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**Datasheet for the decision
of 31 May 2022**

Case Number: T 0214/20 - 3.3.04

Application Number: 12783358.0

Publication Number: 2800467

IPC: A01K67/033, A01N63/00

Language of the proceedings: EN

Title of invention:

Mite composition, carrier, method for rearing mites and uses related thereto

Patent Proprietor:

Koppert B.V.

Opponent:

Biobest Belgium NV

Headword:

Mite composition/KOPPERT

Relevant legal provisions:

EPC Art. 56

EPC R. 106

RPBA 2020 Art. 12(6), 13(2)

Keyword:

Main request, auxiliary requests 1 to 23: inventive step - (no)
Late-filed evidence - admitted in first-instance proceedings
(no) - circumstances of appeal case justify admittance (no)
Obligation to raise objections - objections dismissed



Beschwerdekammern

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Case Number: T 0214/20 - 3.3.04

D E C I S I O N
of Technical Board of Appeal 3.3.04
of 31 May 2022

Appellant: Biobest Belgium NV
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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
25 November 2019 concerning maintenance of the
European Patent No. 2800467 in amended form.**

Composition of the Board:

Chair B. Claes
Members: R. Morawetz
P. de Heij

Summary of Facts and Submissions

- I. European patent No. 2 800 467 (the patent), entitled "*Mite composition, carrier, method for rearing mites and uses related thereto*", was granted on European patent application No. 12 783 358.0, filed as an international patent application and published as WO 2013/103295 (application).
- II. One opposition was filed against the granted patent. The opposition proceedings were based on the grounds for opposition in Article 100(a) EPC, in relation to novelty (Article 54 EPC) and inventive step (Article 56 EPC).
- III. The appeal by the opponent (appellant) is against the opposition division's interlocutory decision that the patent as amended in the form of the main request filed on 26 July 2019, and the invention to which it relates, meet the requirements of the EPC. The patent proprietor is the respondent in these appeal proceedings.
- IV. The following documents are referred to in this decision:
- D1 US 2009/00121186
- D2 Steiner M.Y. and Goodwin S., Australian Journal of Entomology 37, 1998, 101-106
- D4 Freire R.A.P. and De Moraes G.J., Systematic and Applied Acarology 12, 2007, 117-119

- D7 van Lenteren J.C. and Tommasini M.G., in *Quality Control and Production of Biological Control Agents: Theory and Testing Procedures*, CAB International 2003, van Lenteren J.C. (Ed.), 181-189
- D16 Rice husk size data from the Genbank of NARO (National Agriculture and Food Research Organisation, Japan) accessible via the internet address https://www.genc.affrc.go.jp/databases-plant_search_char_en.php?type=1, retrieved on 23 July 2019, extract
- D16(full) Presentation of the complete rice husk size data from the Genbank of NARO (National Agriculture and Food Research Organisation, Japan) accessible via the internet address https://www.genc.affrc.go.jp/databases-plant_search_char_en.php?type=1, retrieved on 2 September 2019
- D18a Declaration by Timmer R., dated 22 March 2018
- D18b Declaration by Timmer R., dated 20 September 2019
- D18c CV Timmer R.
- D18d Van Lenteren J.C. *et al.*, in *Quality Control and Production of Biological Control Agents: Theory and Testing Procedures*, CAB International 2003, van Lenteren J.C. (Ed.), 265-303

D19 Sabelis M.W. and van Rijn P.C.J., in
 Thrips as Crop Pests, CAB-International
 1997, London, T. Lewis (Ed.), 1-86

D20 WO 2020/070334

- V. The opposition division held, *inter alia*, that the claimed subject-matter of the main (and sole) request was novel over the disclosure in document D1. The subject-matter of claim 1 was furthermore held to meet the requirements of Article 56 EPC when any of documents D1, D2, D4 or D7 was taken as a starting point for the assessment of inventive step. Documents D18a, D18b, D18c and D18d were not admitted into the proceedings as they were considered to be filed late and not *prima facie* relevant.
- VI. In the statement setting out the grounds of appeal, the appellant submitted, *inter alia*, arguments that the subject-matter of the set of claims of the main request lacked an inventive step when document D1 was taken to represent the closest prior art. Arguments as to, *inter alia*, lack of inventive step were also submitted with respect to auxiliary requests 1 to 17, filed with letter dated 26 July 2019, and auxiliary requests 18 to 23, filed with letter dated 20 September 2019.
- VII. In reply to the statement of grounds of appeal, the respondent maintained the main request considered in the decision under appeal as its main request. It also maintained auxiliary requests 1 to 23, filed during the opposition proceedings and filed documents D19 and D20. The respondent submitted, *inter alia*, that there were two differences between the disclosure in document D1 and the claimed subject-matter and that documents D18a, D18b, D18c and D18d provided evidence of a surprising

technical effect of *Poaceae* husks having an average longest axis of 3.0 to 9.0 mm over the carrier for which document D1 provided a concrete disclosure, buckwheat husks.

VIII. Claims 1 and 8 of the set of claims of the main request read as follows:

"1. Mite composition comprising:

- a population of individuals of a mite species selected from the Phytoseiidae;
- a food source for the Phytoseiid mite individuals;
- and a carrier for the individuals of the mite species comprising stacked carrier elements selected from husks from a *Poaceae* species, said carrier elements having an average longest axis of 3.0-9.0 mm and comprising structures suitable as mite shelters.

8. Rearing device for rearing a Phytoseiid mite species, said device comprising a container holding the composition according to any of the claims 1-5, preferably a container comprising an exit for at least one motile life stage of the Phytoseiid mite species, more preferably an exit suitable for providing a sustained release of said at least one motile life stage."

Auxiliary requests 1 to 5 concern the set of claims of the main request, wherein additional technical features are incorporated in claim 1.

Auxiliary requests 6 to 11 concern a single claim based on device claim 8 of the main request and claim 1 of auxiliary requests 1 to 5 which further specifies that the container of the device comprises an exit designed for release of at least one motile life stage of the

Phytoseiid mite species.

Auxiliary requests 12 to 17 concern a single claim based on device claim 8 of the main request and claim 1 of auxiliary requests 1 to 5 which further specifies that the exit is designed for providing a sustained release at least one motile life stage of the Phytoseiid mite species.

Auxiliary requests 18 to 23 concern a single claim relating to the use in crop protection of the device of claim 8 of auxiliary requests 6 to 11.

