BESCHWERDEKAMMERN DES EUROPÄISCHEN PATENTAMTS | BOARDS OF APPEAL OF THE EUROPEAN PATENT OFFICE | CHAMBRES DE RECOURS DE L'OFFICE EUROPEEN DES BREVETS

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File Number: T 79/88 - 3.3.3

Application No.: 81 302 949.3

Publication No.: 0 043 273

Title of invention: Impact-resistant resin composition and a product produced from it

Classification: C08L 55/02

D E C I S I O N
of 25 July 1991

Proprietor of the patent: JAPAN SYNTHETIC RUBBER CO., LTD.

Opponent(01): Bayer AG

Opponent(02): BASF Aktiengesellschaft

Headword:

EPC Articles 83, 116

Keyword: "Sufficiency of disclosure (denied) - undue burden on skilled person wanting to repeat the invention"
"Auxiliary request for oral proceedings - no abuse"

Headnote

Case Number : T 79/88 - 3.3.3

D E C I S I O N
of the Technical Board of Appeal - 3.3.3
of 25 July 1991

Appellant (01): (Opponent 01)
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Respondent : (Proprietor of the patent)
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Decision under appeal :
Decision of Opposition Division of the European Patent Office dated 20 October 1987, issued on 27 January 1988 rejecting the oppositions filed against European patent No. 0 043 273 pursuant to Article 102(2) EPC.

Composition of the Board :

Chairman : F. Antony
Members : C. Gérardin
M. Aúz Castro

Summary of Facts and Submissions

I. The mention of the grant of the patent No. 0 043 273 in respect of European patent application No. 81 302 949.3 filed on 29 June 1981 and claiming priority of 27 June 1980 of an earlier application in Japan, was published on 16 May 1984 on the basis of thirteen claims.

Claim 1 reads as follows:

"An impact-resistant resin composition comprising: a graft polymer in which an aromatic alkenyl compound and an alkenyl cyanide compound are grafted on a rubbery polymer; and a matrix comprising a copolymer of an aromatic alkenyl compound and an alkenyl cyanide compound, characterized in that:

(a) the proportion of rubbery polymer in said impact-resistant resin composition is from 10-30% by weight;

(b) the graft polymer has a degree of grafting of from 70 to 120% by weight;

(c) the matrix has an intrinisic viscosity of from 0.55 to 0.80 dl/g, measured at 30°C in methyl ethyl ketone; and

(d) the weight ratio of the aromatic alkenyl compound to the alkenyl cyanide compound in the impact resistant resin composition is from 2.0 : 1 to 2.8 : 1."

Claims 2 to 12 are dependent claims directed to preferred embodiments of the subject-matter of the main claim. Further, Claim 13 concerns a box body for a refrigerator formed from an impact-resistant resin composition according to any one of Claims 1 to 12.

II. On 7 September 1984 Opponent 01 filed a Notice of Opposition against the grant of the patent on the general

grounds that the requirements of Article 100 EPC were not met. However, the arguments presented simultaneously concerned only lack of novelty and lack of inventive step of the claimed subject-matter (Article 100(a) EPC).

Opponent 02 lodged an opposition to the granted patent on 22 November 1984 and requested revocation thereof on the grounds of lack of novelty and lack of inventive step (Article 100(a) EPC).

By way of auxiliary request both Opponents requested oral proceedings.

In substance, it was argued in both Statements of Grounds of Opposition that feature (b) in Claim 1 of the patent in suit must be regarded as implicitly disclosed in the documents relied upon. This particular point developed into a controversial issue under Article 100(b) EPC since, on the one hand, the Patentee put forward that feature (b) was a distinguishing parameter conferring both novelty and inventive step to the claimed subject-matter, and, on the other hand, the Opponents put forward that the achievement of a degree of grafting of from 70 to 120% was not possible by conventional methods on the sole basis of the information disclosed in the patent specification.

As far as the objections of lack of novelty and inventive step were concerned, the Patentee submitted that these issues could be dealt with quite satisfactorily on a written basis and that, consequently, the oral hearing requested by both Opponents was regarded not only as superfluous, but even as abusive in view of the considerable inconvenience and higher expenses the attendance at such a hearing would place on the Patentee. An apportionment of costs was thus regarded as equitable.

