest prior art in combination with the teaching of D2

D1 disclosed two embodiments, the "*bottle shape*" in Figures 1 to 3 and the "*bulky shape*" in Figures 4 to 6. Since the objective technical problem in view of D1 could be formulated as to optimise the useful volume for maturing wine, the skilled person would select the "*bulky shape*" of Figures 4 to 6 as starting point for assessing the inventive step of claim 1 as it was already somewhat optimised in this respect in this embodiment.

Figures 1 to 3 of D1 disclosed all features of claim 1 except for features (d), (e), (f), (h), (j) and (k).

For each of the distinguishing features a problem to be solved could be derived, leading to the claimed subject-matter involving an inventive step.

D2 did not disclose feature (j). The dotted line shown in Figure 3 of D2 could be a gutter or channel, possibly a localized gutter or channel in view of the presence of a metal plate (27). This did not amount to a downwardly sloped bottom wall according to feature (j).

Considering the problem to be solved as formulated by the appellant in view of features (d), (e), (f) and (k), the skilled person would not consider D2 as it did not relate to the maturation of wine.

Would the skilled person consider D2, he would think of implementing the complete shape of D2 into the container of D1, leading to a final container without features (b) and (h) of the upper wall shape.

Should the skilled person intend to "*keep the wine maturation properties*" of the container of D1 and keep the upper wall shape of the container of D1 for that purpose, there would be no reason why he would not keep by the same token the cylindrical shape of the container of D1. In doing so, feature (f) would not be realised.

Hence, an inventive step was to be acknowledged for the subject-matter of claim 1 starting from D1.

D2 taken as the closest prior art in combination with the teaching of D1

D2 could not represent a suitable starting point for discussing inventive step as it did not disclose the claimed use for the maturation of wine. Furthermore, D2 did not disclose structural features (b), (g), (h) and (j).

When trying to solve the problem formulated by the appellant of improving the use of the container of D2, the skilled person would consider the container of D1 as a whole to be suitable for the maturation of wine, not only part of it. Hence, he would keep the cylindrical shape of the container (4) of D1 when combining D2 with the teaching of D1. In doing so, feature (f) of claim 1 would not be realised.

Appendices E and G did not represent common general knowledge and could not change the above reasoning.

Hence, an inventive step was to be acknowledged for the subject-matter of claim 1 starting from D2.

D1 taken as the closest prior art in combination with the teaching of D7 - admittance

The alleged "misrepresentation" of the content of the disclosure of document D7 to which the appellant referred to justify the late presentation was nothing more than a discussion of the appellant's written submissions. Thus, the late presentation of the objection could not be justified on this basis.

Furthermore, the late-formulated objection could have been filed with the statement setting out the grounds of appeal, if not already in the opposition proceedings.

There were no exceptional circumstances pursuant to Article 13(2) RPBA 2020 justifying the admittance of the late-presented objection into the proceedings.

Reasons for the Decision

1. *Amendments*

With respect to claim 1 of the patent as granted, claim 1 of the fifth auxiliary request was modified so as to be directed to the use of the container assembly for the maturation of wine. The amendment, which is based on the application as originally filed, see for instance page 1, lines 8-10, was not objected to by the appellant, and the Board sees no objection either.

2. *Inventive step*

The appellant contested in their written submissions (point III.E of the statement setting out the grounds of appeal) and orally at the oral proceedings that the subject-matter of claim 1 involved an inventive step in view of

- document D1 taken as the closest prior art in combination with the teaching of document D2; and
- document D2 taken as the closest prior art in combination with the teaching of document D1, possibly also taking into consideration appendixes E and G.

2.1 Document D1

2.1.1 Closest prior art

The Board concurs with the parties that document D1 can be regarded as a suitable starting point to discuss inventive step since it relates to the use of a

container assembly for wine maturation, see page 1, lines 7-9, page 9, lines 7-12 and claims 1 and 2.

