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Datasheet for the decision of 13 December 2021

Case Number: T 2951/18 - 3.2.07

Application Number: 06824489.6

Publication Number: 1954624

IPC: B67D1/08, B65D81/26, B65D47/24, B65D1/02, B29C49/06

Language of the proceedings: EN

Title of invention:
SYSTEM AND METHOD FOR DISTRIBUTION AND DISPENSING OF BEVERAGES

Patent Proprietor:
Petainer Lidköping AB

Opponents:
Perani & Partners S.p.A.
Dispack-Projects N.V.

Headword:

Relevant legal provisions:
EPC Art. 105(1)(a), 112(1)(a)
EPC R. 99(1), 77(1)
RPBA Art. 12(4)
RPBA 2020 Art. 11, 12(6), 23

Keyword:
Intervention of the assumed infringer - admissibility of intervention during appeal proceedings - admissible (yes)
Referral to the Enlarged Board of Appeal - (no)
Remittal - (yes)

Decisions cited:
G 0001/94, G 0003/97, T 0384/15, T 1891/20

Catchword:

Europäisches Patentamt
European Patent Office
Office européen des brevets

Beschwerdekammern

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Case Number: T 2951/18 - 3.2.07

D E C I S I O N
of Technical Board of Appeal 3.2.07
of 13 December 2021

Appellant: (Opponent 1)	Perani & Partners S.p.A. Piazza San Babila 5 20122 Milan (IT)
Representative:	Perani & Partners S.p.A. Piazza Armando Diaz, 7 20123 Milano (IT)
Respondent: (Patent Proprietor)	Petainer Lidköping AB c/o REXAM AB Box 9057 200 39 Malmö (SE)
Representative:	Cummings, Sean Patrick Keltie LLP No.1 London Bridge London SE1 9BA (GB)
Party as of right: (Opponent 2)	Dispack-Projects N.V. Admiraalhof 24 9070 Destelbergen (BE)
Representative:	Arnold & Siedsma Bezuidenhoutseweg 57 2594 AC The Hague (NL)
Decision under appeal:	**Decision of the Opposition Division of the European Patent Office posted on 18 October 2018 rejecting the opposition filed against European patent No. 1954624 pursuant to Article 101(2) EPC.**

Composition of the Board:

Chairman	I. Beckedorf
Members:	V. Bevilacqua
	A. Cano Palmero

Summary of Facts and Submissions

I. Opponent 1 (appellant, hereinafter: opponent) lodged an appeal within the prescribed period and in the prescribed form against the decision of the opposition division rejecting the opposition and maintaining European patent No. 1 954 624 as granted and sought the revocation of the patent in its entirety.

II. The patent proprietor (respondent) replied to the statement setting out the grounds of appeal with letter dated 4 July 2019, and defended the patent as granted to meet the requirements of the EPC or in further amended version.

III. In preparation for oral proceedings, initially scheduled for the 15 March 2021, the Board communicated its preliminary assessment of the case by means of a communication pursuant to Article 15(1) RPBA 2020 according to which the appeal was likely to be dismissed.

IV. On 8 February 2021 an intervention was filed according to Article 105 EPC seeking the revocation of the patent in its entirety.

The intervener (opponent 2 - party as of right) referred with its intervention to evidence already submitted by the appellant, as well as to additional evidence S1 to S8).

V. With letter of 12 February 2021, the opponent submitted further documents.

VI. The patent proprietor filed observations with letter dated 19 February 2021 in response to the intervention and to the letter of the opponent of 12 February 2021.

VII. The Board postponed the oral proceedings with communication dated 26 February 2021.

VIII. The intervener filed observations with letter of 10 March 2021 in response to the letter of the patent proprietor of 19 February 2021 and of the Board's communication dated 26 February 2021.

IX. Oral proceedings before the Board took place on 13 December 2021. At the conclusion of the proceedings the decision was announced. Further details of the proceedings can be found in the minutes thereof. The parties' final request as confirmed by them at the oral proceedings were as follows:

The opponent requested
that the decision under appeal be set aside
and
that the patent be revoked,
or in the alternative,
that the case be remitted to the opposition division.

