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**Datasheet for the decision
of 22 June 2023**

Case Number: T 2195/18 - 3.2.06

Application Number: 04806161.8

Publication Number: 1828543

IPC: F01D5/14

Language of the proceedings: EN

Title of invention:

TURBINE WHEEL WITH BACKSWEPT INDUCER

Patent Proprietor:

Garrett Transportation I Inc.

Opponent:

BorgWarner Inc.

Headword:

Relevant legal provisions:

EPC Art. 100(c), 123(2), 84

RPBA Art. 12(2), 12(4)

RPBA 2020 Art. 13(2)

Keyword:

Amendments - added subject-matter - main request, auxiliary requests 1, 3 to 6 (yes)
Amendment to appeal case - state of the proceedings - auxiliary request 2 admitted (no)
Claims - clarity - auxiliary requests 7 and 9 (no)
Examination of the opposition - discretion of opposition division - appropriately exercised (yes) - auxiliary request 8 - admitted (no)
Substantiation - auxiliary requests 10 to 15 - admitted (no)

Decisions cited:

G 0007/93, T 0545/01, T 0378/02, T 1041/98, T 0193/01,
T 0860/95, T 0649/97, T 0487/89, T 0129/88, T 1018/05

Catchword:



Beschwerdekammern

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Case Number: T 2195/18 - 3.2.06

D E C I S I O N
of Technical Board of Appeal 3.2.06
of 22 June 2023

Appellant: Garrett Transportation I Inc.
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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
16 July 2018 concerning maintenance of the
European Patent No. 1828543 in amended form.**

Composition of the Board:

Chairman M. Harrison
Members: M. Hannam
C. Almberg

Summary of Facts and Submissions

- I. An appeal was filed by each of the appellant (opponent) and the appellant (patent proprietor) against the interlocutory decision of the opposition division in which it found that European patent No. 1 828 543 in an amended form met the requirements of the EPC.
- II. In the written procedure, the parties requested that the decision under appeal be set aside, the opponent additionally that the patent be revoked, and the proprietor additionally that the patent be maintained as granted or in amended form according to one of fifteen auxiliary requests.
- III. The Board issued a summons to oral proceedings and a subsequent communication containing its provisional opinion, in which it indicated *inter alia* that the subject-matter of claim 1 of the main request appeared to extend beyond the content of the application as filed and that a similar conclusion might be reached with respect to auxiliary requests 1 and 3 to 6. It further indicated that claims 7 to 15 would appear not to meet the clarity requirement of Article 84 EPC.
- IV. Oral proceedings were held before the Board on 22 June 2023. At the end thereof, the requests of the parties were as follows:

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

The proprietor requested that the decision under appeal be set aside and the patent be maintained as granted (main request).

In the alternative, the proprietor requested that the patent be maintained based on one of the first to eighth auxiliary requests filed with the statement of grounds of appeal, of which

- the first to sixth had already been filed during the opposition proceedings (with the same labelling),
- the seventh was filed for the first time with said statement, and
- the eighth is the subject of the decision under appeal (then labelled as the seventh auxiliary request).

In the further alternative, the proprietor requested that the opponent's appeal be dismissed, i.e. that the patent be maintained based on the ninth auxiliary request as found allowable in the decision under appeal (then labelled as the eighth auxiliary request).

In the still further alternative, the proprietor requested that the patent be maintained based on one of the tenth to fifteenth auxiliary requests filed for the first time with said statement.

V. Claim 1 of the main request reads as follows:

"A turbine wheel (200) comprising:

a hub (210), a plurality of blades (220), and a backplate (230);

wherein one or more of the blades (220) comprises an exducer portion with a trailing edge (TE); and an inducer portion with a leading edge (LE);

characterized in that:

the inducer has positive local blade angles along the leading edge (LE), with respect to the intended direction of rotation of the turbine wheel (200), that increase in value from a point (C) on the leading edge (LE) proximate to a shroud end to a point (D) on the leading edge (LE) proximate to a backplate end (230)."