Contrary to the respondent's view, the Board is of the opinion that the embodiment of D1 illustrated in **Figures 1 to 3** can be selected as the closest prior art. In this respect, the Board emphasizes that a selected closest prior art does not need to be related to the objective technical problem, which is formulated in a later step of the problem-solution approach. Furthermore, any piece of prior art lying within the technical field or a closely related technical field of the claimed subject-matter can, in principle, be taken into consideration by the skilled person for assessing inventive step, also as a starting point. The presence of a plurality of potential starting points (see the embodiment shown in Figures 4 to 6 of D1 as argued by the respondent), does not exclude that inventive step can be discussed starting from the embodiment of Figures 1 to 3 of D1 (Case Law of the Boards of Appeal, 9th Edition, 2019, Chapters I.D.3.1 to I.D.3.3).

2.1.2 Disclosure of D1, Figures 1 to 3

D1 (page 4, line 4, to page 5, line 21; page 7, line 8 to page 9, line 26; Figures 1 to 3) discloses the use for maturation of wine of a container assembly suitable for the maturation of wine comprising:

- (a) a rigid container ("tank" 4) having a body the walls of which are moulded from oxygen permeable polyethylene (page 7, lines 26-29),
- (b) a neck ("cylinder" 9) with an open mouth extending from an upper wall of the container body (see Figure 2; also linked to feature (h) below) and,
- (c) an outlet ("valve" 8) for draining wine from the

container arranged near a bottom wall of the container (see page 7, lines 12-16 and Figures 1 and 3; the use of "near" in feature (c) covers the disclosure of D1 of the outlet being fitted "above the base" of the tank; also linked to feature (i) below),

- (g) the walls of the container (4) having a volume to surface area to thickness ratio chosen to control oxygen permeation into the wine at a rate suitable for maturation of the wine (page 7, lines 31-33),
- (h) the container (4) having an upper wall shaped to allow substantially all air to flow out of the container through the neck (9) when the container is filled to the level of the bottom of the neck (9) (see in particular Figure 2 showing the upward sloping surface bridging the walls of the container (4) to the neck (9), the latter being opened such as to let air flow out of the container(4)),
- (i) the container (4) being shaped to allow substantially all liquid in the container (4) to drain through the outlet (8) when it is opened (the use of the term "substantially" in feature (i) covers the disclosure of D1 discharging the tank while leaving sediment, page 7, lines 12-16).

2.1.3 Distinguishing features over D1, Figures 1-3

D1, Figures 1 to 3, does not disclose the following features of claim 1:

- (d) a frame is provided for supporting the container and bracing the walls of the container against bulging,
- (e) the frame comprising a stacking structure which facilitates stacking of container assemblies one atop the other,
- (f) the container is generally flat sided,

- (j) the container has a bottom wall which slopes downwardly towards the outlet, and
- (k) the frame has an access opening below the container for allowing entry of the tynes of a forklift,
the container assembly being movable by forklift.

2.1.4 Feature (h)

The respondent contested that D1 discloses feature (h) relating to the upper wall of the claimed container assembly.

In this respect the Board notes that claim 1 is silent with regard to "a **convex** upper wall" but only refers to "*an upper wall shaped to allow **substantially** all air to flow out of the container through the neck when the container is filled to the level of the bottom of the neck*" (emphasis added by the Board). In view of the shape of the portion of the container (4) bridging the walls and the neck (9), see Figure 2, the Board is of the opinion that the claimed result would unambiguously be achieved. Said bridging portion corresponds to the upper wall forming the roof of the container and rises from its outer edges towards the neck. In this respect, contrary to the respondent's view, the embodiment shown in Figures 1-3 of D1 does not comprise a flat upper wall.

2.1.5 Feature (j)

Contrary to the appellant's view apparently admitting only features (d), (e), (f) and (k) as distinguishing features over D1, the Board fails to see any disclosure in D1 relating to the bottom wall sloping downwardly towards the outlet. The appellant has not provided any

reasons why feature (j) should be considered as being known from D1.

2.1.6 Technical effects

The Board concurs with the appellant that the distinguishing features (d), (e), (f) and (k) have a synergistic technical effect to provide a stackable liquid container assembly optimising storage space, also enhancing its manipulation, see also the patent specification, paragraph 4.