The intervener requested
that the patent be revoked
and
that a question be referred to the Enlarged Board of Appeal should the evidence submitted by the intervener not be admitted into the proceedings (letter of 10 March 2021, page 7, last paragraph),
or, in the alternative,

that the case be remitted to the opposition division for further prosecution.

The patent proprietor requested:
that the intervention not be admitted,
or, in the alternative,
that a question be referred to the Enlarged Board of Appeal (letter of 19 February 2019, point 2b),
or, in the alternative,
that the evidence submitted by the intervener not be admitted into the proceedings,
or, in the alternative,
that a question be referred to the Enlarged Board of Appeal (letter of 19 February 2019, point 3b),
or, in the alternative,
that the case be remitted to the opposition division for further prosecution,
or, in the alternative,
that the appeal be dismissed,
or in the alternative,
when setting aside the decision under appeal,
that the patent be maintained in amended form on the basis of one of auxiliary requests 1 to 6 filed with the reply to the appellant's statement of grounds of appeal.

X. The lines of arguments of the parties relevant for the present decision are dealt with in detail in the reasons for the decision. These lines of arguments are focused on the following points:

- Admissibility of the intervention;
- Admittance into the proceedings of the evidence submitted by the intervener;
- Requests for referral of questions to the Enlarged

Board of Appeal;
- Requests for remittal of the case to the opposition division for further prosecution.

XI. In view of the present decision, which is only taken on the issues mentioned above, the text of the claims is not relevant and will therefore not be repeated here.

Reasons for the Decision

1. *Transitional provisions*

The appeal proceedings are governed by the revised version of the Rules of Procedure which came into force on 1 January 2020 (Articles 24 and 25(1) RPBA 2020), with the exception of Article 12(4) to (6) RPBA 2020 instead of which Article 12(4) RPBA 2007 remains applicable (Article 25(2) RPBA 2020).

2. Admissibility of the intervention

2.1 The patent proprietor argued that, following decision T 384/15, the Board had to consider wether, in the present case, when invoking Article 105 EPC, the intervener attempted to circumvent the law by abuse of process.

Should this be the case, according to point 1.4 of the Reasons of T 384/15, the intervention should be deemed inadmissible, even if there were no doubts that in the present case the intervener was a "third party".

2.1.1 The patent proprietor submitted that the legal requirement to present relevant evidence within the original 9 months opposition period was circumvented by the intervener.

This was because the evidence submitted by the intervener related to the same late-filed evidence submitted by the opponent (the "Beer Sphere", reasons of the appealed decision, points 1.4 and 5.2) and to the same alleged common general knowledge (reasons of the appealed decision, point 1.3), which was not admitted by the opposition division (see reasons of the appealed decision, point 1.5) was referred.

Clearly the opponent, in this unsuccessful attempt to get the above mentioned evidence into the proceedings, was acting under the instruction of the intervener.

The abusive nature of the procedural conduct of the intervener, questioning patentability again, on the basis of substantially the same evidence, and introducing it for the second time at a very late stage of the proceedings via a different route, should therefore lead to considering its intervention as inadmissible.

2.1.2 The abusive nature of the procedural conduct of the intervener was also evident from the timing chosen for submitting the declaration of non infringement first, and subsequently of the notice of intervention, which came just a few weeks before the scheduled oral proceedings before the Board, but late enough to have the possibility to withdraw the case before the planned court hearing in national proceedings.

This procedural conduct of the intervener was particularly surprising and therefore abusive because there were no signs that the patent proprietor was going to file a preliminary injunction against the intervener.

2.1.3 As a consequence of the above the intervention should not be admitted.

2.2 The Board is not convinced by the above arguments that the intervener attempted to circumvent the law and that, for this reason, the intervention should not be admitted.