III. By a decision delivered orally on 20 October 1987, with written reasons posted on 27 January 1988, the Opposition Division rejected the two oppositions on the grounds that there could be no question of insufficiency of disclosure, and that the claimed subject-matter was both novel and inventive. In particular, it was stated in that decision that the patent specification made it clear how to prepare the graft copolymer and the matrix copolymer separately and thereafter combine them.

Regarding the request of apportionment of costs, the Opposition Division took the same view as the Patentee and, accordingly, awarded costs comprising the travelling expenses and overnight costs against the Opponents.

IV. The Appellants 01 and 02 (Opponents 01 and 02), thereafter, lodged Notices of Appeal against that decision on respectively 24 February 1988 and 9 February 1988, and paid the prescribed fee at the same time. The arguments presented in the Statements of Grounds of Appeal filed respectively on 26 April 1988 and 25 May 1988, in a later submission and, above all, during oral proceedings held on 25 July 1991, focused on the issue of sufficiency of disclosure.

It was first stated that neither of the two methods of preparation mentioned in the patent specification provided enough information to prepare a graft copolymer having the required degree of grafting; nor could the Examples in the patent in suit be of any help in that respect, since they did not illustrate such preparation. Moreover, essential features of the rubbery polymer, such as its particle size, particle size distribution and degree of crosslinking, were not even disclosed. In view of the interdependence of features (a) to (d) the difficulty was not just to increase the degree of grafting to a range

unknown hitherto, but to achieve that in combination with the requirements of features (a), (c) and (d). Finally, the only document cited by the Respondent (Patentee) likely to provide relevant information, Japanese patent application Kokai No. 4618/81 (document (21)), was not even a prepublished document.

As to the decision on costs, the mere fact that the Opposition Division regarded oral proceedings as superfluous did not make them abusive. These oral proceedings were in fact necessary in view of the erroneous interpretation of the experimental data in Tables 1 and 2 of the patent in suit given by the first instance.

V. The arguments presented by the Respondent in the Counterstatement of Appeal and in the supplementary Counterstatement filed on 9 January 1989 as well as during oral proceedings, in connection with the objections raised under Article 100(b) EPC, can be summarised as follows:

The objection of insufficient disclosure was not raised initially in the Notices of Opposition. Several of the documents relied upon by the Appellants, namely

(3) = DE-B-2 420 358,
(18) = DE-B-1 694 101,
(20) = EP-A-6521, (5) = EP-B-6521,

mentioned degrees of grafting higher than 70%. Such figures were not consistent with the objection of insufficient disclosure. A patent need not be a full technical teaching, since it was addressed to skilled readers. The fact that document (21) was not prepublished was irrelevant, for the critical date should not be the priority date of the patent in suit.

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

The Respondent requested that the appeal be dismissed and that the patent be maintained.

Reasons for the Decision

1. The appeals comply with Articles 106 to 108 and Rule 64 EPC and are admissible.

2. In point II/2 of the decision under appeal, it is mentioned that document (18), which had been submitted after the expiry of the normal opposition period, was briefly appraised, but disregarded as not being relevant (Article 114(2) EPC). Since, however, the Appellants relied extensively upon that document in the appeal procedure, both in their written submissions and during oral proceedings, the Board, in exercising its discretion, has decided to admit it into consideration.

3. As correctly stated by the Respondent, the issue of insufficient disclosure was not raised as such in the Notices of Opposition; in particular, the general reference to the requirements of Article 100 EPC in the Notice of Opposition by Appellant 01 cannot be interpreted as a specific objection under Article 100(b) EPC, in view of the arguments presented therein, which dealt exclusively with the issues of novelty and inventive step under Article 100(a) EPC.

Following the objection of alleged lack of novelty of the claimed subject-matter with regard to the teaching of US-A-2 820 773 (document (1)) - explicit for features (a) and

(d), implicit for features (b) and (c) - raised by Appellant 01 (page 2, paragraph 3 to page 3, paragraph 5 of its letter of opposition of 30 August 1984), the Respondent submitted, together with his observations on the oppositions which he filed on 29 July 1985, a test report, from which it appeared that the grafting degree (feature (b)) and the intrinsic viscosity (feature (c)) of the graft polymer powder according to Examples I to V of that citation - with the exception of feature (b) in the case of Example IV - were considerably outside the ranges required in Claim 1 of the patent in suit. Appellant 01 thereafter took the position that the difference in the degree of grafting could only be attributed to a specific process of preparation, which was not to be found in the patent specification (Statement filed on 7 September 1985, point 3 to page 4, paragraph 3). That issue developed gradually into a major controversial point, as is apparent from the statements filed by Appellant 01 on 20 November 1986 (point 1) and 21 August 1987 (points I and II), the reply submitted by the Respondent on 9 September 1987 (point 1) as well as the communication by the Opposition Division issued on 1 July 1987 (point 1), the minutes of the oral proceedings and the Opposition Division's decision itself.