The technical effect associated with feature (j) is to allow substantially all liquid in the container to drain through the outlet when it is opened such that drainage is facilitated, see the patent specification, column 1, line 55 to column 2, line 1 and paragraph 30. This effect is not related to previous mentioned technical effects achieved with features (d), (e), (f) and (k).

Consequently, features (d), (e), (f) and (k) on the one hand, and feature (j) on the other hand, can be dealt with independently from each other for assessing inventive step of the subject-matter of claim 1.

2.1.7 Problems to be solved

Features (d), (e), (f) and (k) - first partial problem

At the oral proceedings before the Board, the appellant reformulated the first partial problem they had submitted in writing in view of distinguishing features (d), (e), (f) and (k) so as to modify the container of D1, Figures 1 to 3, in order to facilitate its handling

and optimise storage space **while keeping the maturation properties**.

Although the Board is not convinced that the latter part of the problem ("*while keeping the maturation properties*") can be directly associated with the technical effects of the distinguishing features, the Board sees no reason not to adopt this problem. Claim 1 is directed to the use of a container assembly for the maturation of wine and the skilled person would indeed keep this in mind when modifying the container of D1.

The Board cannot concur, however, with the respondent's mere allegation submitted in writing that a different technical problem should be defined for each of the distinguishing features. At the oral proceedings before the Board the respondent argued on the basis of the above mentioned technical problem.

Feature (j) - second partial problem

In view of distinguishing feature (j), the second partial problem can be seen as to modify the container of D1, Figures 1 to 3, in order to facilitate drainage.

2.1.8 Consideration of D2

As already mentioned under point 2.1.1 above any piece of prior art lying within the technical field or a closely related technical field of the claimed subject-matter can, in principle, be taken into consideration by the skilled person for assessing inventive step. This applies to D2 which concerns a container for liquid goods even though not explicitly for wine, see column 1, lines 15-18. Furthermore, the container of D2, column 2, lines 23-30, is of **polyethylene**, which,

contrary to the respondent's suggestion, is not known as being impermeable to air or oxygen. Since oxygen can permeate the walls of the container of D2, said disclosed container is inherently suitable for maturation of wine, at least to some extent. In this respect it is also noted that "*some little maturation may happen during transport and associated short periods*", as admitted by the respondent.

Therefore, there appears to be no valid reason for excluding the container assembly of D2 from the assessment of inventive step of the claimed subject-matter.

2.1.9 Disclosure of D2

D2 (column 2, lines 23-51; Figures 1-4) discloses a container assembly movable by forklift and suitable for the maturation of wine comprising,

- (a) a rigid container ("exchangeable inner container" 2) having a body the walls (14) of which are moulded from polyethylene (column 2, lines 23-30) which is permeable to oxygen as already discussed under point 2.1.8 above,
- (c) an outlet ("outlet opening" 12) for draining wine from the container arranged near a bottom wall of the container (column 2, lines 38-40),
- (d) in which a frame ("outer shell" 3; "lattice bars" 4, 5) is provided which is suitable for supporting the container and bracing the walls of the container against bulging (column 5, lines 1-8; Figures 1 and 3),
- (e) the frame (3, 4, 5) comprising a stacking structure which is suitable for facilitating the stacking of container assemblies one atop the other,
- (f) the container is generally flat sided (see column

- 2, lines 26-27 and Figures 2 and 4),
- (i) the container being shaped to allow substantially all liquid in the container to drain through the outlet when it is opened,
 - (j) whereby the container has a bottom wall which slopes downwardly towards the outlet (see point 2.1.13 below), and
 - (k) whereby the frame has an access opening below the container for allowing entry of the tynes of a forklift due to the wooden pallet (7) (Figure 1).