According to the established case law (see Case Law of the Boards of Appeal [CLB], 9th edition 2019, III.G. 4.3.6), an abusive conduct is not lightly to be presumed, but must be established beyond any reasonable doubt, and the burden of proof is on the party claiming any such abuse of rights.

2.2.1 The alleged existence of a relationship between the appellant and the intervener, even if confirmed, would not be sufficient for concluding that procedural abuse occurred.

This is because, as stated in G 3/97, point 2.1 of the Reasons:

"the question whether the opponent's acts accord with the intentions or instructions of the principal is relevant only to the internal relationship between the latter and the opponent, and has no bearing on the opposition proceedings."

In other words, it is neither vexatious nor illegitimate if the opponent and the intervener coordinate their actions within the limits of the applicable procedural framework.

The intervener referred, when formulating patentability objections, to facts and evidence, such as the so-called "Beer Sphere", which were previously brought forward by the opponent.

Referring to documents and objections submitted by the opponent does not represent an abuse but rather an attempt of the intervener to pursue their legitimate interest by using information which was publicly available, *e.g.* by file inspection, when the intervention was filed.

There is also no requirement in the EPC that the objections and the evidence submitted by an intervener should not be related to those previously submitted by an opponent.

The argument that using a straw man as opponent allowed the intervener to create a second, abusive, opportunity to circumvent the legal requirement to present relevant evidence within the original 9 months opposition period is therefore not convincing.

2.3 The patent proprietor also argued that circumvention of the law by the intervener was evident from the fact that the actions of opponent 1 and those of the intervener were clearly directed by the same professional representatives.

This became particularly evident when, in preparation for the oral proceedings before the Board, the

opponent's professional representative was authorised to act for the intervener, and the intervener's professional representatives were authorised to act for opponent 1 (all letter dated 10 December 2021).

2.4 The Board disagrees. The above argument of the patent proprietor is not convincing for the following reasons.

2.4.1 There is no evidence on file of any such common professional representative(s). During the entire written proceedings of the acts of the opponent and those of the intervener were conducted by distinct professional representatives, as it was Mr. Girlando who submitted the notice of the opponent's appeal and the statement setting out the grounds therefor, whereby the notice of intervention as well as the notice of opposition of the intervener were filed and reasoned by Ms D'Hallewyn.

2.4.2 The opponent and the intervener authorised each other's professional representative only a few days before the oral proceedings, which took place on the 13 December 2021.

Such a "cross-authorisation", shortly in advance of oral proceedings, cannot *per se* be deemed as a sign of abuse of procedure, because abuse of procedure could only occur when a right is exercised for a different purpose than its intended one.

In addition such a "cross-authorization" between opponents, sharing a legitimate interest in the revocation of the patent in suit, is also not uncommon in proceedings before the Boards of Appeal (see for example T 1891/20).

In this context, it is noted that there is no prohibition in the EPC that two distinct parties are represented by the same professional representative.

2.4.3 The procedural conduct of the intervener leading to the timing of the intervention is also not regarded as abusive, because in the present case it was the cease and desist letter, *e.g.* the legal action initiated by the patent proprietor against a third party, which triggered the filing of the notice of intervention at a very late stage of proceedings before the EPO.

2.4.4 As no attempt to circumvent the law could be established by the Board the is no reason to investigate (see point 2.1 above) whether such an attempt could have a negative effect on the admissibility of the intervention.

The other requirements set out in Articles 99(1) and 105(1) EPC and Rule 77(1) EPC being met, which was not contested by the patent proprietor, the Board concludes that the intervention is admissible.

3. Patent proprietor's first request for referral of a question to the Enlarged Board of Appeal

3.1 The patent proprietor requested, to the extent that the Board does not deem the intervention inadmissible, that the following question be referred to the Enlarged Board of Appeal:

> *"- In view of Reason 1.4 of T 0384/15, when an intervener according to Article 105(1) is legally a different party than any of the original opponents, are there any grounds foreseeable for holding an*

opposition and/or an intervention inadmissible because of a suspected attempt to circumvent the law by abuse of process, when there are clear signs that one of the original opponents and one of the interveners are instructed by the same instructor?

