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**Datasheet for the decision  
of 18 November 2021**

**Case Number:** T 1735/19 - 3.2.05

**Application Number:** 12850745.6

**Publication Number:** 2791030

**IPC:** B29K101/00

**Language of the proceedings:** EN

**Title of invention:**

Plastic container for packing of filling product under pressure, and method for the manufacture thereof

**Patent Proprietor:**

TRADIDEC NV

**Opponent:**

Airopack Technology Group B.V.

**Relevant legal provisions:**

EPC Art. 54(1), 83, 111(1), 123(2)

RPBA Art. 12(4)

RPBA 2020 Art. 11, 13(2)

**Keyword:**

Admittance of the main request and auxiliary request 1 (yes)

Added subject-matter (yes: main request)

Novelty (yes: auxiliary request 1)

Sufficiency of disclosure (yes: auxiliary request 1)

Remittal to the opposition division (yes)

**Decisions cited:**

T 1018/02, T 0521/12, T 1646/12, T 0388/13



**Beschwerdekammern**

**Boards of Appeal**

**Chambres de recours**

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**Case Number: T 1735/19 - 3.2.05**

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.05**  
**of 18 November 2021**

**Appellant:** TRADIDEC NV  
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**Respondent:** Airopack Technology Group B.V.  
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**Representative:** Hoyng Rokh Monegier B.V.  
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**Decision under appeal:** **Decision of the Opposition Division of the  
European Patent Office posted on 25 March 2019  
revoking European patent No. 2791030 pursuant to  
Article 101(3) (b) EPC.**

**Composition of the Board:**

**Chairman** P. Lanz  
**Members:** O. Randl  
C. Brandt  
M. Holz  
A. Bacchin

## **Summary of Facts and Submissions**

I. The patent proprietor appealed against the decision of the opposition division to revoke European patent No. 2 791 030 (hereinafter "the patent").

II. Among the documents considered by the opposition division, the following are relevant to the appeal:

E1: WO 2005/082744 A1

E20-P: Expert opinion by Prof. Peter Michel

E21-P: Expert opinion by Rainer Dahlmann

The appellant filed the following documents, among others, with its statement of grounds of appeal:

E32: Declaration by Prof. Peter Michel

E33: Wikipedia entry on "Injection moulding"

III. Oral proceedings before the board took place on 18 November 2021 by videoconference.

IV. The appellant (patent proprietor) requested that the decision under appeal be set aside and that the patent be maintained in amended form on the basis of the main request or any of the first to third auxiliary requests, all requests filed during the oral proceedings.

The respondent (opponent) requested that the appeal be dismissed.

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

V. Claims 1 and 6 of the main request read (for claim 1, the feature references used by the board have been added in square brackets):

1. [1] A method for manufacturing a container (1) of the pressure container packaging type, [1a] said container being a container for packaging under pressure of a filling product continuum, [1b] including (semi-)liquid fluids, resp. discontinuous filling product such as foam, pastes, cream, or powders, [2] comprising a neck section (23) with a pouring opening (24) on its top side, an adjacent sheathing section (22) forming the body of the container, and a bottom section (21) of the container, [3] which is essentially composed of a plastic polymer, [4] which is closable on said top section with a closure (5), wherein [5] the bottom section (21) disposed opposite said top section is closed [5a] by a separately added bottom (21) [5b] which is attached to said body (22) by means of a joint (13), and [6] said body (22) is provided with a set of reinforcements (30), [7] said container body having a profile with a longitudinal axis (1) [7a] that is first formed with subsequent cutting hereof to form a tubular element to the required longitudinal dimension and wherein [8] pressure means are arranged herein to pressurize the container (1) with the filled product, [8a] i.e. to pressure p1 [8c] by gassing, [9] particularly wherein the container (1) is formed by means of the container body formed by the extrusion process, [10] more particularly wherein the container head or body top section is closed with a cover (5), [10a] even more particularly wherein this cover is a dosing valve (17), a screw cap or another closure, characterized in that [11] in a first step (A), a preform is extruded [11a] as a semi-finished product

[11b] by injection molding, wherein [11c] plastic granules are dried, melted in an extruder and subsequently driven in an injection mold; [12] in a subsequent step (B), said semi-finished product is blown in a blow mold to a bottle shape, [12a] in particular tubular, [12b] as a further intermediate product; and [13] in a further next step (C) the bottom of said additional intermediate product is cut to a determined length, whereby [13a] a separately added [13b] injection molding base is then [13c] incorporated in said additional intermediate product (3).

"6. The method according to any one of the preceding claims, characterized in that the reinforcement is implemented by incorporating an inner container, said inner container which in turn is attached with a joint (13) to the bottom, wherein the inner container under internal pressure is additionally supported by the container (1), wherein said inner container is joined to the latter by gluing or welding."

