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Anmeldenummer / Filing No / N^o de la demande : 79 301 597.5
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Bezeichnung der Erfindung:
Title of invention: Separation of multicomponent gas mixtures by
Titre de l'invention : pressure swing adsorption

Klassifikation / Classification / Classement : B 01 D 53/04

ENTSCHEIDUNG / DECISION

vom / of / du 9 April 1987

Anmelder / Applicant / Demandeur :

Patentinhaber / Proprietor of the patent /
Titulaire du brevet :

Air Products & Chemicals, Inc. (Respondent)

Einsprechender / Opponent / Opposant :

Linde AG (Appellant)
Bergwerksverband GmbH (Other party)

Stichwort / Headword / Référence :

Pressure swing adsorption/AIR PRODUCTS

EPO / EPC / CBE

Articles 114(1) and (2)

Kennwort / Keyword / Mot clé :

Leitsatz / Headnote / Sommaire

- I. The principle of examination by the EPO of its own motion (Article 114(1) EPC) takes precedence over the possibility of disregarding facts or evidence not submitted in due time. This follows from the EPO's duty vis-à-vis the public not to grant or maintain patents which it is convinced are not legally valid.
- II. The EPO has to examine the relevance of citations introduced late into the proceedings and has to communicate the results to the parties at least in its decision. No final decision on the opposition can be taken until such an examination has been performed.
- III. Late-filed documents can be designated as not material by the EPO without having to give detailed reasons as it does in the case of citations referred to in due time.

IV. Late-filed documents are not deemed not to have been submitted in due time simply because they have not been submitted during the opposition period; if careful preparation of the opposition proceedings would have revealed the late-filed documents earlier, it is the opponent's task to set out the circumstances that prevented him from mentioning the documents earlier.

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Boards of Appeal

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des brevets

Chambres de recours



Case Number : T 156/84

D E C I S I O N
of the Technical Board of Appeal 3.4.1
of 9 April 1987

Appellant :
(Opponent)

Linde Aktiengesellschaft, Wiesbaden
Zentrale Patentabteilung
Dr.-Carl-von-Linde-Strasse 6-14
D-8023 Höllriegelskreuth

Other party :
(Opponent)

Bergwerksverband GmbH
Franz-Fischer-Weg 61
Postfach 13 01 40
D-4300 Essen 13

Respondent :
(Proprietor of the patent)

Air Products & Chemicals Inc.
PO Box 538
Allentown, Pennsylvania 18105
USA

Representative :

Lucas, Brian Ronald
Lucas, George & Co.
135 Westhall Road,
Warlingham
Surrey CR3 9HJ
England

Decision under appeal :

Decision of Opposition Division of the European
Patent Office dated 3 May 1984 rejecting
the opposition filed against European patent
No. 8 882 pursuant to Article 102(2) EPC.

Composition of the Board :

Chairman : K. Lederer

Members : J. Roscoe

R. Schulte

Summary of Facts and Submissions

I. European patent No. 8 882 was granted on 30 December 1981 with 17 claims in response to the European patent application No. 79 301 597.5 filed on 7 August 1979. Claim 1, the only independent claim, was worded as follows:

"1. In the separation of a multicomponent feed gas mixture in a system comprising a plurality of first and second sorbent beds, with the individual recovery of a primary key component and a secondary key component present in such mixture, by selective sorption, wherein said secondary key component is more strongly sorbed by the sorbent employed than the primary key component and there is present in said mixture at least one tertiary component which is present in a smaller concentration than either said primary key component or said secondary key component and which is more strongly sorbed than both the primary key component and the secondary key component; the method which is characterized in that it comprises in an adiabatic pressure swing cycle the sequential steps of