2.1.10 Feature (b)

At the oral proceedings before the Board the appellant argued that feature (b) did not comprise any specification with regard to the size of the neck or how shallow it was, nor whether it was interior or exterior to the container. For the appellant, paragraph 39 of the patent disclosed that a lid could be screwed **into** the neck, meaning that feature (b) also encompassed necks which were interior to the container, i.e. the wall of which was projecting towards the inside of the container. Thus, for the appellant, the "filling port" (10) of the container of D2, column 2, lines 36-38 and Figure 1, onto or into which the lid (11) was screwed corresponded inevitably to a neck according to feature (b).

The Board does not share the appellant's view and rather follows the respondent's view that a "neck" as defined in feature (b) is to be seen as **protruding from the container**. This interpretation of the neck of feature (b) shows no inconsistency with the disclosure of paragraph 39 of the patent stating that the lid can be screwed into the neck. Hence, the neck of feature (b) does not encompass the configuration of projecting

towards the interior of the container. Since D2 does not directly and unambiguously disclose a neck, i.e. a part protruding from the container (2), as the filling port (10) is detailed neither in the text nor in the figures, feature (b) is regarded as a distinguishing feature over D2. As a result, the fact that feature (b) does not specify the geometry of the neck, i.e. its size or how shallow it is, is irrelevant.

2.1.11 Feature (g)

At the oral proceedings before the Board the appellant explicitly stated that D2 did not disclose feature (g).

The Board shares this view as D2 does not mention the maturation of wine, which is explicitly required in feature (g).

This applies even though the container assembly of D2 is regarded as being suitable for wine maturation.

2.1.12 Feature (h)

At the oral proceedings before the Board the appellant held the view that D2 also disclosed feature (h), arguing that the expression "*substantially all air*" used in feature (h) had a broad meaning also encompassing the shape of the upper wall (9) of the container (2) of D2. For the appellant, the volume of air contained in the raised portions (57) was negligible compared to the volume of the container (2) as a whole. Hence, only a small volume of air was trapped by the raised portions (57) in comparison with the size of the container (2) when the container was filled to the level of the bottom of the neck, falling

therewith within the broad interpretation of feature (h).

The Board does not share this view since the container of D2 has an upper wall shape (9) with raised portions (57) in which air is **inevitably** trapped, see Figures 1 and 3. This goes against feature (h) according to which the upper wall shape is to be conceived in order to allow substantially all air to flow out of the container through the neck when the container is filled to the level of the bottom of the neck. The upper wall (9) of the container (2) of D2 is not shaped to achieve this claimed result. To the contrary it is conceived to inevitably trap air. This applies whatever interpretation of the expression "*substantially all air*" with respect to the size of the container is considered. Hence, D2 does not disclose feature (h).

2.1.13 Feature (j)

Contrary to the respondent's view, the Board is of the opinion that D2 discloses feature (j) in view of the dotted line in Figure 3 showing the bottom of the container slightly sloping downwardly to the outlet opening (12). As a matter of fact, D2 also discloses, column 2, lines 38-40, that the outlet opening (12) is located at the lowest point of the inner container enabling substantially all liquid to drain out of the container when it is opened.

Should the dotted line in Figure 3 be a "gutter" as alleged by the respondent, it is noted that feature (j) does not specify that the bottom wall in its entirety needs to be sloping downwardly. Even in this case the disclosure of D2 falls within the broad meaning of feature (j).

2.1.14 Combination with D2

As a result of the above, document D2 discloses all distinguishing features (d), (e), (f), (j) and (k) of claim 1 over D1.

Feature (j)

Regarding feature (j), the Board considers that the skilled person faced with the second partial problem to facilitate drainage would immediately think of implementing the solution known from D2 in the container of D1. In doing so they would not encounter any technical difficulties. Hence, feature (j) does not justify an inventive step.

Feature (d), (e), (f) and (k)

Regarding features (d), (e), (f) and (k) the respondent argued that the depression (56) in the container of D2 enabled the loss of the smallest useful volume of contained liquid while not topping above the upper ring of the frame such that, in view of the first partial problem, said depression (56), i.e. the complete shape of the container assembly of D2, would also be implemented in the container of D1, **leading to a final container without features (b) and (h)**, as the latter are not disclosed in D2.