- IX. The board scheduled oral proceedings in view of corresponding requests from the parties and issued a communication pursuant to Article 15(1) RPBA in which it informed the parties of its preliminary opinion with respect to, *inter alia*, the requirements of inventive step. In particular, the board indicated that it agreed with the appellant that the embodiment of document D1 relating to a mite composition comprising a rearing population of the phytoseiid predatory mite species *Amblyseius swirskii*, a factitious host population and rice husks as a carrier constituted a suitable starting point for the assessment of inventive step and that there was no technical effect associated with the claimed sub-range of 3.0 to 9.0 mm.
- X. In response to the board's communication, the respondent filed with letter dated 2 May 2022 further arguments as regards, *inter alia*, the inventive step of claim 1 of the main request. These arguments stated that the claimed invention was a selection invention and documents D18, D18a and D18b (the board assumes D18a and D18b as there is no document numbered D18) provided evidence of a surprising technical effect over

the embodiment of example 2 of document D1, buckwheat husks.

XI. In the course of the oral proceedings, the respondent filed two objections under Rule 106 EPC. The board dismissed both objections. At the end of the oral proceedings the Chair announced the board's decision.

XII. The arguments of the appellant, insofar as relevant for the decision, are summarised below.

The respondent's requests to overrule the decision of the opposition division to not admit documents D18a, D18b, D18c and D18d or to admit the documents at the appeal stage

Documents D18a, D18b, D18c and D18d had been filed at a very late stage in the opposition proceedings.

The opposition division had decided according to the right principles.

During opposition proceedings, the respondent had argued that documents D18a, D18b, D18c and D18d were filed in response to the appellant's filing of document D16(full). However, the appellant had argued early in the opposition proceedings that the claimed size range of average longest axis was arbitrary as no technical effect was linked to it. Only on appeal had the respondent argued that it was filed in response to the disclosure in document D1 representing the closest prior art.

Appeal proceedings involved a judicial review and documents D18a, D18b, D18c and D18d should not be admitted on appeal.

If the documents were to be admitted, the oral proceedings would need to be adjourned to give the appellant the possibility to carry out counter-experiments.

Admittance into the appeal proceedings of the respondent's new line of argument presented in the oral proceedings that there were three distinguishing features of the claimed subject-matter over the disclosure in document D1

The allegation that the requirement in the claim that the carrier comprise structures suitable as mite shelters was an additional distinguishing feature over the disclosure in document D1 amounted to an amendment of the respondent's appeal case and should not be admitted into the proceedings.

Main request - claim 1

Inventive step (Article 56 EPC)

Starting point for the assessment of inventive step - closest prior art

The disclosure in document D1 was a suitable starting point for the assessment of inventive step. It addressed mass rearing of predatory mites and hence served the same purpose as the claimed subject-matter and it had almost all technical features in common. Document D1 disclosed only five carriers (see paragraph [0028]), not a long list, and it explicitly disclosed rice husks (which comprise structures suitable as mite shelters). Rice was a *Poaceae* species. All the carrier elements listed in paragraph [0028] of document D1 were stacked (see paragraph [0049]) and

formed structures that were suitable as mite shelters. Thus, document D1 disclosed Phytoseiid mite rearing on a carrier comprising rice husks which comprised structures suitable as mite shelters as an explicit embodiment.

Objective technical problem

The only feature not explicitly disclosed in document D1, and thus the only feature distinguishing the claimed subject-matter from the disclosure in document D1, was the average longest axis of the rice husks of 3.0 to 9.0 mm.

The opposition division had erred when holding that the technical effect of the distinguishing feature was *"sheltering the mites in the carrier elements from disturbing interspecific and/or intraspecific interactions with other mite individuals"*.

Neither the patent nor any cited document indicated that an average longest axis range of 3.0 to 9.0 mm for *Poaceae* husks provided a technical effect over the general range of average longest axis of rice husks. It was also not credible to the skilled person that rice husks with an average longest axis of 9.0 mm would provide better shelter than those with an average longest axis of 9.1 mm or more.

The respondent had not shown that the selected size range had any technical effect over the disclosure in document D1.

The objective technical problem was the provision of an alternative mite rearing composition.

Obviousness

The range of the carrier referred to in the claim was arbitrary. Starting from the disclosure in document D1 of the use of rice husks for rearing Phytoseiid mites, it would have been obvious for the skilled person to arrive at rice husks having an average longest axis falling within this range because over 90% of the rice varieties had husks in this size range (see document D16(full)).

Consequently, the claimed subject-matter lacked an inventive step.

Auxiliary requests 1 to 23

Inventive step (Article 56 EPC)

The same arguments as for claim 1 of the main request applied to the subject-matter of the claims of these requests.

- XIII. The arguments of the respondent, as far as relevant for the decision, are summarised below.

The respondent's requests to overrule the decision of the opposition division to not admit documents D18a, D18b, D18c and D18d or to admit the documents at the appeal stage

On 2 September 2019, the appellant had filed document D16(full) together with a letter containing arguments against the patentability of the claimed subject-matter of the main request and the auxiliary requests then on file based on this document. According to the appellant, document D16(full) reflected that the

range of 3.0 to 9.0 mm in the claims was not a narrow range for rice husks as disclosed in document D1 and therefore the claimed invention lacked novelty over the disclosure in document D1. Document D16(full) and a line of argument based on document D1 in combination with D16(full) had not been previously on file.

Documents D18a, D18b, D18c and D18d were filed on 20 September 2019 in direct response to these new submissions and this new line of argument of the appellant, which had confronted the respondent with a new situation. These documents did not need to be filed in an earlier stage of the proceedings and thus should have been admitted by the opposition division.

The opposition division should also have admitted these documents in view of the fact that the oral proceedings were the first time that the disclosure in document D1 was considered to represent the closest prior art. The respondent therefore should have been given the opportunity to respond to this new attack.

In addition, the substantial change in the appellant's case in connection to inventive step justified the respondent presenting evidence at the appeal stage. Documents D18a, D18b, D18c and D18d were *prima facie* relevant for the assessment of inventive step starting from the disclosure in document D1 representing the closest prior art. They showed a surprising technical effect of *Poaceae* husks having an average longest axis of 3.0 to 9.0 mm over buckwheat husks used as the carrier material in Example 2 of document D1.

Documents D18a, D18b, D18c and D18d were also *prima facie* relevant now that the board had questioned that the carriers used in the experiments reported in the

patent fell within the claimed size range.