- If the answer to the first question is yes, can an attempt to circumvent the legal requirement to present relevant evidence within the original 9 months opposition period be a valid ground for holding the opposition and/or the intervention inadmissible?

- If the answer to the second question is yes, are the following circumstances relevant criteria for determining whether the opponent and/or the intervener are considered to attempt to circumvent the law by abuse of procedure?

o Whether the intervener derives his right to intervene from Article 105(1)(a) or (b).

o The timing of the intervention relative to the progress already made in the opposition procedure (first instance, second instance, time to oral proceedings).

o Whether the opponent has previously made unsuccessful attempts, in first and/or second instance, to have the same or similar evidence admitted into the proceedings."

3.2 For the reasons given above (cf. point 2.2), the Board concluded that no attempt of intervener to circumvent the law could be established and that there are no indications to that end.

As a consequence of the above the Board concludes that the first and decisive question formulated by the patent proprietor does not need to be answered in order to reach a final decision in the present appeal proceedings and decides not to refer it to the Enlarged Board of Appeal.

4. Admittance into the proceedings of the evidence submitted by the intervener

4.1 The patent proprietor further argued that the evidence submitted by the intervener not be admitted into opposition proceedings in application of Articles 12(6) and 14 RPBA 2020.

This was because, so to the patent proprietor, Article 14 RPBA 2020 specified that Article 12(6) RPBA 2020 also applied to interventions, with the result that there were clear limits to what an intervener is allowed to submit in appeal proceedings, which were similar to those foreseen for an appellant-opponent.

The evidence submitted by the intervener should therefore not be admitted because the opposition division already decided (appealed decision, point 1.5) not to admit late-filed evidence related to the same "Beer Sphere" and to and the same common general knowledge.

4.2 The Board notes that that Article 12(6) RPBA 2020, to which the patent proprietor specifically refers, is not applicable to the present proceedings (see point 1 above), instead of which Article 12(4) RPBA 2007 having a similar wording, applies.

Articles 12(4) RPBA 2007 and 12(6) RPBA 2020 both provide for a discretionary power of the Board not to admit evidence which was not admitted in the first instance proceedings.

In the present case the Board, taking into account the principle, firmly established in the case law, that an intervener has the right to present a new ground for opposition at the appeal stage (G 1/94), concludes that the purpose of an intervention under Article 105 EPC during appeal proceedings would be meaningless if the evidence upon which the intervener decides to rely was not admitted therein.

Systematically preventing interveners from referring to duly filed prior-art documents only because the same or similar evidence was filed late by an opponent would force these third parties to pursue their legitimate interest, recognized under Article 105 EPC, in national proceedings.
This would lead to a situation which is incompatible with the spirit and purpose of the EPC (Article 23 RPBA 2020).

As a consequence of the above the Board concludes that the evidence filed by the intervener should be admitted into the present proceedings.

The pages 1-25 extracted from "PET Packaging Technology", which were not admitted by the opposition division (**O26**, see reasons of the appealed decision, point 1.10), and which were referred to in the inventive step objections of the intervener, are therefore also admitted into the present proceedings.

5. Intervener's request for referral of a question to the Enlarged Board of Appeal

5.1 The intervener requested, to the extent that the evidence they submitted not be admitted into the proceedings, that the following question be referred to the Enlarged Board of Appeal:

> *"Does a Board have to admit new grounds and/or arguments and/or evidence filed by an intervener assuming that the intervention is admissible and that the new grounds and/or arguments and/or evidence have been filed within the time limit of Rule 89 EPC for intervening under Article 105 EPC? If the answer is no, under which conditions may a Board decide not to admit such new grounds and/or arguments and/or evidence?"*

5.2 As, however, the Board decided to admit the above mentioned evidence, this question does not need to be answered in order to reach a final decision in the present appeal proceedings.