Claim 1 of auxiliary request 1 reads as for claim 1 of the main request with the following features appended:

"and the leading edge (LE) is swept back with respect to the intended direction of rotation of the turbine wheel (230), and the backsweep increases from the shroud end of the leading edge (LE) to the backplate end of the leading edge (LE)."

Claim 1 of auxiliary request 2 reads as for claim 1 of the main request with the following features appended:

"and local blade angle, β , at a point on the turbine wheel (200) is defined in an (r, θ, z) co-ordinate system in which the z -axis represents the axis of rotation of the turbine wheel (200), and the point on the turbine wheel (200) extends a radial distance r at a particular angle θ , as:

$$\tan(\beta) = r d\theta / dx_m,$$

where x_m is a meridional coordinate along a construction line (208) extending between the leading edge (LE) and the trailing edge (TE) on the meridional plane that is created from a projection onto the meridional plane of a blade camber line extending between the leading edge (LE) and the trailing edge (TE) "

A citation of the precise wording of claim 1 of auxiliary requests 3 to 6 is unimportant in view of the decision taken on these requests.

Claim 1 of auxiliary request 7 reads as follows:

"A turbine wheel (200) comprising:
a hub (210), a plurality of blades (220), and a

backplate (230);
wherein one or more of the blades (220) comprises an
exducer portion with a trailing edge (TE); and
an inducer portion with a leading edge (LE);
characterized in that:
the inducer has positive local blade angles along and
near the leading edge (LE), with respect to the
intended direction of rotation of the turbine wheel
(200), that increase in value from a point (C) on the
leading edge (LE) proximate to a shroud end to a point
(D) on the leading edge (LE) proximate to a backplate
end (230)."

A citation of the precise wording of claim 1 of
auxiliary request 8 is unimportant in view of the
decision taken on this request.

Claim 1 of auxiliary request 9 reads as for claim 1 of
auxiliary request 7 with the following features
appended:

"the leading edge (LE) is swept back with respect to
the intended direction of rotation of the turbine wheel
(230), and the backsweep increases from the shroud end
of the leading edge (LE) to the backplate end of the
leading edge (LE); and
the backsweep corresponds to positive local blade
angles that vary between approximately 10° and
approximately 25° ."

A citation of the precise wording of claim 1 of
auxiliary requests 10 to 15 is unimportant in view of
the decision taken on these requests.

VI. The proprietor's arguments relevant to the decision may
be summarised as follows:

Main request

The objection under Article 100(c) EPC did not prejudice maintenance of the patent as granted. Blade angle interpretation was important to understand the added matter objection. It was not possible to vary the blade angle at the leading edge without this also varying in a similar manner a step back from the leading edge (see page 7, lines 11 to 18 of the application as filed). The skilled person would understand that an angle measured at a point along a line had infinite possible values such that, in order to make any sense, the blade angle had to be measured near the leading edge. Therefore, in order to construct the $\tan(\beta)$ triangle, the skilled person would know that the blade angle had to be measured a step back from the leading edge, the 'and near' wording thus being superfluous in claim 1. An angle measured 'along' the leading edge was thus the same as an angle measured 'along and near' the leading edge. Additionally, if an angle varied 'along and near' the leading edge, this implicitly disclosed the angle varying similarly 'along' the leading edge.

Auxiliary request 2

Despite having presented no arguments in support of auxiliary request 2 in writing, no new facts had been presented in substantiating the request for the first time at oral proceedings; the request had been filed with the proprietor's statement of grounds of appeal so the facts were the same. The Board's preliminary opinion left the issues regarding the $\tan(\beta)$ calculation open such that the Board's finding that the subject-matter of claim 1 of the main request extended beyond the content of the application as filed was an exceptional circumstance justifying the admittance of

substantiation of the request at oral proceedings.