Claim 1 of auxiliary request 1 is identical to claim 1 of the main request. The only difference between the main request and auxiliary request 1 is that dependent claim 6 has been deleted.

VI. For the sake of concision, the board uses the following abbreviations in the present decision:

IM: Injection moulding  
IBM: Injection blow moulding  
ISBM: Injection stretch blow moulding  
EBM: Extrusion blow moulding

VII. The parties' arguments relating to the issues on which the board had to decide can be summarised as follows:

**(a) Main request: added subject-matter**

(i) Respondent (opponent)

Admittance of the objections: During the oral proceedings before the opposition division, the patent proprietor had been allowed to file many auxiliary requests. The discussion concentrated on the novelty of the requests on file. In the heat of the moment the opponent did not concentrate on the added subject-matter. The issue was raised at the first opportunity afterwards, i.e. in the response to the statement of grounds of appeal. The appellant had more than two years to contemplate the objection based on the word "latter". When asked why the objections based on the translations "wherein" and "is/are" were filed only during the oral proceedings before the board and whether there were exceptional circumstances justifying their admission, the respondent explained that the first objection was discovered when looking again at the Dutch original in preparation for the oral proceedings. The issue of "is/are" is related to the question of what "latter" refers to and is discussed in the board's communication.

Merits: Claim 6, which is identical to granted claim 9, extends beyond the content of the original application. When the claim was first filed during the examination proceedings on 11 March 2016, it was based upon page 4, lines 11 to 14, of the English translation, which corresponds to page 4, lines 33 to 36, of the Dutch original. The phrase "... waarbij deze met de behouder verbonden zijn door lijmen of

lassen ..." was translated by "... wherein said inner container is joined to the latter by gluing or welding". The proper translation of that phrase reads: "... whereby these are joined to the container by gluing or welding ...". The appellant argued that the term "the latter" referred to "the bottom". However, normally "the latter" would refer to the immediately preceding feature, i.e. the container. Thus, the claim states that the inner container is joined by gluing or welding to the container. There is no indication in the claim that it is added to the separately added base. Nevertheless, the appellant and the opposition division saw scope for a second interpretation, in which the term "the latter" might refer to the feature "the bottom" and the bottom might be the separately added base. There is no basis for this interpretation in the original application. This is not a matter of clarity alone. The appellant tried to restore novelty over document E1 by unduly stretching the original disclosure. There is also an issue with the translation of the Dutch conjunction "waarbij", which was translated as "wherein" (meaning "contextually, within the context of something else"). The correct translation of this term is "whereby", which expresses the idea that there is a direct causal link between one status or event and the result that is achieved. The purpose of this mistranslation was to avoid the conclusion that the original text requires the inner container to be joined to the container by joints, as disclosed in document E1. "Wherein" and "whereby" have a semantic overlap, but they are not coterminous with one another. As far as the "is/are" issue is concerned, the board's preliminary opinion expressed in the communication pursuant to Article 15(1) RPBA is correct.



(ii) Appellant (patent proprietor)

Admittance of the objections: It is not correct that the opposition division's interpretation of the word "latter" was not known to the respondent before the decision under appeal was received. This matter was discussed extensively during the oral proceedings before the opposition division. The opponent chose not to raise the objection during the opposition proceedings and should not be allowed to do so in the appeal proceedings. When asked why the objection against the admittance of the objection was raised for the first time during the oral proceedings before the board, the appellant explained that it had briefly raised the issue in a written submission. The objection relating to the translation "wherein" is even more belated, because it was raised for the first time during the oral proceedings before the board. At least the objections relating to "wherein" and "is/are" should not be allowed.

Merits: Claim 6 is based on page 4, lines 11 to 14, of the English translation of the application. This corresponds to page 4, lines 33 to 36, of the original application in Dutch. The Dutch text ("... waarbij deze met de behouder verbonden zijn door lijmen of lassen, ...") has some flaws. It should have been translated as "wherein these are joined to the container by gluing or welding" instead of "wherein said inner container is joined to the latter by gluing or welding". The original wording makes clear that the plural expression *deze zijn verbonden* ("these are joined") refers both to the bottom and to the inner container. The bottom is joined to the container and the inner container is joined to the container through the bottom. Therefore, the inner container can support

the outer container by the internal pressure of the inner container. Since it is stated in the preamble of claim 1 that the bottom is joined to the outer container by the joint 13, in claim 6 it is only necessary to further stipulate that the inner container is joined to the bottom and that they are joined to the outer container, in order to avoid redundance.