Document D18a (supplemented with D18b) showed the interaction between carrier type and size and that both were required to achieve shelter. Millet husks having an average longest axis of 3.0 ± 0.1 mm and rice husks having an average longest axis of 7.2 ± 1.4 mm exemplified the lower and upper end of the claimed range. Both these carriers worked well, providing evidence that the claimed range was suitable. Buckwheat husks having an average longest axis of 5.2 ± 0.5 mm fell within the claimed range but did not work as well. Therefore documents D18a and D18b provided evidence that carrier type and size could not be separated as both were needed for the sheltering effect.

Request to stay the appeal proceedings

If the board would not consider post-published evidence in the form of document D18a for the reason that the effects demonstrated in this document were not plausible, based on the information in the patent application, the appeal proceedings should be stayed until the outcome of referral case G 2/21 was known.

Admittance into the appeal proceedings of the respondent's line of argument presented in the oral proceedings that there were three distinguishing features of the claimed subject-matter over the disclosure in document D1

The claimed subject-matter differed from the disclosure of document D1 in the carrier material, the average longest axis and in that shelter was provided.

That the latter feature was a distinguishing feature had already been set forth in writing (see reply to the statement of grounds of appeal, points 50 and 51) and was therefore not new and thus did not constitute an amendment to the respondent's case. Since sheltering was said to be part of the solution it could not have been disclosed in document D1, and was therefore a distinction over document D1.

Objections under Rule 106 EPC

During the oral proceedings the following two objections were raised:

"1) Objection against the Board's conclusion not to admit the (allegedly) new line of argument based on 3 distinguishing features

This line of argument is foreshadowed in the Proprietor's reply to the grounds of appeal. The Board's conclusion deprives the Proprietor from presenting its complete case and thus violates its right to be heard.

2) Objection against the Board's conclusion not to admit D18a-d into the appeal proceedings

This conclusion deprives the Proprietor from an adequate reply to the Opponent's grounds of appeal as well as from answering an objection raised by the Rapporteur for the first time during the oral proceedings. This amounts to a violation of the right to be heard."

Main request - claim 1

Inventive step (Article 56 EPC)

First line of argument, submitted in the reply to the statement setting out the grounds of appeal

Starting point for the assessment of inventive step - closest prior art

The disclosure in document D1 was not a suitable starting point for assessment of inventive step because it did not pay any attention to the relevance of the carrier in the disclosed mite composition in relation to the problem of disturbing interspecific and intraspecific interactions with other mite individuals.

Objective technical problem

The claimed subject-matter differed from the disclosure of document D1, in that, first, *Poaceae* husks (rice husks in document D1) had to be selected from a list in document D1 containing multiple alternative carrier materials and that, second, these *Poaceae* husks had to be selected in the size range of 3.0-9.0 mm.

The technical effect of these differences between the claimed invention and the disclosure of document D1 was an improved rearing system, wherein the improvement concerned disturbing interspecific and intraspecific interactions with other mite individuals (see paragraph [0005] of the patent).

The objective technical problem was how to modify the rearing system of document D1 to provide an improvement in connection to disturbing interspecific or intraspecific interactions with other mite individuals.

The opposition division had formulated the objective technical problem as including the aspect of sheltering but this should not be part of the problem as this was part of the claimed solution.

Obviousness

Starting from the disclosure of document D1 as a whole, the skilled person was not motivated specifically to select rice husks as carrier material and to further consider a specific size of rice husks within the range of the claim.

Examples I and II of the patent supported the surprising effect of improvement of rearing systems according to the invention over known rearing systems using (wheat) bran as a carrier material. The latter was also mentioned in document D1 in the list of possible carriers. The claimed subject-matter thus involved an inventive step when starting from the disclosure in document D1.

All claims of the main request referred back to claim 1 and thus incorporated the technical features of claim 1. Therefore, these claims involved an inventive step over the disclosure in document D1 as well.

Second line of argument, submitted in response to the board's communication setting out the preliminary opinion

Starting point for the assessment of inventive step - closest prior art

Document D7 referred to negative population effects and ways to control or improve them. Document D7 rather than document D1 therefore represented the closest prior art.

Evaluating inventive step solely on the basis of a feature from document D1 which established novelty introduced hindsight. Rather, the claimed invention included the purposive selection of *Poaceae* husks (with additional requirements of a size range 3.0 to 9.0 mm) from the various alternative carrier materials disclosed in document D1. In the context of such a selection invention it was not decisive whether the skilled person could have selected *Poaceae* husks from document D1, but instead whether - based on the disclosure of document D1 as a whole - the skilled person would have selected *Poaceae* husks in order to find a solution to the objective technical problem.

Document D1 did not pay any special attention to the carrier and merely presented the carrier as preferred/ optional (see claim 1 and paragraph [0028]). Only buckwheat husks and rice husks contained structures suitable as mite shelters. Paragraph [0029] stated that it was further preferred that the carrier may comprise a suitable food substance for Astigmatid mites which optionally may be used as a prey for the predatory mites. The use of *Poaceae* husks was contradictory to this preferred embodiment, as *Poaceae* were not a

suitable food source for Astigmatid mites.

The only explicit disclosure in document D1 of (i) a phytoseiid predatory mite, (ii) a food source for the predatory mite and (iii) a carrier was presented in example 2. In this example, the carrier used was buckwheat.

Reformulated objective technical problem

The non-obviousness of the improvement of the negative population effects by directing the selection of the carrier towards *Poaceae* husks (with an average size of the longest axis of 3.0 - 9.0 mm) should be the core factor considered when reaching a decision.

The surprising effect of the selection of *Poaceae* husks was an improvement in Phytoseiid predatory mite rearing of the negative population effects connected to disturbing interspecific and/or intraspecific interactions, such as motional activity, disturbance, interference and cannibalism, with other mite individuals, as was reflected in paragraphs [0005] and [0016] of the patent.

Example I of the patent showed that females of the Phytoseiid predatory mites *Amblyseius swirskii* and *Amblydromalus limonicus* have a preference to reside in the millet husk carrier. Example II of the patent showed a positive result for the millet husk carrier compared to the standard (wheat) bran carrier.

In light of the improvement of the population development indicated in the patent (see paragraph [0017], lines 29 to 33), the reformulated objective technical problem was how to improve Phytoseiid

predatory mite population development in the rearing system of document D1.

Obviousness

Document D1 gave no indication that the carrier had any influence on population development by improving negative population effects. Thus, the skilled person would not have sought the solution to the problem by making a specific choice in connection to the carrier. Moreover, the skilled person had no incentive to use *Poaceae* husks having an average longest axis of about 3.0 to 9.0 mm having structures suitable as mite shelters, when wishing to solve the problem.