Auxiliary request 7

The term 'near' was a relative term only insofar as it defined the blade angle being measured near to rather than far from the leading edge. Similar terms included in claims had been found not to offend Article 84 EPC in, for example: T 860/95 (with respect to the term 'long'); T 649/97 (transparent); T 1041/98 and T 193/01 (thin); T 545/01 (flat) and T 378/02 (smooth). The blade angle being measured 'along and near the leading edge' was a single angle, not two separate angles, since the angle at the leading edge itself, being a line, would have no technical meaning. The term 'near' should be understood in the context of the patent as a whole. This provided a frame of reference at which the blade angle could be measured. An angle could not be measured at the leading edge itself so the skilled person would see 'near' as being a *de minimis* distance from the leading edge i.e. just distant enough to enable the $\tan(\beta)$ triangle to be produced. With such an understanding of 'near', the angle 'along the leading edge' and the angle 'along and near the leading edge' would be the same. The skilled person would also appreciate that the curvature of the camber line stated in paragraph [0022] of the patent to describe the local blade angle could also be described by the surface of the blade, since the blade angles simply needed to increase from point C to point D on the leading edge.

VII. The opponent's arguments relevant to the decision may be summarised as follows:

Main request

The subject-matter of claim 1 lacked basis. Throughout the application as filed, the positive local blade

angles were solely disclosed 'along and near' the leading edge such that omission of 'and near' resulted in the claimed subject-matter extending beyond the content of the application as filed.

Auxiliary request 2

The proprietor had provided no submissions in support of this request to date, such that the request was unsubstantiated and thus should not be taken into account.

Auxiliary request 7

The expression 'positive local blade angles along and near the leading edge' could reasonably be two separate angles, one along the leading edge and the other near the leading edge. The term 'near' was also unclear. How 'near' was this to the leading edge? The blade angle of the inducer depended on the distance from the leading edge at which it was measured. Since this was not clearly defined, this led to a lack of clarity in the claim as a whole.

Reasons for the Decision

1. *Main request*

Article 100(c) EPC

- 1.1 Relative to claim 1 as filed, claim 1 of the main request has been amended *inter alia* to define that the positive local blade angles 'increase in value from a point on the leading edge proximate to a shroud end to a point on the leading edge proximate to a backplate end'. The proprietor accepted that a basis for the

claimed subject-matter could not be found in the claims as filed, but argued that such basis could be found in the application as a whole.

1.2 The question to be answered is whether the omission of the limitation 'and near' from the following passage in claim 1 'the inducer has positive local blade angles along [*and near*] the leading edge' has basis in the application as filed. The opposition division found this requirement not to be met, since all references to the positive blade angles in the description were relative to positions 'near the leading edge' rather than simply 'along the leading edge' (see, for example, page 4, lines 9 to 17; page 5, lines 13 to 17; and page 7, lines 11 to 18).

1.3 The proprietor pointed out that an angle measured at a point had infinite possible values so that it would be a non-sensical measurement; this much is accepted by the Board. The proprietor continued that the skilled person would thus need to interpret where the blade angle could be reliably and repeatably measured in order to allow a meaningful measurement to be made. This also made technical sense in the light of the proprietor's reference to the ' $\tan(\beta)$ triangle', which was a right-angled triangle with the hypotenuse representing a delta along the blade leading edge, dx_m was a projection of the camber of the blade onto the meridional plane forming the side of the triangle adjacent to the blade angle β and $rd\theta$ was the local angular displacement forming the side of the triangle opposite the blade angle β . Constructing this triangle allowed the blade angle to be ascertained (leaving aside the fact that such an explanation was nowhere to be found in the application as filed and was presented for the first time during the oral proceedings).