(a) an adsorption step during which said multicomponent feed gas mixture at initial super-atmospheric pressure is passed through a first sorbent bed selective for preferential retention of said tertiary component and then through a second sorbent bed selective for retention of said secondary key component, and discharging from said second sorbent bed unadsorbed primary key component, said passing of said multicomponent feed gas mixture being continued for a controlled time period until or short of breakthrough of said secondary key component from said second sorbent bed while retaining essentially all of the tertiary component in said first sorbent bed;

(b) thereafter interrupting flow of multicomponent feed gas mixture to said first sorbent bed and discontinuing gas flow communication between said first and second sorbent beds; and

(i) rinsing said second sorbent bed at about said initial superatmospheric pressure by flowing a stream of substantially pure secondary key component therethrough until said second sorbent bed is saturated with said substantially pure secondary key component; and meanwhile

(ii) first reducing to an intermediate level the pressure in said first sorbent bed by gas withdrawal therefrom; and

(iii) then further reducing the pressure in said first sorbent bed to substantially ambient level by further gas withdrawal therefrom; and

(c) thereafter, reducing the pressure of the said second sorbent bed to substantially ambient pressure level by gas withdrawal therefrom comprising substantially pure secondary key component and during such pressure reduction of said second sorbent bed

(i) purging said first sorbent bed with part of the substantially pure secondary key component being withdrawn from said second sorbent bed; and

(ii) rinsing another second sorbent bed with part of the substantially pure secondary key component being withdrawn from the first mentioned second sorbent bed after compressing the said substantially pure secondary key component to about said initial superatmospheric pressure;

(d) following reduction of pressure in said second sorbent bed to substantially ambient pressure level, evacuating said second sorbent bed to lowest pressure in the operating sequence thus further desorbing secondary key component therefrom; and

(e) repressuring the previously evacuated second sorbent bed to feed pressure level by flow thereinto of primary key component and while said second sorbent bed is being thus repressurized

(i) first bringing said first sorbent bed to an intermediate pressure level by flow thereinto of a gas stream comprising the desorbed gas from another first bed then undergoing the pressure reduction step defined in step (b) (ii); and

(ii) then re-establishing flow between said second and first sorbent beds and flowing primary key component through said second sorbent bed into said first sorbent bed until said first sorbent bed is brought to said initial superatmospheric pressure; and

(f) when said first and second sorbent beds are at said initial superatmospheric pressure at the conclusion of step (e) above, repeating the above-recited sequence of operations beginning with step (a) above".

II. On 24 September 1982 opposition was lodged against the European patent by Bergwerksverband GmbH of Essen (BRD) (Opponent 1) on the grounds that the subject-matter of the patent was not patentable according to Articles 52-57 EPC. It was submitted that the subject-matter of the claims was obvious in the light of the disclosure of DE-C-2 604 305, and full revocation of the patent was requested.

On 30 September 1982 opposition was lodged against the patent by Linde Aktiengesellschaft (Opponent 2) on the grounds that the claimed process was lacking in inventive step having regard to

DE-B-1 544 009 (1)
DE-A-2 258 299 (2) and
DE-A-2 604 305 (3).

In a reply to the observations filed by the Patentee, filed on 23 August 1983, the Opponent 2 referred to a further document DE-C-588 885 (4) and in a later letter received on 2 February 1984 to yet another document DE-A-2 745 088 (5).

In a communication pursuant to Article 101(2) and Rules 58(1) to (3) EPC, dated 23 November 1983 the Opposition Division stated that it had, pursuant to Article 114(2) EPC, disregarded the reference to DE-C-588 885 (document 4).

III. In a decision dated 3 May 1984 the Opposition Division rejected the opposition and maintained the patent unamended. In its decision the Opposition Division stated that it maintained its earlier decision to disregard document (4) and that for similar reasons it had decided to disregard document (5). Document (4) had been published in 1933 and document (5) on 20 April 1978. In the circumstances there would appear to have been no obstacle preventing access to these documents. The Opposition Division, being aware that the nine month period for opposition was intended to be long enough for a full case to be made out, had decided it would be inexpedient to the procedure to admit such late filed documents and arguments and they were therefore disregarded for the purposes of the decision.