As regards the understanding of "wherein", neither the drafter nor the translator of the original application was an English native speaker. The issue is how the skilled person would understand the claim. Subtleties regarding the linguistic interpretation of these different terms are irrelevant. The Dutch word "waarbij" can mean both "whereby" and "wherein", and the meanings of these terms overlap. A native Dutch speaker cannot be expected to be aware of linguistic subtleties when preparing a *bona fide* translation. The internal pressure is supported by the outer container without reference to the bottom.

The effectual technical link is between the internal pressure of the inner container and the supporting outer container. Therefore, even from a technical point of view, it is illogical to say that this is the direct effect of the joint. The appellant is by no means trying to stretch the wording of the original application. The issue concerning the term "latter" is an issue of clarity and not of added subject-matter. The patent as granted already contains this wording, and this feature was not amended during the opposition proceedings. The respondent itself acknowledged that the term "the latter" in its ordinary usage would refer to the immediately preceding feature, i.e. the container.

**(b) Auxiliary request 1: compliance of claim 1 with the requirements of Article 83 EPC in view of the content of the description**

(i) Respondent (opponent)

As the description has not been amended, the claim still covers the 100-bar and 300-bar embodiments. The description mentions these as embodiments of the invention (see in particular paragraph [0017] of the patent, but also paragraph [0058]). Article 69 EPC stipulates that the description and drawings must be used to interpret the claims. This provision is relevant in the context of Article 83 EPC. The invention is defined by the claims. To know what the claimed invention is, it is necessary to know its boundaries, i.e. the scope of the claim. A patent is its own dictionary. Paragraph [0017] states that the invention extends to bottles pressurised up to 300 bar. This feature cannot be excluded from claim 1. Thus paragraph [0017] "poisons" claim 1. The deletion of the references to such pressures in the description would make it possible to overcome this objection, because non-working embodiments are not part of the scope of protection of the claim. The skilled person would not then be confronted with the internal contradiction that a non-working embodiment is explicitly said to be part of the invention.

(ii) Appellant (patent proprietor)

Sufficiency of disclosure is about the subject-matter of the claims. The fact that the description contains embodiments that the respondent considers not to be feasible is another issue. In decision T 521/12 it was stated that the skilled person wishing to implement the

claimed invention would exclude such embodiments as meaningless and not consistent with the teaching of the application. If an embodiment in which the container is pressurised to 300 bar is not feasible, the skilled person would not consider it to be relevant. Therefore, there is no reason why it would have to be removed from the description for the sake of sufficiency of disclosure. As the claims are clear in themselves, there is no reason to refer to the description. Therefore, there is no issue with Article 83 EPC. The description also comprises embodiments that are perfectly feasible. Consequently, the requirements of Article 83 are met.

**(c) Auxiliary request 1: novelty over document E1**

(i) Appellant (patent proprietor)

The subject-matter of claim 1 is new over the disclosure of document E1, which does not disclose features 5a and 13b.

Feature 5a

Cylinder 2 of document E1 is not a container "bottom" within the context of the patent. On the contrary, it is a large cylinder having an axial length that is more than 33% of the axial length of the bottle 50 (see Fig. 5 of document E1). "Bottom" needs to be understood according to the common understanding of a full closing element which has no internal volume. This is also how the opponent normally understands "bottom", see e.g. WO 2016/120404, in which document E1 is discussed. Page 1, lines 27 to 29, refers to the bottom part of the inner vessel; see also page 2, lines 17 to 22. The patent only discloses a bottom without an internal

volume. It is disclosed and claimed that an inner container is joined to the bottom, which means that the bottom itself does not have an internal volume. This also follows from the original application, see page 15, line 37, to page 16, line 2, and original claim 34 ("onderaan wordt de behouder afgesloten door een vol deksel", the translation of which is: "the container is closed underneath by a full cover"). The cover, which is *de facto* the claimed bottom, has no internal volume.

Feature 13b

Feature 13b should be understood as meaning an injection moulded base. "IM base" is interpreted by the skilled person as being "obtained by/obtainable by IM", not as being "obtained by a series of steps including an IM step". Moreover, it is not correct that the IBM process involves a first step, in which a parison is formed by an IM process. The following diagram shows the steps of the IBM process:

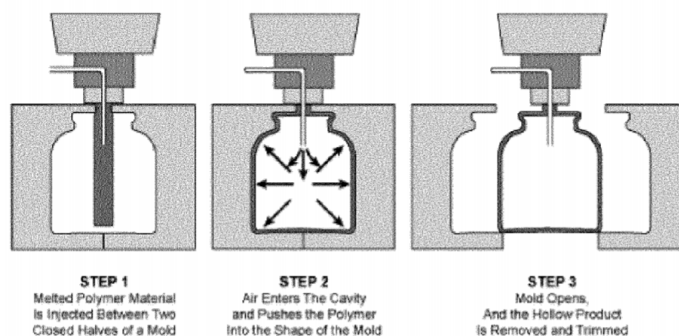


Fig II

In a first step a blob of molten material is introduced into a mould, but this is not what is commonly understood as IM. In a second step the blob is blown against the walls of the mould, forcing upon the material more or less the shape of the inside of the

mould walls. This is the actual moulding step, by means of which the product is obtained in IBM. There is no intermediate step of forming a preform or use of a stretch rod, as in ISBM. The opposition division and the board (in its preliminary opinion) have confused IBM and ISBM. A bottom obtained by IBM is not a bottom obtained by IM. Feature 13b is a "product by process" feature. In accordance with the jurisprudence and the Guidelines for Examination (F-IV 4.12), in order to establish whether a product under consideration (defined - in part - by a process) is novel over the prior-art products, the question to be answered is whether the product under consideration is identical to known products. A product obtained by IM is physically clearly different from a product obtained by IBM and different from a product obtained by ISBM. In the patent literature there do not appear to be any disclosures in which IBM products are referred to as IM products or *vice versa*. In the art, a clear distinction is made between the two types of products (which are in turn both clearly distinct from ISBM). It may be true that an IBM product shows that it has undergone an IM step, but it also shows that this step was followed by a blow step. The additional steps mentioned in claim 2 do not define the bottom itself but relate to how the base is then joined to the inner or outer container. The correct interpretation of the feature should be determined based on the patent without taking the prior art into account. In the patent a clear distinction is made between ISBM and IM. The outer container is made by ISBM, whereas the separately added base is made by IM. If the line of argument proposed by the opponent were followed, there would be no need to distinguish between ISBM and IM, since they would be one and the same method. It is therefore abundantly clear that ISBM and IM are different techniques, as is IBM, and a

product obtained by IM is novel over a product obtained by IBM or by ISBM. An IBM base is no more an IM base than a car is a "rolled product" (because the sheet metal used to make the car is rolled), bread a "milled product" (because the grain with which the bread is made has been milled), a glass bottle a "molten product" (because the glass of which the bottle is made is molten prior to moulding) or an "IM product" an extruded product (because the granules of which the plastic is molten to be injected is extruded by an extruder). It is not logically correct to refer to a product by a prior processing step in a process or by the final step either, even if such a prior processing step is discernible from the end product. Professor Michel's expression "pure IM" is based on the fact that experts have their own, cautious way of expressing things. He was referring to "pure" IM as opposed to some prior art involving hybrid methods. In the respondent's own patent application WO 2016/120404, ISBM, IBM and injection moulding are distinguished as different techniques used for different parts of the pressure control system. In the course of the examination proceedings of that patent application, the respondent's representative stated that it is common knowledge that IM is "completely different" from ISBM (see letter dated 17 August 2021). Consequently, document E1 does not disclose an IM base. Pages 10 to 11 of document E1 only teach that the bottle 50 is obtained by ISBM and the cylinder 2 by IBM. Cylinder 2 has not been obtained by IM.

(ii) Respondent (opponent)

Document E1 anticipates the subject-matter of claim 1. The appellant's argument to the contrary is based on an incorrect interpretation of features 5a and 13b.

Feature 5a

The appellant does not set out what contextual basis in the patent it believes would lead to that special, narrow interpretation of the term "bottom". Nor does the appellant indicate at what axial length a bottom ceases to be a bottom. There is no basis in the claim language for this limited interpretation. According to the well-established jurisprudence the description of a patent cannot be used to give a different meaning to a claim feature which in itself imparts a clear, credible technical teaching to the skilled reader (see decisions T 1018/02 and T 388/13). Even if the claim is interpreted in light of the description, there is no basis to conclude that the term "bottom" would be necessarily narrower than an element that closes the bottom section of the container, is separately added, and is attached by a joint.

Feature 13b

The patent itself does not include a definition of an IM base excluding that there are further processing steps such as blowing. Claim 2 also involves extra features such as welding. Thus further processing steps are not excluded. The appellant fails to see the difference between IM and "pure" IM, to use Professor Michel's expression. The IBM base of document E1 is an IM base within the meaning of claim 1, because the container of document E1 has been preformed by IM and has then been blown to obtain its final shape. There are portions of this container (such as the neck, the gate scar, the bottom portion that has not been stretched) that maintain characteristics of the IM step. The orientation of the stretched polymer is



maintained: when the container is heated up, it will shrink back to the shape of the preform. IBM is a process that involves IM of a preform. An IBM product falls within the scope of an IM product. Denying this would go against the established jurisprudence on product-by-process features. Products that would be processes afterwards but would still maintain characteristics of the process defining them would suddenly fall outside of the product-by-process definition. The appellant's explanation of the IBM process is incorrect. The appellant confuses extrusion blow moulding (EBM) with IBM. Its reasoning is based on the entirely incorrect premise that the process shown in Fig. II is IBM.