The Board therefore decides that the request for referral to the Enlarged Board of Appeal of the intervener is refused.

6. Patent proprietor's second request for referral of a question to the Enlarged Board of Appeal

6.1 The patent proprietor requested, to the extent that the evidence submitted by the intervener be admitted into the proceedings, that the following question on the interpretation of Article 12(6) RPBA 2020 be referred to the Enlarged Board of Appeal:

"For the interpretation of Article 12(6) RPBA, does the Board have the option to allow into the proceedings any requests, facts, objections or evidence which were not admitted in the proceedings leading to the decision under appeal for the reason that, in the appeal, the requests, facts, objections or evidence are submitted by a different party than the party who did so in the proceedings leading to that earlier decision?

- If the answer to the first question is yes, are the following circumstances relevant criteria for determining whether the Board should decide to admit the requests, facts, objections or evidence?
o The timing of the submission relative to the progress already made in the appeal procedure.

o Whether the different party is an intervener who was not yet a party to the proceedings at the time of the decision not to admit the requests, facts, objections or evidence.

o Whether such intervener is, or is suspected to be, the original instructor behind the party who first submitted the requests, facts, objections or evidence.

o Whether the requests, facts, objections or evidence concerns exactly the same requests, facts, objections or evidence, or only concern the same or similar subject-matter."

6.2 As discussed in point 1 above, Article 12(6) RPBA 2020 is not applicable to the present case, and, as discussed in point 4.2 above, the decision to admit the evidence filed with the intervention was taken without

the need of dealing with the issues raised in the question formulated by the patent proprietor.

The decision to admit the evidence filed with the intervention was taken on the basis of Article 12(4) RPBA 2007, Article 23 RPBA 2020 and of principles firmly established in the case law (see point 4.2 above).

Therefore the question formulated by the patent proprietor clearly does not need to be answered in order to reach a final decision in the present appeal proceedings, and the Board decides that also the second request for referral to the Enlarged Board of Appeal of the patent proprietor is refused.

7. Request of all parties for remittal to the department of first instance

7.1 All parties requested that, in the event that the intervention and the additional evidence filed therewith would be considered, the case be remitted to the opposition division for further prosecution.

7.2 It is the Boards' settled case law that parties do not have a fundamental right to have their case examined at two levels of jurisdiction. Accordingly, they have no absolute right to have each and every matter examined at two instances. Article 111(1), second sentence, EPC leaves it instead to the Board's discretion to decide on an appeal either by exercising any power conferred on the department of first instance or by remitting the case to that department (see CLB, *supra*, V.A.7.2.1).

In addition, according to Article 11 RPBA 2020, a Board shall not remit a case to the department whose decision

was appealed for further prosecution, unless special reasons present themselves for doing so.

7.3 In the present case the Board considers that the additional objections, facts, arguments and evidence originated by the intervention constitute special reasons in the sense of Article 11 RPBA 2020, for the following reasons.

The primary task of the Boards of Appeal is to review the decision of the department of the administrative departments of the EPO. The additional facts, evidence, arguments and the objections relied upon by the intervener have not been examined by the opposition division. While taking account of the legislator's intention that Article 11 RPBA 2020 aims at reducing the likelihood of a "ping-pong" effect between the Boards and the administrative departments of the EPO and at avoiding an undue prolongation of the entire proceedings before the EPO, the particular circumstances of the present case, in particular in view of the filing of an intervention based on substantially new evidence after the decision under appeal had been announced by the opposition division, call for remitting the case to the opposition division (see also G 1/94, point 13 of the Reasons).

The Board thus concurs with the parties who concordantly requested that the case be remitted to the opposition division.

Order

For these reasons it is decided that:

1. The requests for referral to the Enlarged Board of Appeal are refused.

2. The intervention is admissible.

3. The decision under appeal is set aside.

4. The case is remitted to the opposition division for further prosecution.

The Registrar: The Chairman:

G. Nachtigall I. Beckedorf

Decision electronically authenticated