IV. A notice of appeal was filed by the Appellant on 3 July 1984 against the decision of the Opposition Division, and the appeal fee duly paid. The Statement of Grounds, which made reference to yet another new document DE-B-1 259 844 (document 6), was filed on 25 August 1984.

V. In this statement the Appellant (Opponent 2), quoting Part E, Chapter VI of the Guidelines for Examination, contended that in deciding on the admissibility of late-filed facts and evidence their relevance to the decision was one of several factors to be taken into account, and that it was clear from the language used in the Guidelines that when the Opposition Division intended to disregard any such late-filed facts and evidence using the powers conferred on it by Article 114(2) EPC it was obliged to inform the parties of its intention before deciding on the opposition.

In the present case the Opposition Division did not inform the parties that they were going to disregard document (5), the fact that it had been disregarded only emerging on issue of the decision. The question therefore arose as to whether this omission on the part of the Opposition Division constituted a serious procedural violation justifying reimbursement of the appeal fee.

Moreover, the reasons given under point 6 of the decision for the disregarding of documents (4) and (5) did not appear to be valid since they made no reference to the factual relevance of either of the two documents, even though Opponent 2 (the Appellant) had stressed the considerable relevance of document (5) to the judgment of inventive step.

On the issue of inventive step the arguments advanced by the Appellant in the Statement of Grounds proceed from the disclosure in late-filed document (5) and rely additionally on the disclosures of documents (1) and (2) and on the document (6), referred to in IV. above.

VI. In a response to the Statement of Grounds the Respondent (Patentee) drew attention to the wording of parts (1) and (2) of Article 114 EPC and contended that they were reconcilable only if the former were construed to mean that the facts which the EPO had to consider of its own motion were those submitted in due time, and the word "may" in part (2) to mean "shall except in exceptional circumstances" and pointed to the delays in proceedings, potentially extremely damaging to the Patentee, which might arise if Article 114(1) were interpreted otherwise.

The Opposition Division had acted properly, since Article 114(2) gave them the absolute right to disregard the new citations and the opponents had no reason to expect these to be introduced into the proceedings since, though publicly available during the opposition period they were filed outside that period and were irrelevant. Also when introducing document (5) they withdrew their request for oral proceedings thereby constructively notifying the EPÖ that their case was concluded.

VII. Though a party to the appeal proceedings as of right by virtue of Article 107 EPC, opponent (1) presented no written submissions and was not represented at the oral proceedings.

VIII. At the oral proceedings, since the appellant insisted that at least document (5) should be considered in the proceedings, the chairman of the Board instructed the parties to first present their submissions on the question

of whether or not the Opposition Division had acted improperly in not admitting documents (4) and (5) into the proceedings, and whether or not it had so acted, how these documents should now be treated.

Having heard these submissions the Board found that the Opposition Division had been wrong in not admitting them without first considering their relevance to the issues to be decided. Therefore the case would be referred back to the first instance for further prosecution providing the Board shared the opinion of the first instance that the documents submitted by the opponents during the opposition period alone were not prejudicial to maintenance of the patent in unamended form. The parties then presented their arguments on this issue.

IX. The appellant requested that the decision under appeal be set aside and that either the patent be revoked (main request) or that the case be remitted to the Opposition Division (auxiliary request).

X. The respondent requested that either the appeal be dismissed and the patent maintained (main request) or that the case be remitted to the Opposition Division (auxiliary request).

Reasons for the Decision

1. The appeal complies with the requirements of Articles 106 to 108 and Rule 64 EPC and is therefore admissible.
2. Novelty and inventive step.