Third line of argument, submitted in the oral proceedings before the board

Starting point for the assessment of inventive step - closest prior art

The patent concerned the improvement of mite rearing systems (see paragraph [0005]) and paragraphs [0016] and [0017]), introducing the sheltering concept and stacking. Sheltering was achieved by stacking carriers having a suitable form and size. Support for the concept that sheltering was brought about by a specific carrier having a certain size and certain form was provided in Examples 1 and 2 and Figures 5A, 5B and 6. If the carrier was too small or too big it could not offer shelter.

Document D1 did not mention problems with mass rearing. It was silent about interspecific and/or intraspecific interactions, motional activity, disturbance and interference and sheltering. Document D1 disclosed

countless alternative carriers in paragraph [0028]; it disclosed that a three dimensional culture was important for the free movement of the mites but did not mention sheltering in that context (see paragraph [0049]). Document D1 therefore did not address the same problem and was not a suitable starting point for the assessment of inventive step. It was inappropriate to create a notional embodiment with rice husks as a starting point.

Objective technical problem

The claimed subject-matter differed from the disclosure of document D1 in the carrier material, the average longest axis and in that shelter was provided.

Carrier type and size could not be considered separately (see decision T 653/93, Reasons, point 4.3.1). The selected carrier together with the chosen size range resulted in the effect of providing shelter for the mites. It was for the appellant to provide evidence that the selected range was not significant.

The objective technical problem to be solved was to improve the negative population density effect in *Phytoseiidae* predatory mite rearing.

Obviousness

Document D1 did not point to the claimed solution of this problem. Document D1 did not mention population density effects or how to address them. Document D1 mentioned the importance of free movement of the mites. This pointed the skilled person away from the claimed solution. The skilled person would not have arrived at the claimed subject-matter starting from the disclosure

in document D1.

Auxiliary requests 1 to 23

Inventive step (Article 56 EPC)

The arguments in favour of inventive step of auxiliary requests 1 to 23 over the disclosure in document D1 were the same as those for the main request.

- XIV. The appellant requested that the decision under appeal be set aside and the patent be revoked and that documents D18a, D18b, D18c, D18d and D19 not be admitted into the appeal proceedings.
- XV. The respondent requested that the appeal be dismissed and the patent be maintained on the basis of the set of claims of the main request or, in the alternative, on the basis of any of auxiliary requests 1 to 23, considered in their consecutive order; that documents D18a, D18b, D18c, D18d, not admitted by the opposition division, be admitted into the appeal proceedings; and that documents D19 and D20, filed in reply to the statement of grounds, be admitted into the appeal proceedings.

Reasons for the Decision

1. The appeal complies with Articles 106 to 108 and Rule 99 EPC and is admissible.
2. Documents D19 and D20 turned out not to be relevant to the decision of the board. Therefore, no decision was required as to their admittance.

3. The respondent submitted two separate requests as regards the admittance of documents D18a, D18b, D18c and D18d. They are dealt with in turn below.

The respondent's request to overrule the decision of the opposition division to not admit documents D18a, D18b, D18c and D18d

4. It is established case law that if a discretionary decision of the opposition division is challenged on appeal, it is not the task of the board to review all the facts and circumstances as if it were in the place of the opposition division and to decide whether or not it would have exercised discretion in the same way. The board should overrule the way in which the opposition division exercised its discretion only if it concludes that the opposition division did so according to the wrong principles or without taking into account the right principles, or that it exercised its discretion in an unreasonable way and thus exceeded the proper limit of its discretion (see Case Law of the Boards of Appeal, 9th edition 2019, ("CLBA"), V.A.3.5.1 b)). Article 12(6) RPBA reflects this case law by referring to "an error in the use of discretion".
5. During opposition proceedings, the respondent had filed document D16, an extract from rice husk size data from the Genbank of NARO on 26 July 2019, and in response, the appellant had filed a complete version of this document as document D16(full) on 2 September 2019 and submitted that 91.4% of the entries in the database with a value for grain length fell within the claimed range of 3.0 to 9.0 mm, which was thus not narrow.
6. On 20 September 2019, three working days before the oral proceedings in the opposition proceedings, the

respondent then filed documents D18a, D18b, D18c and D18d, allegedly in response to the filing of document D16(full). Document D18a contained experimental data showing that husks from *Poaceae* (exemplified by millet husks and rice husks) had unexpected benefits over buckwheat husks and in document D18b, the author of document D18a provided information about the longest axis of the various carriers used in document D18a. Document D18c, the CV of document D18a's author and document D18d, a scientific article, were both referred to in document D18a and filed for completeness.

7. The opposition division did not admit documents D18a, D18b, D18c and D18d into the opposition proceedings in the exercise of its discretion under Article 114(2) EPC. It considered that neither document D18a nor document D18b provided evidence of any effect of the claimed range of average longest axis - between 3.0 and 9.0 mm - of the husks from *Poaceae* species as compared to carriers not falling in that range. These documents were therefore not considered *prima facie* relevant for "*determining if the criterion (c) of the test of novelty of a sub-range as detailed in the Guidelines, edition 2018, G-VI, 8, item (ii) is satisfied (i.e. the selected range is not an arbitrary specimen of the prior art), or for determining the technical effect of the claimed range when assessing inventive step of claim 1.*" (see decision under appeal, point 2.1).

Furthermore, the opposition division noted that "[t]he opponent's argumentation of lack of novelty of the claims of the patent concerning the specific claimed range of a.l.a. of rice husks between 3.0 and 9.0 mm, due to criteria a) and c) of the novelty test of a sub-

range not being satisfied, had already been submitted in the letter of the opponent dated 23.01.2018, page 2, second paragraph. Documents D18a-D18d could thus have been filed earlier to counter-argue that the criterion c) is satisfied." (see decision under appeal, point 2.2.1).

8. It is evident from the above that the opposition division considered the filing of documents D18a, D18b, D18c and D18d not to be occasioned by the appellant's submissions of 2 September 2019 and that these documents could and should have been filed earlier since the appellant had already submitted in its letter dated 23 January 2018 that the claimed range of average longest axis of the husks from *Poaceae* species was not narrow and was arbitrary. Accordingly, the opposition division concluded that documents D18a, D18b, D18c and D18d were late-filed.
9. It is at the opposition division's discretion whether or not to admit late-filed documents (Article 114(2) EPC). Consideration of *prima facie* relevance to the outcome of the proceedings is among the criteria to be considered when deciding on the admittance of late-filed documents (see CLBA, IV.C.4.5.3). It is apparent that the opposition division considered this criterion and concluded that it was not fulfilled (see point 7 above).
10. On appeal, the respondent contested the reasoning of the opposition division. It re-submitted that the filing of documents D18a, D18b, D18c and D18d had been a direct response to the appellant's filing of document D16(full) on 2 September 2019 and the appellant's new line of argument that the claimed range of 3.0 to 9.0 mm was not a narrow range for rice husks.