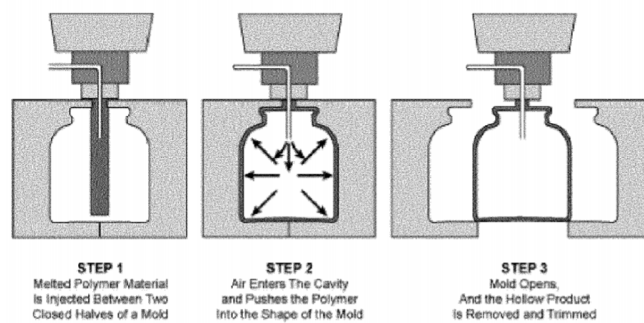


Fig II

The figure actually illustrates EBM. In EBM, plastic is melted and extruded into a hollow tube, which is captured by closing it into a mould, prior to blowing. IBM involves a first step of obtaining a preform by IM, which has a fully formed neck with a thick tube of polymer attached. The appellant's position directly contradicts the opinion of its own experts, Professors Michel (E20-P) and Dahlman (E21-P). The appellant's argument is that it would be unusual to refer to a product made by ISBM as an extruded product. However, this is exactly what the patent does. Feature 9 refers to "the container formed by the extrusion process".

Thus the patent itself makes clear that its terminology should not be so strictly understood. Even if there were a contradiction with regard to the respondent's submission in the grant proceedings for application WO 2016/120404 - which is not conceded - two wrongs do not make a right.

## **Reasons for the Decision**

### 1. Main request

#### 1.1 Admittance

The main request was filed during the oral proceedings before the board and is based on claims 1 to 3 and 6 to 8 of former auxiliary request 12 filed with the statement of grounds of appeal. It is designed to overcome a series of objections under Article 100(c) EPC discussed in the board's communication pursuant to Article 15(1) RPBA 2020 against dependent claims, in particular claim 9, and to ensure that the board could decide on all but one objection raised by the respondent before a possible remittal to the opposition division for further prosecution. The board duly took into account the fact that the communication under Article 15(1) RPBA 2020 was based on the respondent's submissions filed for the first time with the reply to the statement of grounds of appeal, but additionally contained broader considerations with respect to the disclosure in the original application, in particular of the features contained in claim 9. The appellant addressed these objections by filing new sets of claims on 22 October 2021 (18th to 22nd auxiliary requests) and again on 16 November 2021. In view of the above, the amended main request, albeit constituting an

amendment of the appellant's appeal case, represents a legitimate reaction to overcome the further developed objections under Article 100(c) EPC against the dependent claims, in particular claim 9. The respondent did not object to the admittance of the request. Having concluded that the circumstances of the case are "exceptional circumstances" within the meaning of Article 13(2) RPBA 2020 that justify the admission of the request, the board has decided to admit the request into the appeal proceedings.

1.2 Compliance of claim 6 with the requirements of Article 123(2) EPC

1.2.1 Admittance of the objections

The respondent raised three objections relating to

- the correct interpretation of "latter",
- the meaning of "waarbij" in the alleged basis in the Dutch original of the application as filed for the feature of claim 6, and
- the meaning of the word "zijn" in the same passage of the application as filed.

The respondent's objection relating to the feature that the inner container is joined to "the latter" by gluing or welding was not raised in the notice of opposition. The respondent explained that the objection had not been raised during the oral proceedings before the opposition division, because the appellant had been allowed to file many new auxiliary requests during the oral proceedings before the opposition division and the discussion of these requests concentrated on the question of novelty. The respondent only became aware that the opposition division had adopted a specific

understanding of the expression "the latter" when it read the decision under appeal.

The board weighed up the circumstances of the case, including the fact that the respondent had no opportunity to effectively raise this objection during the opposition proceedings and that it was filed at the very beginning of the appeal proceedings, i.e. in the respondent's reply to the statement of grounds of appeal. On that basis, the board did not see compelling reasons for holding the objection inadmissible in accordance with Article 12(4) RPBA 2007, which applies here in view of Article 25(2) RPBA 2020.

The objections based on the allegedly incorrect translation of the words "waarbij" and "zijn" used in the original application are inseparable from the first objection. The board has to ascertain the meaning of these terms anyway, in order to properly deal with the first objection. Thus, the objections based on the aforementioned terms do not constitute unrelated, new objections but deepen and consolidate the original objection.