- 2.1 After a careful examination of the document (6), first referred to in the Statement of Grounds of Appeal, the Board finds it not to be relevant in the sense of leading the Board to a different decision and has, therefore, making use of the power conferred on it by Article 114(2) EPC, decided to disregard it since it was not submitted in due time.
- 2.2 Next the Board has to consider whether the subject-matter of Claim 1 is novel and involves an inventive step having regard to the disclosure in documents (1) to (3).
- 2.3 Having carefully examined documents (1) to (3) the Board finds that the subject-matter of Claim 1 and hence of all the claims is novel. Since neither of the opponents has raised the issue of novelty either in the course of the opposition or during the appeal proceedings, it is not necessary to go into this matter as such in detail.
- 2.4 It remains therefore to be determined whether the subject-matter of Claim 1 involves an inventive step in the light of the prior art represented by the documents (1) to (3) and the routine knowledge of the skilled man.
- 2.4.1 The process as claimed in Claim 1 relates to the separate recovery of the primary and secondary key components from a feed gas consisting of these two components and at least one tertiary component, involving the use of a plurality of sequentially operated adsorption paths each including first and second sorbent beds connected in series in the feed gas flow. Of the two key components to be recovered the secondary is more strongly adsorbed than the primary, whereas the tertiary component, which is present in smaller concentration than either key components is more strongly sorbed than either of these.

The process comprises in an adiabatic pressure swing cycle the sequential steps (a) to (f) as listed in the claim (see I above).

2.4.2 The Board is satisfied that by following these steps efficient individual recovery of the primary and secondary key components can be achieved and the appellant has not sought to question this during the proceedings.

2.4.3 In the Board's opinion the closest state of the art to be found in documents (1) to (3) is the process described with reference to Fig. 1 of document (1). This involves sequential use of adsorption paths (1,2,3) each consisting of three sorbent beds (Schutzkammer, Stufe 1, Stufe 2) through which feed gas comprising, for example, in descending order of concentration, hydrogen (primary key component), light hydrocarbons e.g. methane (secondary key component) and heavier hydrocarbons (tertiary component) successively flows during the adsorption phase. Whereas the hydrogen is not substantially adsorbed in any of the beds the heavy hydrocarbons are adsorbed in the first bed they encounter (guard bed) and the lower hydrocarbons in the other two beds (of stages 1 and 2). Hydrogen is recovered in highly pure form at the exit from the third beds and in less pure form as a mixture of gas desorbed from a third bed undergoing desorption and product gas emerging from a second bed in the adsorption phase. Adsorbed heavy and light hydrocarbons are removed from the first and second beds respectively by reducing the pressure and then passing a purging flow of hydrogen (product gas) through the series connected beds thus generating a mixture of all three gases which is used as fuel.

Thus this method provides for the individual recovery of only the primary key component.

2.4.4 Before the steps of this process can be meaningfully compared with those set out in Claim 1 it has to be decided which beds correspond to the first and second beds of the claim. The Board considers that only the guard beds perform a role comparable with that of the first beds of the claim since the gas fed to the first stage beds (terminology of document (1)) no longer contains a tertiary component corresponding to that of the claim. In consequence the beds of the first (or first and second) stages are to be regarded as the second sorbent beds of the claim.

When the prior method is viewed in this way it emerges that it lacks at least the rinsing feature (b)(i), the purging feature (c)(i) and the repressuring features (e)(i) and (ii) and hence also step (f) which is required to follow this step. In addition there is no compressing of substantially pure secondary key component prior to the rinsing (c)(ii) and the repressuring of the second sorption bed, otherwise identifiable with step (e)(ii), is not performed by flowing into it primary key component.

2.4.5 To objectively determine the problem solved by the claimed process the result achieved by the latter has to be compared with that achieved by this prior art method. Such a comparison shows the claimed process to additionally provide efficient individual recovery of the secondary key component and the problem is thus to be seen as how to modify the known method in order to provide this.

2.4.6 The Board cannot find, and the appellant has not directed its attention to, anything in document (1) itself giving the skilled man any information on how to modify the process to this end, still less information which would lead him to so modify it as to correspond to the claimed method.