2.1.15 The appellant contested this view arguing that D2 did not disclose the effect alleged by the respondent that *"the depression (56) allows for losing the smallest useful volume of contained liquid while not topping above the upper ring of the frame"*. This effect was further not plausible as air was trapped in the raised

portions (57) instead of wine, losing thereby useful volume. Hence, the skilled person would not consider implementing the complete shape of the container assembly of D2 into that of D1, i.e. the upper wall shape with the raised portions (57).

This was all the more true since D1 taught the advantages of the shape of the upper wall of Figures 1 and 3 for the maturation of wine, see page 3, lines 27-33 and page 8, line 19: "*[A]ny free surface arising from the head-space in a wine storage vessel is undesirable, if it contains oxygen (...) The lesser the free surface area, the longer that wine can be safely kept in bulk storage*". Hence, the skilled person would not consider implementing the shape of the upper wall (9) of the container (2) of D2 with the raised portions (57) into that of D1 since they contained oxygen and would rather think of keeping the shape of the upper wall of D1. This was especially true in view of the first partial problem to be solved to preserve the wine maturation properties of the container of D1.

2.1.16 The Board does not share the appellant's view for the following reasons provided by the respondent.

The skilled person would have no reason to select and cherry-pick only parts of the container assembly (1) of D2 when faced with the issue of optimising storage space. In this respect, the appellant has not convincingly proven that the shape of the upper wall (9) of the container (2) of D2 with the raised portions (57) would not be suitable for this purpose, especially in view of the absence of a neck. Hence, the Board is not convinced that the skilled person faced with the first partial problem would not think of implementing the complete shape of D2. In doing so, features (b) and

(h) would not be realised, since D2 does not disclose these features as already discussed under points 2.1.10 and 2.1.12 above.

Should the skilled person intend to "*keep the wine maturation properties*" of the container of D1 as argued by the appellant when formulating the problem to be solved, and seek to keep the neck (9) of the container of D1 for this reason, the Board does not see any reason why they would not keep by the same token the cylindrical shape of the container of D1. As a matter of fact, the container (4) of D1 is specifically intended for the claimed use of the maturation of wine while this use is not disclosed or suggested in D2. The skilled person intending to "*keep the wine maturation properties*" would hence retain the complete shape of the container (4) of D1. In doing so, feature (f) would not be realised (see also decision under appeal, page 6, second paragraph).

2.1.17 In view of the above, the objection of lack of inventive step raised by the appellant against claim 1 on the basis of D1 taken as the closest prior art is not convincing.

2.2 Document D2

2.2.1 Closest prior art

The appellant considered that document D2 represented a suitable closest prior art for claim 1 since the container disclosed therein was utilised for the storage and the transportation of liquid goods, including in the grocery industry, and made of polyethylene, rendering it suitable for the maturation

of wine, see column 1, lines 13-18 and column 2, lines 23-30.

Despite the fact that the Board is not convinced by the appellant's view since D2 is silent on the claimed use for the maturation of wine, the corresponding objection is discussed in the following.

2.2.2 Disclosure of D2 - distinguishing features

In view of the discussion under points 2.1.8 to 2.1.13 above, D2 discloses neither the use for the maturation of wine nor the following features of claim 1:

- (b) a neck with an open mouth extending from an upper wall of the container body and,
- (g) the walls of the container having a volume to surface area to thickness ratio chosen to control oxygen permeation into the wine at a rate suitable for maturation of the wine,
- (h) the container having an upper wall shaped to allow substantially all air to flow out of the container through the neck when the container is filled to the level of the bottom of the neck.

2.2.3 At the oral proceedings before the Board the appellant formulated the objective technical problem in view of the distinguishing features so as to improve the use of the container of D2.

For the appellant the skilled person facing this problem would come across and consider the disclosure of D1 since the container (4) of the latter was in polyethylene like that of D2. The skilled person would then immediately think of the use of the container of D2 for the maturation of wine as it was disclosed D1. The skilled person would all the more be motivated to

look at the maturation of wine since appendices E and G disclosed Schutz IBC containers similar to that of D2 for that use, see appendix G page 76, right-hand column, first paragraph.