The same attention was paid to that question in the written submissions by Appellant 01 and the Respondent in the appeal procedure. The relevant issue, therefore, did not constitute a new opposition ground, but resulted from the ongoing discussion of an objection duly raised within the nine-month opposition period, and the Respondent had every opportunity - of which he made ample use - to fully argue this point.

4. In dealing with the issue of sufficiency, the first question to examine is what the patent specification

actually discloses with respect to the preparation of the impact-resistant resin composition.

4.1 A first method is described on page 3, lines 30 to 35. According to that passage the claimed composition can be prepared simply by adding a monomer mixture comprising the aromatic alkenyl compound and the alkenyl cyanide compound to a latex of the rubbery polymer and subjecting the resulting mixture to emulsion polymerisation, as well as by other conventional graft polymerisation methods, for example the bulk-suspension polymerisation method, the solution polymerisation method, the emulsion-bulk polymerisation method or similar methods.

According to that embodiment, thus, graft polymer and matrix are formed simultaneously. However, as pointed out by Appellant 01 in the Statement of Grounds of Appeal (whole page 4), this sole indication does not provide any information about the process features which lead simultaneously to a graft polymer having a given degree of grafting and a matrix having a given intrinsic viscosity, let alone the relative amounts of these two components which have to be within certain limits. Nor does the patent specification indicate any single document the skilled man could refer to for that purpose.

Relying on his own experience of thirty years in that field, Appellant 01 argues further that the above method could not give rise to a product having the required viscosity, because the rubbery polymer would act as a molecular weight regulator and, thereby, prevent the formation of long chains. This essential argument has been left unanswered by the Respondent.

4.2 The second method mentioned in the patent specification (page 3, lines 52 to 57) comprises first preparing a

rubbery resin composition (with a high rubbery polymer content), which contains a graft polymer having a degree of grafting within the specified range, and then blending it with a copolymer of an aromatic alkenyl compound and an alkenyl cyanide compound to regulate the rubbery polymer content.

Although that alternative embodiment has the advantage that the copolymer can be chosen according to freely selected criteria, the other component, i.e. the rubbery resin composition, is supposed to contain a graft polymer with a specific degree of grafting, whose preparation raises all the difficulties mentioned above in the case of the first embodiment.

4.3 Nor can the examples provide additional information, since it is only said in the introductory paragraph (page 4, lines 19 and 20) that the powdery ABS resins were prepared by a conventional emulsion polymerisation method in a 10 litre glass reaction vessel. As pointed out by Appellant 01, the rubbery polymer is not even identified, let alone the usual, but critical parameters, such as the particle size, the particle size distribution and the degree of crosslinking, which are not mentioned.

5. The second question to examine is whether the documents relied upon by the Appellants, wherein degrees of grafting higher than 70% are mentioned, provide any information in that respect.

5.1 Document (3) describes moulding compositions based on ABS graft polymers comprising according to Claim 1:

(A) 6 to 30 parts by weight of a first ABS graft polymer having a degree of grafting of from 15 to 70%,

(B) 14 to 45 parts by weight of a second ABS graft polymer having a degree of grafting from 40 to 90%, and

(C) 25 to 80 parts by weight of a SAN copolymer.

The composition according to Comparative Example A (columns 17/18, first Table in combination with columns 13/14, Table) comprises 35 parts by weight of the graft polymer B-1 and 65 parts by weight of a SAN copolymer; it is characterised by a proportion of rubber polymer of 17.5%, a degree of grafting of 72% and a weight ratio styrene : acrylonitrile of 2.3 : 1, and consequently meets the requirements concerning the features (a), (b) and (d) in the patent in suit. Since the parties disagree about the value of intrinsic viscosity and the value of that parameter is not decisive for the present issue, no conclusion will be drawn in that respect. It can thus be said that:

(i) degrees of grafting up to 90% are generally possible for ABS graft polymers in view of the definition of component (B) in Claim 1,

(ii) a degree of grafting of 72% is explicitly disclosed in connection with a specific ABS graft polymer, which is otherwise at least very similar to the composition claimed in the patent in suit.