Consequently, the board has decided to admit all three objections into the appeal proceedings under Article 12(4) RPBA 2007.

#### 1.2.2 Merits of the objections

Claim 6 of the main request reads:

*"The method according to any one of the preceding claims, characterized in that the reinforcement is implemented by incorporating an inner container, said inner container which in turn is attached with*

*a joint (13) to the bottom, wherein the inner container under internal pressure is additionally supported by the container (1), wherein said inner container is joined to the latter by gluing or welding.*" (Underlining by the board.)

The respondent's objections relate to the feature that the inner container is joined to the latter by gluing or welding. The alleged basis for this feature is found on page 4, lines 11 to 14, of the English translation (cf. paragraph [0019] of the patent), which reads:

*"According to a preferred embodiment of the invention, a reinforcement is implemented by incorporating an inner container which in turn is attached with a joint to the bottom, wherein this inner container under internal pressure is additionally supported by the container, wherein said inner container is joined to the latter by gluing or welding, possibly without a joint."*  
(Underlining by the board.)

This passage corresponds to page 4, lines 33 to 36, of the original application, which reads:

*"Volgens een bevoorrechte uitvoeringsvorm van de uitvinding is een versteviging bewerkstelligd door inbrengen van een binnenbehouder die op zijn beurt met een verbinding aan de bodem is bevestigd, waarbij deze binnenbehouder onder binnendruk extra gesteund is door de behouder, waarbij deze met de behouder verbonden zijn door lijmen of lassen, desgevallend zonder verbinding." (Underlining by the board)*

The respondent's assertion that the conjunction "waarbij" must always be translated by "whereby" and that its translation by "wherein" generates added matter is not persuasive. Depending on the context, "waarbij" may be equivalent to "wherein". However, the question of whether its translation as "wherein" is appropriate in the current context has to be left unanswered because the precise meaning of the whole clause is uncertain.

A literal translation of the underlined passage reads:

"... whereby/wherein these are joined to the container through gluing or welding ..."

The pronoun "deze" (this, these) refers to something that has already been mentioned. It can be either singular or plural, but the verbal form "zijn" (are) requires that it be plural here (hence the translation "these are"). What exactly does "deze" refer to? The most natural antecedent would be a plural noun form, but there is none. Several explanations can be imagined. The drafter may have made a mistake and intended to write "deze ... verbonden is". If so, the most natural understanding would be that the inner container (*binnenbehouder*) was meant rather than the bottom (*bodem*). It could also be that the "deze" refers to a set of singular nouns such as the container and the bottom. There is no way of knowing with certainty what the drafter of the application wanted to convey. Consequently, the passage cannot be said to provide a direct and unambiguous disclosure for the subject-matter of claim 6.

Thus claim 6 infringes Article 123(2) EPC.

Although this objection is based on a lack of clarity of the description, it should be noted that it is not an objection under Article 84 EPC. As the amendment has no clear and unambiguous basis in the original application, the subject-matter of the amended claim extends beyond the content of the original application.

### 1.3 Conclusion regarding the main request

Claim 6 of the main request does not meet the requirement of Article 123(2) EPC. Consequently, it is not possible to maintain the patent on the basis of this request. The main request must be dismissed.

## 2. Auxiliary request 1

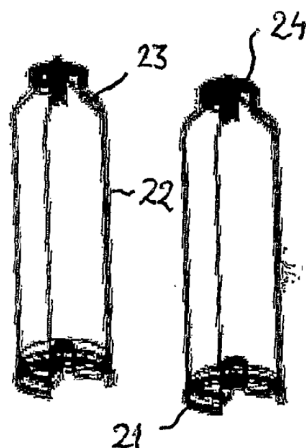
### 2.1 Admittance

This request was filed for the first time as a new main request in preparation for the oral proceedings (see the appellant's letter dated 16 November 2021). The board found this request to be admissible. The reasons are the same as for the main request (see point 1.1 above).

### 2.2 Claim interpretation

#### 2.2.1 "... said top section ..." (feature 4)

Feature 4 refers to "said top section", but there is no antecedent for the expression "top section". Three sections are mentioned beforehand: a "neck section (23)", a "sheathing section (22)" and a "bottom section (21)". Fig. 41 shows these sections.



Detail of Fig. 41

As feature 5 requires that the bottom section be disposed opposite the top section, "said top section" is identical to the "neck section" 23.

#### 2.2.2 "bottom" (feature 5a)

Feature 5a requires that the bottom section 21 be closed "by a separately added bottom (21)". Although both the bottom section and the bottom are designated by reference numeral 21, they have to be distinguished. Apparently the bottom section only refers to a side of the container, whereas the bottom designates one of its parts. Feature 5a requires that the bottom be "separately added", i.e. the bottom is not integral to the container.