This had confronted the respondent with a new situation and therefore the opposition division should have admitted documents D18a, D18b, D18c and D18d.

11. This line of argument fails for two reasons. First, as also observed by the opposition division (see point 7 above), the appellant had already argued earlier in the opposition proceedings that the claimed range was not narrow. Indeed, the opponent had submitted that *"for a range to be novel, it must fulfill all of three conditions, which include that the range must be narrow compared to the prior art and that it should not be an arbitrary specimen (CL BoA I.C.6.3.1). Evidently, a range comprising almost all available rice husk varieties is not narrow, nor is there any indication why 9 mm would not be an arbitrary upper limit and what the difference would be over e.g. 9.2 mm."* (see letter dated 23 January 2018, page 2, second paragraph).
12. Accordingly, the line of argument that the claimed range was not narrow (and was arbitrary) had been on file before the filing of D16(full) on 2 September 2019 and therefore, the respondent had not been confronted with a new situation by the filing of D16(full) and the accompanying argument by the appellant. Under these circumstances, documents D18a, D18b, D18c and D18d could and should therefore have been filed sooner, regardless of whether they were intended to provide evidence that the claimed range was narrow or not arbitrary.
13. Second, during the opposition proceedings, the respondent had relied on documents D18a, D18b, D18c and D18d as providing evidence that *Poaceae* husks had unexpected benefits over buckwheat husks (see points 6 and 7 above). They were not relied upon to address the

issue of whether or not the claimed range of average longest axis between 3.0 and 9.0 mm of the husks from *Poaceae* species was narrow. The opposition division held that the documents were not *prima facie* relevant because they provided no information on an effect of carrier elements within the claimed range of 3.0 to 9.0 mm as compared to carrier elements not falling within that range (see point 7 above) and the respondent has not provided any argument why the opposition division's decision was incorrect in this respect.

14. During the oral proceedings before the board the respondent furthermore submitted that the opposition division should have admitted these documents as the disclosure in document D1 was considered to represent the closest prior art for the first time at the oral proceedings and the respondent should have been given the opportunity to respond to this new attack.

15. The board observes that according to the minutes of the oral proceedings before the opposition division, the respondent was asked at the beginning of the oral proceedings whether it intended to rely on documents D18a, D18b, D18c and D18d in the context of novelty or inventive step (see minutes, page 1, lines 11 to 9 from the bottom of the page). The respondent replied that documents D18a, D18b, D18c and D18d were "*prima facie relevant for novelty of the main request*" because they were "*prima facie relevant for establishing the technical effect of the range disclosed in claim 1*" (see minutes, page 1, lines 8 to 4 from the bottom of the page). After hearing the parties, the opposition division decided not to admit these documents into the proceedings (see minutes, page 2,

lines 2 to 3, and point 7 above).

16. According to the minutes of the oral proceedings before the opposition division (see page 2, line 18 to page 3, line 6) the respondent did not request that documents D18a, D18b, D18c and D18d be admitted into the proceedings during the discussion of inventive step over the disclosure in document D1 representing the closest prior art. More importantly, the opposition held the subject-matter of claim 1 of the main request to be inventive over the disclosure in document D1, even when the content of D16(full) was taken into account. Accordingly, there was no need for the opposition division to re-consider admittance of documents D18a, D18b, D18c and D18d at this stage of the opposition proceedings.

17. Therefore, the board considers that, by not admitting documents D18a, D18b and accompanying documents D18c and D18d into the proceedings, the opposition division exercised its discretion in accordance with the right principles and in a reasonable way. As a consequence the board decided not to overturn this decision.

The respondent's request to admit documents D18a, D18b, D18c and D18d at the appeal stage (Article 12(6) RPBA)

18. Under Article 12(6) RPBA, the board shall not admit requests, facts, objections or evidence which were not admitted in the first-instance proceedings, unless the decision not to admit them suffered from an error in the use of discretion or unless the circumstances of the appeal case justify their admittance.

19. Documents D18a, D18b, D18c and D18d were not admitted into the opposition proceedings and the opposition

division's decision in this respect did not suffer from an error in the use of discretion (see points 4 to 17 above).

20. Accordingly, admittance of documents D18a, D18b, D18c and D18d into the appeal proceedings hinges on whether or not the circumstances of the appeal case justify their admittance.
21. The respondent submitted that the appellant's arguments, as presented in the grounds of appeal based on the disclosure in document D1 representing the closest prior art, had been presented for the first time during the oral proceedings in the opposition proceedings, that this was a substantial change in the appellant's case and that under these circumstances, it was justified that the respondent presented evidence that supported a surprising technical effect over the teaching of document D1. Documents D18a, D18b, D18c and D18d were *prima facie* relevant for the assessment of inventive step starting from the disclosure in document D1 representing the closest prior art.
22. However, as set out in points 7 and 11 above, the appellant had argued early in the opposition proceedings that the claimed range of 3.0 to 9.0 mm for *Poaceae* husks was arbitrary. That this argument was then considered during the oral proceedings before the opposition division in the context of inventive step and not of novelty does not amount to a change to the appellant's case.
23. In addition, the board is in fact not persuaded by the respondent's argument that these documents provide evidence that supports a surprising technical effect

over the teaching of document D1.

24. Document D18a reports a rearing experiment for the phytoseiid predatory mite *Amblyseius swirskii* wherein the population development is compared for mite compositions using *Poaceae* carriers (millet husks and rice husk) on the one hand and buckwheat husks on the other hand. The experiment shows an improvement of the average population size and growth rate of the phytoseiid predatory mite on *Poaceae* husks in comparison to buckwheat husks, the carrier in Example 2 of document D1 (see figure 1 of document D18a). Document D18a is silent about the size of the husks used. According to the respondent, document D18a, when supplemented with document D18b, provided evidence of a surprising technical effect of *Poaceae* husks having an average longest axis of 3.0 to 9.0 mm over buckwheat husks.
25. However, the embodiment of document D1 involving buckwheat husks as the carrier material is not the starting point for the assessment of inventive step of the claimed subject-matter (see point 59 below), an embodiment involving rice husks is. A comparison of rice husks (and millet husks) with buckwheat husks is therefore unsuitable for supporting a surprising technical effect over the disclosure in document D1 that is taken as the starting point for the assessment of inventive step.
26. In the course of the oral proceedings before the board the respondent submitted as part of its arguments in support of inventive step that Example II and figure 6 provided evidence that the selected carrier together with the chosen size range resulted in the effect of

providing shelter for the mites.