5.2 Document (20) is concerned with the use of specific additives in the production of ABS graft polymers in order to improve the impact resistance thereof (Claim 1). These polymers are defined as mixtures of

(a) 5 to 70 parts by weight of at least one graft product derived from the polymerisation of from 20 to 95

parts by weight of, in particular, a mixture of styrene and acrylonitrile in a weight ratio of from 90 : 10 to 50 : 50 in the presence of 5 to 80 parts by weight of a rubber,

(b) 95 to 30 parts by weight of at least one thermoplastic resin, which is advantageously a copolymer of styrene and acrylonitrile (page 3, lines 1 to 21; page 5, lines 7 to 14).

(In that definition the lower limit of the amount of component (a) actually disclosed, i.e. 50, has been corrected to 5; the original value is obviously inconsistent with the upper limit of the amount of component (b), i.e. 95, as well as with the ranges mentioned on page 7, lines 1 to 24 for two typical ABS graft polymers.)

According to a preferred embodiment the amount of graft product is such that the final polymer contains 5 to 25 parts by weight of rubber (page 5, lines 1 to 6). The specific product P3 (page 10, Table), wherein the weight ratio styrene : acrylonitrile is 2.3 : 1, has a degree of grafting of 72%.

As in the case of document (3), and with the same remark regarding the intrinsic viscosity, it can thus be concluded that document (20) describes a specific ABS graft polymer whose features (a), (b) and (d) fall within the terms of Claim 1 of the patent in suit.

5.3 Document (18) deals with stabilised moulding compositions containing:

(A) 5 to 60 percent by weight of a graft polymer obtained by polymerising 10 to 80 parts by weight of a mixture

of styrene and acrylonitrile in the weight ratio of from 50 : 50 to 90 : 10 in the presence of 20 to 90 parts by weight of a conjugated diene rubber, and

(B) 30 to 94 percent by weight of a thermoplastic copolymer of styrene and acrylonitrile in the weight ratio 50 : 50 to 95 : 5,

as polymer components (Claim 3; column 5, line 34 to column 6, line 15).

According to Example 1, part A, 35 parts by weight of a graft polymer of 36 parts by weight of styrene and 14 parts by weight of acrylonitrile on 50 parts by weight of polybutadiene are combined with 65 parts by weight of a copolymer of styrene and acrylonitrile in the weight ratio of 2.3 : 1.

These figures are interpreted by Appellant 01 as referring to the amount of styrene and acrylonitrile actually grafted on polybutadiene, which would mean that the degree of grafting was exactly 100% (Statement of Grounds of Appeal, page 10, paragraphs 1 to 3; Statement filed on 21 August 1987, point IV). In the Respondent's view, by contrast, such round figures would be rather diagnostic of the proportions of the raw material and, therefore, indicative of the composition of the whole polymerised product comprising this graft polymer as well as the corresponding copolymer, since both types of reaction occur simultaneously (Counterstatement of Appeal, point 15). Although the strict wording used in Example 1, i.e. the expression "graft polymer", would tend to exclude the presence of a true copolymer, the Board notes that even a degree of copolymerisation up to 30% would still result in a degree of grafting of at least 70%. On that basis, it can reasonably be assumed that the specific

polymer composition described in Example 1 meets the requirements regarding not only features (a) and (d), but also feature (b), as expressed in Claim 1 of the patent in suit.

5.4 In view of the foregoing, it can be concluded that ABS graft polymers, which are very close by their definition and their properties to the polymer compositions claimed in the patent in suit, may have a degree of grafting higher than 70%.

6. Without disputing that conclusion, the Appellants argue that the teaching of documents (3), (18) and (20) was basically directed to moulding compositions containing such ABS graft polymers and that the preparative aspects considered therein did not go much beyond the control of the degree of grafting without any connection with the other critical features of the polymers. In addition, the fact that only one specific ABS graft polymer in each of the above citations was known to have a degree of grafting slightly higher than 70% did not inform the skilled reader about any general method which could be used in order to obtain degrees of grafting extending over the whole range of from 70 to 120% as required in Claim 1 of the patent in suit.