The skilled person would therefore incorporate the features of the container of D1 into that of D2 in view of better controlling oxygen take-up in the contained liquid for the maturation of wine. In doing so, he would arrive at the claimed subject-matter in an obvious manner since D1 also disclosed the structural distinguishing features.

2.2.4 The Board does not share the appellant's view.

As under point 2.1.16 above, the Board fails to see why the skilled person would cherry-pick only some features of the container (4) of D1 when trying to solve the problem formulated by the appellant of improving the use of the container of D2. As a matter of fact the Board is of the opinion that he would consider the container of D1 as a whole as being suitable for the maturation of wine, not only part of it. Hence, he would also think of keeping the cylindrical shape of the container (4) of D1 when combining it with the teaching of D2. In doing so, feature (f) of claim 1 would not be realised.

2.2.5 The above reasoning is made irrespective of the disclosure of appendices E and G which are therefore irrelevant.

Notwithstanding this the Board notes that appendixes E and G disclose the storage and the transportation of liquid products like wine. This does not amount, however, to what the skilled person in the present

technical field would understand as falling within the claimed use for the maturation of wine, even though some maturation of wine can occur during storage and transportation. Furthermore, appendices E and G are magazine articles and as such cannot be regarded as reflecting the common general knowledge. They concern advertisements for IBC containers commercialised by DSL packaging. Contrary to the appellant's view, "*rampant availability*" of a product, even if sold to customers and advertised many times, does not necessarily render its features as belonging to the skilled person's common general knowledge. In any case, the containers of appendixes E and G have a similar shape to that of the container of D2 and do not disclose or suggest the structural distinguishing features (b) and (h). Hence, their combination with the teaching of D2 cannot lead to the claimed subject-matter.

2.2.6 As a result, the objection of lack of inventive step raised by the appellant against claim 1 on the basis of D2 taken as the closest prior art is not convincing.

3. *Late-filed objection - Admittance*

3.1 At the oral proceedings before the Board the appellant raised an objection of lack of inventive step starting from D1 as the closest prior art in combination with the disclosure of D7.

3.2 It was undisputed by the appellant that D7 was originally considered, in their written submissions, as showing a lack of inventive step of feature (j) only. At the oral proceedings before the Board the appellant referred for the first time to D7 to show obviousness of distinguishing features (d), (e), (f) and (k) (see point 2.1.3 above).

The reason given by the appellant for justifying the late presentation of this objection was an alleged "misrepresentation" of D7 put forward in the Board's communication dated 8 July 2021, point 7.1.13. For the appellant, contrary to the Board's preliminary opinion, D7 disclosed features (d), (e), (f) and (k) in addition to (j) in a straightforward manner, see the figures. Thus, D7 was highly relevant and the objection should be admitted into the proceedings.

- 3.3 The Board does not share the appellant's view for the following reasons discussed at the oral proceedings.

The Board's preliminary opinion on the combination of the teachings of D1 and D7 provided to the parties in the communication dated 8 July 2021 merely explained why the appellant's written submissions involving D7 were not convincing, and did not introduce any new element justifying a late change to the appellant's case.

This is also because features (d), (e), (f) and (k) were already identified and discussed as distinguishing features over D1 in the decision under appeal, point II.2.2.1, so that no unexpected development arose during the appeal proceedings in this respect. The appellant could have filed the objection with the statement setting out the grounds of appeal, if not already in the opposition proceedings.

The fact that D7 allegedly discloses features (d), (e), (f) and (k) in a straightforward manner does not amount to exceptional circumstances.

Consequently, in the absence of exceptional circumstances pursuant to Article 13(2) RPBA 2020 the late-presented objection is not admitted into the proceedings.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the first instance with the order to maintain the patent on the basis of claims 1-13 of the fifth auxiliary request filed on 31 October 2014, and a description to be adapted thereto.

The Registrar:

The Chairman:



G. Nachtigall

V. Bevilacqua

Decision electronically authenticated