27. When the board observed that Example II and figure 6 of the patent do not disclose the size of the carriers, the respondent submitted that documents D18a, D18b, D18c and D18d should be admitted in the appeal proceedings because they were *prima facie* relevant now that the board questioned that the carriers used in the experiments reported in the patent fell within the claimed size range.
28. However, these documents do not provide any information on the size range of *Poaceae* husks used in the experiments reported in the patent.
29. Furthermore, according to the respondent's submissions set forth in the oral proceedings, document D18a, when supplemented with the information of document D18b, provided a comparison of *Poaceae* husks (millet and rice) falling within the claimed range of 3.0 to 9.0 mm versus non-*Poaceae* (buckwheat) husks falling within that same range.
30. However document D18a, even when supplemented with the information of document D18b, does not provide a comparison of *Poaceae* husks falling within the claimed range versus *Poaceae* husks falling outside that range, i.e. being smaller than 3.0 mm or bigger than 9.0 mm. Accordingly, documents D18a, D18b, D18c and D18d provide no information on any technical effect of *Poaceae* husks falling within the claimed range over *Poaceae* carriers in general, as disclosed in document D1.
31. Finally, it had not been argued before by the respondent that the Examples of the patent provided

evidence of the specific interaction between carrier type and size providing shelter. The board's observation that the patent, as a matter of fact, does not disclose a feature - the size of the carrier used in the Examples - which is asserted by the respondent for the first time in the oral proceedings to be disclosed therein cannot justify admitting any new evidence at this stage of the appeal proceedings either.

32. Accordingly, the circumstances of the appeal case did not justify the admittance of documents D18a, D18b, D18c and D18d and the board decided not to allow the respondent's request to admit these documents into the appeal proceedings (Article 12(6) RPBA). The appellant's request to adjourn the oral proceedings therefore became irrelevant.

The respondent's request to stay the appeal proceedings

33. The respondent requested to stay the appeal proceedings until the outcome of referral case G 2/21 was known if the board would not consider post-published evidence documents D18a, D18b, D18c and D18d for the reason that the effects demonstrated in these documents were not plausible, based on the information in the patent application.
34. It is apparent from points 28 to 30 above that plausibility considerations as regards the disclosure in the patent application played no role in the board's decision not to admit documents D18a, D18b, D18c and D18d.

35. The respondent's request to stay the proceedings was therefore irrelevant.

Admittance into the appeal proceedings of the respondent's line of argument presented in the oral proceedings that there were three distinguishing features of the claimed subject-matter over the disclosure in document D1 (Article 13(2) RPBA)

36. In its reply to the statement setting out the grounds of appeal, the respondent held that there were two differences between the claimed subject-matter and the disclosure of document D1 *"in that first Poaceae husks (rice husks in D1) must be selected from a list containing multiple alternative carrier materials and that second the Poaceae husks must be selected in the proper size range of 3.0-9.0 mm. These two differences were also identified by the opposition division"* (see reply, point 48).
37. In the course of the oral proceedings before the board, the respondent then argued that the claimed subject-matter differed from the disclosure in document D1 not only in the carrier and its size range but also by the presence of structures suitable as mite shelters such that there were three features that distinguished the claimed subject-matter from the disclosure in document D1.
38. When asked by the board where this additional distinguishing feature had been set forth in the written procedure, the respondent referred to points 50 and 51 of the reply to the statement of grounds of appeal. The appellant submitted that the alleged additional distinguishing feature was a new argument that should not be admitted into the proceedings.

39. In view of the respondent's reliance on the submissions in points 50 and 51 of its reply, they are reported below in full for ease of understanding.

"50. The technical effect of the differences between the claimed invention and the disclosure of D1 is an improved rearing system, wherein the improvement is based on an improvement in connection to disturbing interspecific and intraspecific interactions with other mite individuals (see paragraph [0005] of the patent). The technical problem can thus be formulated as how to modify the rearing system of D1 to provide an improvement in connection to disturbing interspecific or intraspecific interactions with other mite individuals" and

"51. It should be noted that the opposition division has formulated the technical problem over D1 as how to modify the composition for rearing Phytoseiid mite species of D1 in order to improve sheltering from disturbing interspecific and/or intraspecific interactions with other mite individuals (see 5.2.1 of the decision of the OD). The patentee is of the opinion that the aspect of sheltering should not be in the formulation of the technical problem, as this is part of the solution."

40. In the board's judgement, it can be inferred from the opposition division's formulation of the objective technical problem that it considered that sheltering was disclosed in document D1, otherwise the problem would have been formulated as "to provide shelter" instead of "improve sheltering". Earlier in point 48 of its reply, the respondent had submitted that it considered that there were two differences between the subject-matter claimed and the disclosure of

document D1, which were the same differences as identified by the opposition division (see however also point 68 below). Nowhere in points 50 or 51 of the reply or elsewhere did the respondent argue that the carrier elements disclosed in document D1 did not comprise structures suitable as mite shelters or that this would constitute a further difference over the disclosure in document D1. That "sheltering" is said to be part of the solution does not imply that sheltering is a further difference over the disclosure in document D1. Rather, it seems to refer to improved sheltering mentioned earlier in point 51. In any case, this statement is too vague and ambiguous to detract from the clear statement in point 48.

41. Thus, even when point 48 is read in conjunction with points 50 and 51, it is not apparent from the respondent's reply to the statement of grounds of appeal that it was argued that sheltering is a further difference over the disclosure in document D1.
42. The respondent's argument that there were three distinguishing features of the claimed subject-matter over the disclosure in document D1, one being the feature regarding the suitability of the structure to provide shelter to the mites, therefore constituted an amendment of its appeal case made after notification of a summons to oral proceedings.
43. Pursuant to Article 13(2) RPBA, which applies in the case at hand, any amendment to a party's appeal case after notification of a summons to oral proceedings is, in principle, not to be taken into account unless there are exceptional circumstances, which have been justified with cogent reasons by the party concerned.