However, the proprietor's further argument that the skilled person would thus identify the only location to measure the blade angle to be 'a step back' from the leading edge and that the inclusion of the 'and near' wording in claim 1 would thus be superfluous, is not accepted. The sole, consistent disclosure in the application as filed is for the blade angle to be measured 'near' the leading edge (see references in point 1.2 above as well as page 7, lines 22 to 24). Even if measuring the blade angle 'a step back' from the leading edge were seen as a technically reasonable location for such measurement, neither this approach nor the location are disclosed or defined in the application as filed. Again, this step-back approach was only derivable after a detailed explanation of how the blade angle could be measured using mathematical approximations. The sole disclosure in the application as filed is however for the blade angle to be measured 'near' the leading edge and the omission of this from claim 1 results in the claimed subject-matter lacking basis.

- 1.4 The proprietor's corollary from its 'step back from the leading edge' argument that a blade angle measured 'along the leading edge' would be the same as one measured 'along and near the leading edge' - since, it argued, otherwise a discontinuity would be present - is not accepted. With the term 'near' being undefined, it is not unambiguous that a blade angle measured 'at' the leading edge will necessarily be the same as one measured 'near' the leading edge in a continuously varying blade geometry. This is not least the case since, in the light of the proprietor's 'tan(β) triangle' argument, even when the value of dx_m approaches zero, any blade angle measured 'near' the leading edge will only be an approximation of the

actual blade angle 'at' the leading edge. It is therefore not the case that a blade angle measured 'at' the leading edge would necessarily be the same as one measured 'near' the leading edge.

1.5 The proprietor's further contention, that if an angle varied 'along and near' the leading edge, this implicitly disclosed the angle varying similarly 'along' the leading edge, is also not accepted. Claim 1, and indeed the application as filed as a whole, failed to provide any indication as to the rate of blade angle variation across the width of a blade. It is thus technically reasonable for the term 'near' to encompass a distance large enough for the alleged implicit equal variation in blade angle between the two locations to not be realised i.e. that the blade angle measured 'along and near' the leading edge could be appreciably different to that measured just 'along' the leading edge, such that a zero angular change at the leading edge (i.e. no increase in angle passing from the shroud to the backplate) may, depending on the distance chosen, become an increasing angle according to the claim.

1.6 In further support of its position, the proprietor referred to T 487/89 and T 129/88. These decisions both related to a lack of an upper limit for tenacity in claim 1, which was found not to offend Article 83 EPC as the skilled person understood that claim 1 would embrace values as high as could be practically attained. It is not immediately evident how the finding in these decisions should support the proprietor's contention that the wording 'and near' could be omitted from claim 1. If the omission of 'and near' were seen as similar to omitting the upper limit of a parameter range, the findings in the cited decisions anyway

relate to sufficiency of disclosure and thus provide no precedent for a finding that such an omission necessarily does not add subject-matter. As found above in points 1.2 to 1.5, the omission of 'and near' from claim 1 does lack basis in the application as filed. Similarly, T 1018/05, cited by the proprietor, concerns sufficiency of disclosure and does not support the proprietor's contention that omission of 'near' finds basis in the application as filed.

1.7 The Board thus concludes that a blade angle measured 'along and near' the leading edge is the only direct and unambiguous disclosure in the application as filed.

1.8 Consequently, the omission of the wording 'and near' from claim 1 results in the subject-matter of claim 1 extending beyond the content of the application as filed. The ground for opposition under Article 100(c) EPC thus prejudices maintenance of the patent as granted.

2. *Auxiliary request 1*

Article 123(2) EPC

2.1 To the preliminary opinion given at oral proceedings that the subject-matter of claim 1 of auxiliary request 1 appeared to suffer from the same defects, albeit under Article 123(2) EPC, as the subject-matter of claim 1 of the main request, the proprietor presented no counter-arguments.

2.2 The Board thus finds the subject-matter of claim 1 of auxiliary request 1 not to meet the requirement of Article 123(2) EPC. Consequently, auxiliary request 1

is not allowable.