2.4.7 Document (2) describes with reference to Fig. 3 a method for separating substantially pure nitrogen from atmospheric air which makes use of three sequentially operated adsorption paths each involving a series connected pair of beds (103, 104; 105, 106; 107, 108). In the adsorption phase the air passes through the auxiliary adsorber bed (103; 105; 107) of the respective pair of beds which extracts carbon dioxide and residual water vapour and then into a main adsorber bed (104; 106; 108) in which (mainly nitrogen and to a lesser extent oxygen are selectively adsorbed. Thus the tertiary and secondary and primary key components in the sense of Claim 1 of the patent-in-suit are carbon dioxide and water, nitrogen and oxygen respectively and the auxiliary and main beds of a path correspond in their adsorption function to the first and second beds of the claim.

The only information in this document of potential relevance to the problem is that relating to the recovery of secondary key component. Such recovery is accomplished by first eluting (i.e. rinsing) with the main bed at pressure slightly below the adsorption pressure (atmospheric), then reducing the pressure in the bed to release that component from the sorbent. This procedure though having certain of the features of step (b)(i) of Claim 1 is neither carried out at superatmospheric pressure nor does it employ substantially pure secondary key component. Furthermore, the main and auxiliary (first) bed cannot be subjected to pressure reduction by gas withdrawal during the rinsing step as required by steps (b)(ii) and (iii) of the claim. Apart from this the first and second beds of a path are repressured simply by flowing the feed gas through the auxiliary into the main adsorber bed which is in no way suggestive of the steps (e) and (e)(i) and (ii) of Claim 1.

Therefore this document would not lead the skilled man from the process of document (1) to that claimed.

2.4.8 Finally, turning to document (3) this also relates to a process for recovery of substantially pure primary and secondary component from a three component feed gas consisting of e.g. hydrogen (primary component), carbon monoxide (secondary) and methane (tertiary) with the aid of adsorber beds in series connected pairs.

During the adsorption phase of this process the tertiary component, which in contrast to the situation in document (1) and the claim under consideration, is less readily adsorbed than the secondary component, is adsorbed with it in the first bed. It is only in a subsequent step with the feed gas cut off that the adsorbed gases are driven from the first to the second bed from which they are subsequently removed by a pressure reduction step. Secondary component gas used for rinsing the second bed is fed to it via the first bed at a pressure, 3 bars, much lower than the adsorption, or feed gas, pressure of 20 bars. The second bed rinsing is thus neither simultaneous with a reduction of pressure in the associated first bed nor performed with the beds separated as in features (b)(i) to (iii).

The Board cannot therefore see how this document could lead the skilled man to modify the process of document (1) to employ these features. Quite apart from this the repressuring steps, throughout which the first and second beds are connected in series cannot induce him to adopt the essentially different repressuring set out in steps (e) and (e)(i) and (ii) of Claim 1.

- 2.5 In view of what has been said above the Board considers the Opposition Division's decision to maintain the patent unamended, in the face of the documents it considered, to have been justified.
3. Admissibility of documents filed after expiry of the opposition period.
- 3.1 In its decision using the powers conferred on it by Article 114(2) EPC the Opposition Division disregarded citations (4) and (5). In support of its argument that citations (4) and (5) filed after expiry of the opposition period were not **submitted in due time** the Opposition Division explained that the nine-month period was sufficiently long and the two citations had been publicly available for a long time, in point of fact since 1933 and 1978 respectively. The Board considers such treatment of citations mentioned after expiry of the opposition period to be irregular and not consonant with Article 114 EPC.
- 3.2 Paragraphs 1 and 2 of Article 114 EPC contain two different provisions: under Article 114(1) EPC the EPO has to examine the facts of its own motion without being restricted thereby to the facts, evidence and arguments provided by the parties and the relief sought, whereas Article 114(2) EPC empowers the EPO to disregard facts or evidence not submitted in due time by the parties concerned.
- 3.3 To some extent the two paragraphs are at variance with one another. If the EPO has to examine the facts of its own motion it must consider all the circumstances relevant to its decision. Article 114(1) EPC imposes no time limit on this obligation, which therefore applies for the duration of the proceedings. Article 114(2) EPC, on the other hand,

allows facts not submitted in due time by the parties concerned to be disregarded. This apparent contradiction has to be resolved by careful interpretation of the provisions.