44. That there were any exceptional circumstances which would justify admitting its new line of argument into the appeal proceedings was not submitted by the respondent and was not self-evident to the board either.
45. The board therefore decided not to admit the new line of argument into the appeal proceedings.

Objections under Rule 106 EPC

46. During the hearing before the board, the respondent raised two objections under Article 112a(2)(c) EPC, in conjunction with Article 113(1) EPC and Rule 106 EPC (see section XIII).

First objection

47. The first objection concerned the board's conclusion not to admit the respondent's line of argument based on three distinguishing features over the disclosure in document D1 into the appeal proceedings (see points 36 to 45 above).
48. In the respondent's view the line of argument was foreshadowed in its reply to the statement of grounds of appeal and the board's conclusion not to admit it in the appeal proceedings deprived the respondent of the opportunity to present its complete case and therefore violated its right to be heard.
49. Under Article 113(1) EPC the decisions of the EPO may only be based on grounds or evidence on which the parties concerned have had an opportunity to present their comments. In the context of *inter partes* proceedings, Article 113(1) EPC reflects the principle

that each party should have a proper opportunity to reply to the case which is presented by an opposing party (see decision of the EBA G 4/95, OJ 1996 412, Reasons, point 10). Article 12(3) RPBA lays down the requirement that the statement of grounds of appeal and the reply thereto should contain the party's complete case and Article 13 RPBA governs the admittance of amendments to a party's appeal case.

50. The respondent's appeal case made in its reply was that there were two differences between the subject-matter claimed and the disclosure of document D1 (see point 36 above). That the phytoseiid mite rearing compositions disclosed in document D1 did not comprise structures suitable as mite shelters and that this would be a further distinguishing feature over the disclosure in document D1 was not part of the respondent's case made in reply as it was neither argued nor foreshadowed therein (see points 39 to 41 above). Accordingly, it was not part of the respondent's "complete" case. Its submissions at the oral proceedings therefore represented an amendment of its appeal case, admittance of which is governed by Article 13(2) RPBA.

51. As the respondent was given the opportunity to present its comments as regards the amendment of its appeal case as well as admittance thereof, a violation of the right to be heard as guaranteed in Article 113(1) EPC cannot be established.

Insofar as the objection stems from the view that the mere fact that an amendment of the respondent's appeal case is not admitted constitutes a violation of its right to be heard, this view is rejected. The right to be heard does not mean that a party is entitled to

present arguments irrespective of the requirements of a timely submission of its appeal case as laid down in the RPBA which serve the interest of procedural economy and fair proceedings for all parties to the proceedings.

52. Therefore, the board dismissed the first objection.

Second objection

53. The second objection concerned the board's conclusions not to admit documents D18a, D18b, D18c and D18d into the appeal proceedings (see points 18 to 32 above).

54. In the respondent's view these conclusions deprived it of the opportunity to formulate an adequate reply to the appellant's grounds of appeal as well as to answer an objection raised by the rapporteur for the first time during the oral proceedings and amounted to a violation of the right to be heard.

55. Reference is made to points 18 and 49 above. The respondent was given the opportunity to present its comments as regards the admittance of documents D18a, D18b, D18c and D18d in reply to the appellant's grounds of appeal (see points 20 to 25 above) or in reply to an observation made by the rapporteur in the oral proceedings (see point 30 above). A violation of the right to be heard as guaranteed in Article 113(1) EPC cannot therefore be established. The mere fact that the documents were not admitted does not constitute a violation of the right to be heard as set out above in point 51.

56. Therefore, the board also dismissed the second objection.

Main request - claim 1

Inventive step (Article 56 EPC)

Starting point for the assessment of inventive step - closest prior art

57. The claimed invention lies in the field of rearing commercially relevant mites (see paragraph [0001]) and relates to a mite composition suitable for rearing a mite species (see paragraphs [0007] and [0008] of the patent and claim 1).

58. Document D1 discloses a mite composition comprising a rearing population of the phytoseiid predatory mite species *Amblyseius swirskii*, a factitious host population comprising at least one Astigmatid mite species, and optionally a carrier for individuals of said populations (see claim 1). Paragraph [0028] of document D1 discloses as a preferred embodiment that the composition comprises a carrier for the individuals of the population and that (wheat) bran, buckwheat husks, rice husks, saw dust and corn cob grits are examples of a suitable carrier. The carrier elements listed in paragraph [0028] of document D1 are provided in a three dimensional layer (see paragraph [0049], i.e. they are stacked.

59. In agreement with the appellant, the board considers that document D1 discloses, as one embodiment, a mite composition comprising a rearing population of the phytoseiid predatory mite species *Amblyseius swirskii*, a food source for the phytoseiid mite individuals and

rice husks (a *Poaceae* species) as a carrier comprising stacked elements and structures suitable as mite shelters.

60. The respondent's line of arguments that is based on the assertion that *Poaceae* husks (rice husks in document D1) had to be selected from a list containing multiple alternative carrier materials cannot succeed. Rice husks are a single selection from the carriers mentioned in paragraph [0028]. Therefore, document D1 discloses a phytoseiid mite rearing composition comprising rice husks as an explicit embodiment, not as a notional one. This embodiment relates to the rearing of predatory mites and hence to the same purpose as the claimed invention and shares - with the exception of the claimed range of average longest axis - all its technical features. Therefore, the embodiment is a suitable starting point for the assessment of inventive step and thus may represent the closest prior art.

61. The respondent's various lines of argument to the effect that document D1 was not a suitable starting point for the assessment of inventive step because it did not pay any attention to the relevance of the carrier in its mite composition in connection with the problem of disturbing interspecific and intraspecific interactions with other mite individuals and did not address negative population effects are not found to be persuasive. These arguments are based on the subjective problem said to be addressed in the patent (see e.g. paragraphs [0005] to [0008]) which is based on an effect achieved in the light of the starting point used in the patent being standard (non-sheltering) carriers used in rearing systems of mites such as wheat bran (see paragraph [0006], Examples I and II of the

patent).