3. *Auxiliary request 2*

3.1 Article 12(2) RPBA 2007 requires the statement of grounds of appeal and the reply to contain a party's complete case, in that it is set out clearly and concisely the reasons why it is requested that the decision under appeal be reversed, amended or upheld, and specifies expressly 'all the facts, arguments and evidence relied on'. Any part of the party's case failing to meet this requirement can result in the Board not taking that part into account (Article 12(4) RPBA 2007).

3.2 Auxiliary request 2 was filed with the proprietor's statement of grounds of appeal yet was not accompanied by any substantiation of how this new request might overcome any potential objections which might be raised by the opponent to the higher ranking requests. The proprietor's reply to the opponent's appeal also failed to provide any such substantiation. Consequently, the Board could, in exercising its discretion under Article 12(4) RPBA 2007, decide not to take auxiliary request 2 into account.

3.3 At oral proceedings, the proprietor argued that it was able to substantiate auxiliary request 2 at that time. According to Article 13(2) RPBA 2020, any amendment to a party's appeal case made after notification of a summons to oral proceedings shall, in principle, not be taken into account unless there are exceptional circumstances, which have been justified with cogent reasons by the party concerned. Providing substantiation of auxiliary request 2 at this time thus required exceptional circumstances in order to be taken

into account.

3.4 The proprietor's contention that the arguments being presented in support of auxiliary request 2 included no new facts and were thus just new arguments is not accepted. Fundamentally, the case being presented by the proprietor related to auxiliary request 2 which, despite having been filed with the proprietor's statement of grounds, included a plurality of additional features over the main request. As stated in 3.1 above, the facts, evidence and arguments relied on need to be stated. The relevance of the additional features in respect of overcoming the objections to the main request were being substantiated for the first time at oral proceedings, whereby the relevance of these features themselves put forward as a result of the arguments based on them constitute new facts for consideration by the Board and the opponent. The fact that the request per se had been filed previously does not correspond to the requirements in Article 12(2) RPBA 2007.

3.5 As to the proprietor's argument that the Board's preliminary opinion left a conclusion regarding the 'tan(β) triangle' calculation open, such that the conclusion on this issue at oral proceedings was an exceptional circumstance justifying substantiation of the request at oral proceedings to be admitted, is not accepted. The requirement for a party to present its complete appeal case in its statement of grounds and reply is clearly stated in the Rules of Procedure of the Boards of Appeal. Such a 'complete appeal case' must include all facts, arguments and evidence relied upon. Should the Board ultimately disagree with a party and decide against it, this cannot be seen as an exceptional circumstance, rather, in contentious *inter*

partes proceedings, finding against one of the parties is necessarily the norm. In the present case, therefore, the Board finding the main request to be unallowable on the basis of objections raised by the opponent, cannot be seen as an exceptional circumstance justifying the substantiation of auxiliary request 2 only at oral proceedings.

3.6 In summary, therefore, the Board exercises its discretion under Article 13(2) RPBA 2020 not to admit the substantiation of auxiliary request 2. Consequently, lacking substantiation, the Board exercises its discretion not to take auxiliary request 2 into account under Article 12(4) RPBA 2007.

4. *Auxiliary requests 3 to 6*

4.1 To the Board's preliminary opinion given at oral proceedings that the subject-matter of claim 1 of auxiliary requests 3 to 6 appeared to suffer under the same defects, albeit under Article 123(2) EPC, as the subject-matter of claim 1 of each of the main request and auxiliary request 1, the proprietor presented no counter-arguments.

4.2 The Board thus finds the subject-matter of claim 1 of each of auxiliary requests 3 to 6 not to meet the requirement of Article 123(2) EPC. Consequently, auxiliary requests 3 to 6 are not allowable.

5. *Auxiliary request 7*

Article 84 EPC

5.1 Claim 1 has been amended to define the inducer having 'positive local blade angles along and near the leading

edge'. This amendment was argued by the opponent to be unclear as such, since it was ambiguous how near the leading edge the blade angles were to be measured. The Board concurs with this.