3.4 The Board considers that the principle of examination by the Office of its own motion enshrined in Article 114(1) EPC takes precedence over the possibility of disregarding facts or evidence not submitted in due time provided for in Article 114(2) EPC. This is evident from the wording of both provisions. That of Article 114(1) EPC: "ermittelt" in the German text, "shall examine" in the English and "procède" in the French, expresses an obligation whereas Article 114(2) EPC implies a discretion - the German text choosing the words "braucht nicht zu berücksichtigen", the English text "may disregard" and the French "peut ne pas tenir compte". The wording alone thus makes it clear that the provision in paragraph 1 has priority over that in paragraph 2.

3.5 Even in *inter partes* proceedings before the EPO, which is what opposition proceedings are, account must be taken not only of the interests of the parties involved; the EPO also has a duty *vis-à-vis* the public not to grant or maintain patents which it is convinced are not legally valid.

This is the real reason for the introduction of the principle of examination by the Office of its own motion in Article 114(1) EPC and of the provision of Article 115 EPC enabling third parties to present observations concerning the patentability of the invention in respect of which the application has been filed. The public has to be enabled to rely as far as possible on the legal validity of a patent granted by the EPO. Taking the aforementioned principle to its logical conclusion, the EPO may not disregard any

material at its disposal which is of relevance to an appraisal of the legal validity of a patent, which in turn means that in its decision the EPO must consider all the circumstances, irrelevant of how and when it became aware of them.

- 3.6 The principle of examination by the Office of its own motion therefore does not allow essential facts, evidence and arguments to be disregarded merely because they were not submitted by a party within a time limit. That facts prejudicial to maintenance of a patent which the Opposition Division or Board has itself ascertained have to be considered at any time until a decision is pronounced is evident from the distinction drawn in Article 114(1) EPC between "the facts" on the one hand, and "the facts which are submitted by the parties" on the other and the applicability of Article 114(2) EPC to only these last mentioned facts.
- 3.7 Another category of facts to which Article 114(2) evidently does not apply are those presented in observations by third parties concerning the patentability of the invention pursuant to Article 115(1) EPC, since it is clear from the sentence "That person shall not be a party to the proceedings before the European Patent Office" that such a person is not one of the parties referred to in Article 114(2). Furthermore there is no provision either in Article 115 or elsewhere in the EPC imposing any limit on the period within which such observations have to be presented or empowering the EPO to disregard facts which come to its notice in this way whenever they are presented. This serves to reinforce the view that Article 114(2) cannot apply to such facts since "due time" can have no meaning in respect of facts which do not have to be presented within a limited period.

That the provisions of Article 115 apply not only to the period before grant but also to the post grant period is apparent from the reference in paragraph (2) of the article to communication of the observations to the applicant for or **proprietor of the patent**. In the Board's view, a situation where facts submitted by a person who is not even a party to the proceedings have to be considered by the EPO regardless of when they are submitted, whereas those submitted by the opponent after a specific time limit has expired do not, would be scarcely justifiable. It would be ridiculous if the opponent had to file documents found late through a third party in accordance with Article 115 EPC, if he wished to ensure that they would not be disregarded under Article 114(2) EPC.

Furthermore, seen objectively, it is in the general interest of all, including the patent proprietor, that his patent be examined against the background of the entire prior art known in the course of the opposition proceedings, as that would strengthen his legal position in any future infringement proceedings in which the infringer may plead that the patent lacks legal validity.