62. The board recalls that in accordance with the problem-and-solution approach the relevant purpose for selecting the closest prior art is that of the claimed invention. In the case at hand this is a mite composition suitable for rearing a mite species. A disclosure which shares this purpose and most of its technical features, i.e. the embodiment of document D1 comprising rice husks as a carrier, does not become *unsuitable* as starting point for the assessment of inventive step in light of an effect achieved over the starting point used in the patent which is further away from the claimed invention than the embodiment of document D1.
63. The respondent's argument that evaluating inventive step solely on the basis of a feature which established novelty (the size range 3.0 to 9.0 mm) introduced hindsight and that it had to be assessed whether based on the disclosure of document D1 as a whole the skilled person would have selected *Poaceae* husks in order to find a solution for the objective technical problem is not found persuasive either.
64. First, evaluating inventive step on the basis of the feature from document D1 which establishes novelty, is in line with the problem-and-solution approach established in the case law of the Boards of Appeal. Second, the line of argument ignores that the objective technical problem is only formulated after the starting point for the assessment of inventive step has been identified.
65. The respondent's argument that the use of *Poaceae* husks was contradictory to the preferred embodiment of

paragraph [0029] of document D1, as *Poaceae* were not a suitable food source for Astigmatid mites cannot succeed either. It is irrelevant whether or not the embodiment involving rice husks as the carrier is the most preferred embodiment of document D1, it suffices that it is disclosed as one embodiment.

66. Lastly, the embodiment of document D1 comprising rice husks as the carrier has more features in common with the claimed subject-matter than Example 2 of document D1 which discloses a mite composition comprising a non-*Poaceae* species (buckwheat) as the carrier and which was proposed by the respondent as an alternative starting point for the assessment of inventive step.

67. As regards document D7, proposed by the respondent as representing the closest prior art, the board notes that it is established case law of the Boards of Appeal that if the skilled person has a choice of several workable routes starting from different disclosures which might lead to the invention, the rationale of the problem-and-solution approach requires that the invention be assessed relative to all these possible routes, before inventive step can be acknowledged for the claimed subject-matter. Conversely, if the invention is obvious to the skilled person in respect of at least one of these routes, as in the case at hand (see point 68 and following below) there is no need to consider other starting points, such as the disclosure in document D7, before concluding that an inventive step is lacking (see CLBA, section I.D.3.1).

Objective technical problem

68. In agreement with the appellant, the board considers that the sole difference between the claimed subject-matter and the disclosure in document D1 taken as the starting point for the assessment of inventive step (see point 59 above) is the sub-range of average longest axis of 3.0 to 9.0 mm of the *Poaceae* carrier. Incidentally, this was also the sole difference identified by the opposition division as regards the claimed subject-matter and the disclosure in document D1 (see decision under appeal, point 5.2.1), contrary to what is stated in point 48 of the respondent's reply.
69. In agreement with the appellant, the board considers that the opposition division erred when holding that the effect of the difference was specified in paragraph [0005] of the patent as being "*sheltering the mites in the carrier elements from disturbing interspecific and/or intraspecific interactions with other mite individuals*" (see decision under appeal, point 5.2.1 and 5.2.4.1).
70. Paragraph [0005] of the patent states that "*The inventors of the present invention have now surprisingly found that rearing systems of commercially relevant mites may be improved by selecting a carrier comprising carrier elements, said carrier elements preferably having a longest axis of about 3.0-9.0 mm, wherein the stacking of the carrier elements comprises shelters for mite individuals. Without wishing to be bound by any theory it is believed that in providing shelters for the mite individuals the mite individuals may shelter from disturbing interspecific and/or intraspecific interactions, such as motional activity,*

disturbance, interference and cannibalism, with other mite individuals."

71. It can thus be derived from this paragraph that the effect of "sheltering the mites" is attributed to the stacking of carrier elements. However, the fact that the effect of "sheltering the mites" is to be attributed to the sub-range of average longest axis of 3.0 to 9.0 mm of *Poaceae* carriers as compared to *Poaceae* carriers having an average longest axis lying outside that range is not derivable from paragraph [0005] of the patent.
72. Such an effect is not derivable from the Examples of the patent either. Examples I and II of the patent compare rearing systems using millet chaff (representative for carriers according to the invention) with known rearing systems using (wheat) bran or vermiculite as a carrier material. A comparison between rearing systems using *Poaceae* carriers having an average longest axis of 3.0 to 9.0 mm and *Poaceae* carriers having an average longest axis lying outside that range is not provided in the Examples of the patent.
73. As regards the respondent's submission at the oral proceedings before the board that it was the selected carrier together with the chosen size range that resulted in the effect of providing shelter for the mites, the board has seen no evidence that the relevant sheltering effect is limited to such *Poaceae* husks which have an average longest axis of 3.0 to 9.0 mm and is not seen with *Poaceae* husks having an average longest axis outside that range, e.g. 9.1 mm or bigger, nor any evidence that there exist rice husks that give

no shelter in a three dimensional layer.

74. The respondent did not dispute that there is no evidence on file comparing *Poaceae* husks having an average longest axis of 3.0 to 9.0 mm with *Poaceae* husks having an average longest axis below 3.0 or above 9.0 mm. However, it submitted that it was for the appellant to provide evidence for the absence of any surprising technical effect.
75. It is established case law of the Boards of Appeal - and the board sees no reason to deviate from it in the case at hand - that each party bears the burden of the proof for the facts it alleges. Accordingly, it was for the respondent to provide suitable evidence for a surprising technical effect associated with the claimed sub-range.
76. The board concludes from the above observations that there is no technical effect associated with the claimed sub-range of 3.0 to 9.0 mm of the *Poaceae* carrier.
77. Accordingly, the objective technical problem cannot be formulated as any kind of improved mite rearing system, as submitted by the respondent, but needs rather to be formulated as the provision of an alternative mite rearing system.

Obviousness

78. The skilled person faced with the technical problem identified above has at their disposal, *inter alia*, all known rice husks. Accordingly, mite compositions comprising any one of these known rice husks as a carrier are possible solutions available to the skilled

person and hence obvious. Selecting one of these obvious solutions is considered arbitrary and not inventive (see also CLBA I.D.9.19.8 and the decisions cited therein).

79. All the respondent's arguments to the effect that the claimed invention was not obvious to the skilled person fail because they do not relate to the pertinent objective technical problem (see point 77 above) and furthermore rely on the non-obviousness of features which are not distinguishing features but are part of the disclosure taken as the starting point for the assessment of inventive step (see point 59 above).
80. The claimed subject-matter lacks an inventive step.

Auxiliary requests 1 to 23

Inventive step (Article 56 EPC)

81. With respect to the inventive step of auxiliary requests 1 to 23, the respondent relied solely on the arguments provided for claim 1 of the main request. As these arguments are not found persuasive (see points 57 to 80 above), the claimed subject-matter of auxiliary requests 1 to 23 does not involve an inventive step either.

Order

For these reasons it is decided that:

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

The Registrar:

The Chair:



I. Aperribay

B. Claes

Decision electronically authenticated