5.2 The Board however does not accept the opponent's contention that the blade angle being measured 'along and near the leading edge' could refer to two separate angles being measured. Since a blade angle measured 'along' the leading edge itself could have infinite different values due to an angle subtended perpendicular to a line possibly adopting any angle, such an angle measured just 'along' the leading edge would have no technical meaning. 'Along and near' must therefore be two descriptors of where, relative to the leading edge, a single blade angle is to be measured.

5.3 The Board is nonetheless not persuaded by the proprietor's argument that the description as a whole should be consulted to determine how the term 'near' is to be understood. In this regard, there are specific passages of the description which recite the claimed 'along and near' terminology, for example, page 4, lines 9 to 17; page 5, lines 13 to 17; and page 7, lines 11 to 18, yet these passages provide no elucidation, beyond reciting the 'along and near' terminology, as to how the term 'near' should be interpreted. It is also not evident, and was also not detailed by the proprietor, how other passages of the description would further clarify the interpretation of the term 'near' with respect to the vicinity to the leading edge at which the blade angle should be measured.

5.4 The proprietor's argument that the term 'near' was a relative term insofar as it defined the blade angle

being measured near to, rather than far from, the leading edge does not persuade the Board that the term itself is therefore clear. It remains ambiguous at what distance to the leading edge the blade angle is to be measured e.g. 0.5mm or perhaps 3mm or more? The Board finds it both possible and technically reasonable for the blade angle at such different distances from the leading edge to be appreciably different in relative terms such that the term 'near' introduces a lack of clarity in the claim as a whole.

- 5.5 The proprietor referred to various decisions in order to support its argument that the relative term 'near' was clear.
- 5.6 In this respect, the Board notes that relative terms constitute a potentially unclear element due to their characteristic to change their meaning according to the context yet, in the case law of the Boards of Appeal, such terms are nevertheless considered as clear, if their meaning is clear in the context of the whole disclosure.
- 5.6.1 In T 860/95 a catalyst is defined to be in use 'for a long period of time' which was found to be clear in the context of the use of that specific catalyst in a particular application. In the Board's view, however, this differs from the use of the term 'near' in claim 1 of auxiliary request 7 where technically reasonable interpretations of the term could result in appreciably different measured blade angles.
- 5.6.2 In T 649/97 an article was defined to be transparent which was construed as meaning sufficiently transparent for the article to carry out its intended function. The term transparent was thus deemed to be clear. The

finding in this case was however very case dependent and does not allow a generalisation to be made that all 'relative terms' are thus clear. In claim 1 of auxiliary request 7 the term 'near' has no such clarity imparted by its intended function i.e. to allow a meaningful blade angle to be measured along and near the leading edge.

5.6.3 In both T 1041/98 and T 193/01 the relative term 'thin' was found to have a sufficiently precise meaning in the context of the claim. Again, the precise context in which such relative terms are used is decisive for whether the terms are clear or not. In claim 1 of auxiliary request 7, the Board can credit no such clarity to the term 'near' in the context of determining the blade angle along and near the leading edge of the blade; this may cover a broad range of distances from the leading edge, each providing a different estimation of the blade angle along the leading edge itself.

5.6.4 Similarly, in T 545/01 and T 378/02 relating to the clarity of the relative terms 'flat' and 'smooth' respectively, the context of these terms' disclosure resulted in their meaning being clear. In contrast, as the Board notes, the use of the term 'near' in claim 1 of auxiliary request 7 allows a range of technically reasonable interpretations which could result in appreciably different measured blade angles. The clarity of the term 'near', even when considered in context, is lacking.