The interpretation that a "bottom" within the meaning of the patent is an element that closes off the open end of the container body and is not filled with an internal volume is narrower than what is actually required by claim 1. All that claim 1 requires is that the bottom should close the container on its bottom side, it should be distinct from the container, and it should be attached to the container by means of a joint



(see also point 2.2.3 below). The question of whether or not the bottom itself has an internal volume is left open.

The respondent allegedly used the term "bottom" in accordance with this narrow understanding in one of its applications in which document E1 is discussed. However, this has no bearing on the interpretation of this feature in the current context.

2.2.3 "... attached to said body (22) ..." (feature 5b)

"Said body (22)" must refer to the body formed by the "sheathing section (22)" mentioned in feature 2. Thus, the bottom, which is distinct from the container body, is attached to the latter by means of a joint.

2.2.4 "IM base" (feature 13b)

Feature 13b requires that the separately added base incorporated into the intermediate product be an IM base.

The patent itself does not contain a definition of the expression "IM base", which is used only once (see paragraph [0015], based on original claim 52). The skilled person would have understood this expression to mean a base that was obtained using an IM process. Consequently, feature 13b has to be taken as a product-by-process feature. Such features are accepted in European patent practice, provided that the process leads to identifiable structural features of the claimed product. It is uncontested that it is possible to ascertain from a plastic product that it was obtained by IM.

In the field of plastics processing, several shaping processes are known. Besides IM, there are also techniques such as IBM and ISBM, to name only those discussed in the present case. Both the patent itself and several documents cited by the parties refer to all these various techniques side by side.

The board notes that the translation of the original application contains the following statement on page 10, lines 4 and 5:

*"The cylindrical or prismatic body can be made by using injection moulding technology or by extrusion, as further described below with the corresponding methods for manufacturing the container."*

Further in the translation of the original application (see page 13, lines 1 to 4) a container is described, which is manufactured from an IM preform subsequently inflated to form a bottle. Thus, at least in the mind of the drafter of the original application, IBM appears to have been an "IM technology". However, it should be noted that the expression "IM technology" is contrasted with extrusion and seems to encompass IM, IBM and ISBM. It does not constitute a univocal reference to the IM process as such.

One of the core issues of the present appeal is whether a base obtained by IBM can qualify as an "IM base" within the meaning of claim 1.

This question arises because an IBM process involves a first stage, in which a parison is formed by an IM process and subsequently inflated. This was contested

by the appellant on the basis of a Fig. II of unknown origin and a reference to the glass-blowing process.

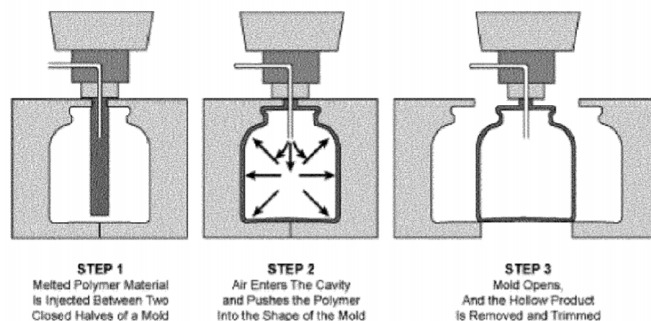


Fig II

The board cannot endorse this objection. The process shown in this Fig. II corresponds to what is commonly referred to as IBM. Glass-blowing processes are not normally understood to be IBM processes.

The crucial question to be answered by the board boils down to whether an IBM base may reasonably be called an IM base because IBM involves an IM step.

Having weighed up the arguments presented by the parties, the board concludes that this question has to be answered in the negative. This is because in the technical field under consideration, IM, IBM and ISBM are commonly presented as available alternatives. They are not seen as encompassing each other in the style of Matryoshka dolls (ISBM being a category of IBM, which itself is a type of IM). In other words, the skilled person would have identified the IM process as something different from an IBM process and would not have seriously considered a part obtained by IBM to constitute an IM part in the sense of claim 1, even though its manufacture involves injection moulding of a preform.

The board concludes that the feature "IM base" has to be interpreted as "a base whose shape was essentially determined by an IM process". By contrast, an IBM base would correspond to a base whose shape was essentially determined by an IBM process. Part of its shape (such as the neck, the gate scar, the bottom portion that has not been stretched) may still bear the traces of the IM steps involved in its manufacture, but it is clear - and detectable on the product - that its overall shape has been obtained by blowing. Consequently, an IBM base is not an IM base in the sense of claim 1.

This does not mean that an IM base cannot have undergone any subsequent processing steps, such as gate trimming, welding and so on. What is meant is that its overall shape will not have been significantly modified by subsequent shaping processes. By contrast, an IM preform that is then blown into a bottle shape becomes an IBM bottle and it would not be appropriate to refer to it as an IM bottle.