- 3.8 Even though therefore, under Article 114(1) EPC the EPO has to consider without limit as to time all circumstances which come to its attention in whatever way and which are relevant to its decision, it does not follow that Article 114(2) EPC is meaningless. That provision enables the Opposition Division or Appeal Board in its decision to designate citations referred to by the opponent after expiry of the time limit as not material - i.e. having no bearing on the decision - without having to give detailed reasons, as it does in the case of citations referred to in due time. The Opposition Division or Board has however to examine objectively the relevance of the citation introduced late into the proceedings and has then to

communicate the results to the parties at least in its decision. This has not happened in the present case. In the contested decision the Opposition Division has disregarded documents (4) and (5) simply because they were not cited within the opposition period. Nothing in the decision indicates that the Opposition Division considered the substance of the documents introduced late into the proceedings to be not relevant.

No final decision on the opposition can be taken until such an examination has been performed. In the circumstances the Board considers it proper that this should be done by the Opposition Division thus ensuring the right of both parties of a full examination of the opposition before two instances.

3.9 Therefore, despite the conclusion of the Board reached in point 2.5 above neither the Appellant's nor the Respondent's main request can be allowed.

The Board has decided to make use of the powers conferred on it by Article 111 EPC to refer the case back to the Opposition Division for further prosecution in accordance with the auxiliary request of both parties.

3.10 If the Opposition Division in objectively examining the relevance of documents (4) and (5) concludes that they alone or in combination with the state of the art cited within the time limit for filing the opposition do not allow the patent to be maintained without amendment it must base its decision on these citations. If it concludes that the documents introduced late do not prejudice the maintenance of the patent in its granted form it needs merely communicate to the parties in its decision the results of its objective examination with a reference to their late introduction.

3.11 This presupposes that the opponent did not submit documents (4) and (5) in due time. Facts, evidence and arguments are not deemed not to have been submitted in due time ("verspätet vorgebracht", "n'ont pas été produites en temps utile") simply because they have not been submitted during the opposition period. On the contrary, some blame must also be attachable to the opponent for his failure to mention documents (4) and (5) within the opposition period. Although the Opposition Division is aware of this fact it does not give adequate reasons for concluding that the documents were not filed in due time but merely refers to the lengthy nine-month opposition period and the existence of the documents since 1933 and 1978 respectively. However, documents are deemed to be introduced late only if, in the present case, the opponent could have mentioned documents (4) and (5) within the opposition period or earlier than in fact he did. There is nothing to indicate this. If it could be assumed that careful preparation of the opposition proceedings would have revealed to the opponent documents (4) and (5) - and this is what the Opposition Division would seem to be implying in the reasons it gives for claiming their late introduction - it would have been his task to set out the circumstances that prevented him from mentioning the two documents earlier.

3.12 The Board considers moreover that too strict a standard should not be set when a decision is taken on whether to admit citations submitted outside the opposition period. There is the major risk of proceedings being unduly delayed if the first instance judges facts, evidence or arguments not to have been submitted in due time, the Board of Appeal disputes this and the case is referred back to the first instance. For these reasons the first instance should use the powers conferred on it by Article 114(2) EPC only if it

can be clearly established that they had not been submitted in due time.

- 3.13 The Board considers it not possible to order reimbursement of the appeal fee in the present case since there has been no **substantial procedural** violation within the meaning of Rule 67 EPC. Although the Board feels that the Opposition Division did not act in accordance with correct procedure it cannot be held guilty of a substantial procedural violation because, to the knowledge of the Board, there is as yet no standardised procedure for dealing with documents not submitted in due time in proceedings before the first instance and the Guidelines for Examination in the European Patent Office merely state that in deciding whether to admit the facts or evidence not filed in due time their relevance to the decision, the state of the procedure and the reasons for the belated presentation are to be considered (cf. Part E-VI, 2.).

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:

F.Klein

K.Lederer