5.7 At oral proceedings the following example was discussed as highlighting the lack of clarity resulting from the term 'near' in the claim: The Board saw distances of both 1 mm from the leading edge and 3 mm from the

leading edge as possible and reasonable interpretations of 'near to the leading edge'. If, for the sake of example, the blade angle at 3 mm from the leading edge were 2 degrees i.e. falling under claim 1, it was technically reasonable for the blade angle measured at just 1 mm from the leading edge to be zero degrees i.e. not positive and thus not meeting the 'positive local blade angle' requirement of claim 1, the blade geometry varying continuously from 1 mm to 3 mm. It was thus evident that, dependent upon how the expression 'near the leading edge' in claim 1 is interpreted, a turbine wheel may, or may not, fall under the scope of the claim.

The proprietor's response to this example that, if there were any lack of clarity resulting from the term 'near' in claim 1, the skilled person would see the term 'near' as being a *de minimis* distance from the leading edge, is not supported in any part of the patent specification. Whilst this could be how the skilled person might interpret the term, no link between the '*de minimis* argument' and the term 'near' is provided in the patent. In fact the "*de minimis* argument" again came only as a result of diagrammatic and mathematical explanations given during the oral proceedings by the proprietor. It is not necessarily the case that the skilled person would interpret the term 'near' in this way, a far broader interpretation being technically reasonable and resulting in different measurements of blade angle. The skilled person, being aware of the resultant different blade angle measurements, would conclude that the term 'near' thus rendered claim 1 unclear.

5.8 In summary therefore, the ambiguity associated with the term 'near' in claim 1 results in the clarity

requirement of Article 84 EPC not being met by claim 1. Auxiliary request 7 is consequently not allowable.

6. *Auxiliary request 8*

Admittance

6.1 According to G 7/93, Reasons 2.6, in cases where a department of first instance has exercised its discretion, it is not the function of a Board of Appeal to review all the facts and circumstances of the case as if it were in the place of the first instance department, in order to decide whether or not it would have exercised such discretion in the same way. Rather, its competence should normally be limited to establishing whether the first instance department has exercised its discretion in accordance with the right principles and that it has exercised its discretion in a reasonable way.

6.2 Current auxiliary request 8 was presented to the opposition division as auxiliary request 7. The opposition division found that claim 1 of the request before it *prima facie* lacked clarity (Article 84 EPC) and thus exercised its discretion not to admit the request into the proceedings. In reaching its conclusion under Article 84 EPC, the opposition division examined the clarity of claim 1 on a *prima facie* basis since the request had been filed for the first time during oral proceedings (see point 3 of the opposition division's decision and page 5 of the minutes).

6.3 The Board sees the opposition division as having exercised its discretion both in accordance with the right principles and in a reasonable way. To this

opinion given preliminarily at oral proceedings, the proprietor presented no counter arguments. The Board thus confirms the decision of the opposition division, that auxiliary request 8 is not admitted into the proceedings.

7. *Auxiliary request 9*

Article 84 EPC

7.1 To the preliminary opinion given at oral proceedings that claim 1 of auxiliary request 9 appeared to lack clarity for the same reasons as claim 1 of auxiliary request 7, the proprietor presented no counter-arguments.

7.2 The Board thus finds claim 1 of auxiliary request 9 to lack clarity for the same reasons as those given for claim 1 of auxiliary request 7. Consequently, auxiliary request 9 is not allowable.

8. *Auxiliary requests 10 to 15*

8.1 Auxiliary requests 10 to 15 were filed with the proprietor's statement of grounds of appeal yet these grounds failed to include any substantiation of how these requests might overcome any potential objections which might be raised by the opponent to the higher ranking requests. The proprietor's reply to the opponent's appeal also failed to provide any such substantiation.

8.2 To the preliminary opinion given at oral proceedings that auxiliary requests 10 to 15 appeared to be unsubstantiated and might therefore not be taken into account, the proprietor presented no counter-arguments.

8.3 Consequently, in exercising its discretion under Article 12(4) RPBA 2007, the Board decided not to take auxiliary requests 10 to 15 into account.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The patent is revoked.

The Registrar:

The Chairman:



D. Grundner

M. Harrison

Decision electronically authenticated