The argument that this understanding of the feature contradicts the established jurisprudence on product-by-process features is unfounded. This is because the skilled person is familiar with the IM process and does not consider that any process in which a preform is injection moulded at some stage is an IM process.

#### 2.2.5 Optional features

In accordance with the established practice of the EPO (as reflected e.g. in "Guidelines for Examination in the EPO", March 2021, F-IV 4.9), optional features 9, 10, 10a and 12a can be disregarded in the examination of novelty and inventive step.

### 2.3 Compliance with Article 83 EPC

Article 83 EPC lays down that a European patent application must disclose the invention in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art. The board understands "the invention" to mean the invention as defined in the claims.

Claim 1 as granted comprised an optional feature ("... particularly ranging from atmosphere to approx. 100 bar, and more"). In response to the respondent's objection and the board's preliminary finding that, at the priority date, the skilled person would not have known how to pressurise the container to such pressures (see point 7 of the board's communication pursuant to Article 15(1) RPBA 2020), the appellant deleted this feature from claim 1.

As the problematic feature has been deleted from claim 1, the board is satisfied that the skilled person would have known how to carry out the invention of claim 1.

The respondent argued that the invention defined by claim 1 was still insufficiently disclosed, because the claim had to be interpreted in light of the description (Article 69 EPC). As a consequence, claim 1 still encompassed the embodiments which the skilled person would not have been able to carry out.

Article 69 EPC concerns the extent or scope of protection conferred by a European patent. In accordance with Article 69(1) EPC, the extent of the protection conferred by a European patent is determined

by the claims. Nevertheless, the description and drawings must be used to interpret the claims.

The board is of the opinion that Article 69(1) EPC is not applicable when compliance with Article 83 EPC is to be examined.

As a rule, a claim should be interpreted on its own. Under certain conditions, it may be necessary to consult the description, especially if claim features are unclear (see T 1646/12, point 2.1 of the reasons). However, claim 1 under consideration is clear. Therefore, it is not necessary to consult the description to interpret its subject-matter (see "Case Law of the Boards of Appeal of the European Patent Office", 9th edition, 2019, in the following "Case Law", section II.A.6.3.4, in particular T 1018/02, Reasons 3.8).

Consequently, the reference to pressures of 100 or even 300 bar in the description has no bearing on the interpretation of the claim. It is true that claim 1 contains no explicit upper limit for the pressure to which the containers may be pressurised. However, this does not lead to the claimed subject-matter being insufficiently disclosed. This is because the skilled person would not consider pressures that cannot be obtained to be part of the invention. In this respect, the board refers to the established jurisprudence relating to unspecified upper limits (see Case Law, section II.A.3.6).

Thus, the board concludes that this objection is unfounded.

## 2.4 Novelty of the subject-matter of claim 1 over the disclosure of document E1

The appellant argued that document E1 did not disclose features 5a and 13b.

### 2.4.1 Feature 5a

The opposition division was of the opinion that the lower closure member (reference 52 in Fig. 5, designated as container 2 in several figures) shown in Fig. 5 of document E1, taken as a whole (52, 2), qualified as a bottom in the sense of feature 5a because (i) it closed the bottom section, (ii) it was separately added to the body and (iii) it was attached by means of a joint (see point 22.3 of the reasons for the decision under appeal). As explained in point 2.2.2 above, the board shares the view expressed in the decision under appeal. Consequently, the board concludes that document E1 discloses feature 5a.

### 2.4.2 Feature 13b

Document E1 discloses that the container 2 is obtained by IBM (see e.g. page 9, lines 24 and 25). The opposition division found it to qualify as an IM base. The board has explained in point 2.2.4 that it cannot endorse this interpretation of feature 13b. Based on the interpretation determined by the board, an IBM base does not anticipate an IM base in the sense of claim 1. Consequently, the board concludes that document E1 does not disclose feature 13b.

#### 2.4.3 Conclusion

The subject-matter of claim 1 is new over the disclosure of document E1 because this document does not disclose feature 13b (Article 54(1) and (2) EPC).

#### 3. Remittal

Both parties requested that the case be remitted to the opposition division for the examination of the remaining objections (lack of novelty over an alleged public prior use, lack of inventive step). The board agrees that, in the circumstances of the case, special reasons in the sense of Article 11 RPBA 2020 present themselves for a remittal. Consequently, the case is remitted to the opposition division for further prosecution in accordance with Article 111(1) EPC.



## Order

### For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the opposition division for further prosecution.

The Registrar:

The Chairman:



N. Schneider

P. Lanz

Decision electronically authenticated