6.1 General information about controlling the degree of grafting is provided in document (3). According to column 8, lines 5 to 26 the degree of grafting is affected by the type of rubbery polymer as well as by the ratio rubbery polymer : graft monomers. More specifically, low degrees of grafting are obtained when the average particle size of the rubbery polymer is large and the ratio rubbery polymer : graft monomers high; conversely, when the average particle size is small and that ratio is lower than 1 : 1, high degrees of grafting can be obtained.

Further, for a given rubbery polymer the degree of grafting may be adjusted by the use of appropriate chain transfer agents, emulsifying agents, activators as well as by the manner in which the monomers are introduced.

6.2 Although at first sight this information might appear sufficient to the skilled man to embark upon systematic experimentation on the basis of trial and error in order to increase the degree of grafting, in practice this would be an oversimplified approach which would not lead to success.

First of all, this would involve regarding the polymer with a degree of grafting of 72% disclosed in documents (18) and (20) as a practical starting basis for such experimentation and attempting to increase that parameter on the basis of the general information mentioned in document (3). In view of the many process features known to have an influence on the degree of grafting, it is evident that many solutions are conceivable and that, consequently, attempts could be made in many directions.

Moreover, since the range of degree of grafting actually considered in the prior art does not extend beyond the limit of 90%, the skilled man would have no information whatsoever about the process features required to increase the value of that parameter to up to 120%. In fact, as will appear hereinafter, such high degree of grafting cannot be achieved by any arbitrary combination of process features using conventional methods.

In the second place, as pointed out by the Appellants during oral proceedings, it is not proper to consider the degree of grafting in isolation, for the technical difficulty is not just to increase the value of that

parameter, but to achieve this while controlling the other features as well, which are affected by the variations of the degree of grafting and which too have to meet specific requirements. That applies in particular to the intrinsic viscosity of the matrix, since this is precisely the difficulty Appellant 01 was faced with in opposition procedure (statement filed on 21 August 1987, points I and II), when he tried to prepare ABS graft polymers for comparative purposes which would fulfil both the conditions expressed under (b) and (c) in Claim 1 of the patent in suit.

As noted in decision T 14/83 "Vinylchloride resins" published in OJ EPO, 1984, 105, occasional lack of success of a claimed process does not impair its feasibility in the sense of Article 83 EPC if, for example, some experiments are still to be done to transform the failure into success, provided that such experiments are not undue and do not require inventive activity (point 6, paragraph 1). Such is not the situation in the present case since, for the reasons given above, the skilled man has no information about the specific process features whose combination would lead to ABS graft polymers having a degree of grafting extending over the whole range of from 70 to 120 %, and wherein additionally the matrix would have an intrinsic viscosity of from 0.55 to 0.80 dl/g.

6.3 Document (21) relied upon by the Respondent cannot be a remedy in that respect. As it was not available to the public at the priority date of the patent in suit, this document is not part of the state of the art. As argued by the Appellants, the patent in suit is to be interpreted as it would have been read by a skilled person at the priority date of the original application, not in the light of later contributions to and developments in the

art (see T 24/81, OJ EPO, 1983, 133). Even more important, document (21) could only be taken into consideration if it represented common general knowledge (see T 137/83 -unpublished). This is, however, not the case. On the contrary, it deals with a particular problem, basically directed to the preparation of ABS graft polymers having a degree of grafting of at least 140%, thus even outside the range envisaged in the patent in suit. Furthermore, it is concerned only with the degree of grafting of the polymer, thus with one parameter considered in isolation, not with the simultaneous control of the intrinsic viscosity of the matrix, which is the real difficulty to overcome.

The embodiment which is illustrated in document (21) provides evidence that only a specific combination of features can lead to such high degrees of grafting. From point 43 of the Counterstatement of Appeal it appears that, besides features which may indeed be regarded as usual in the art, the rubbery polymer latex should have a specific particle size distribution, as well as a well-defined ratio rubbery polymer : monomers which should be kept low within relatively narrow limits; moreover, the grafting monomers should be added continuously. In the Board's view, to find this specific combination of operative features from the many parameters mentioned in document (3) as having an influence on the degree of grafting (see point 6.1 above), would place an undue burden on the skilled man and practically require from him to make the invention again.

6.4 In view of the foregoing, it is concluded that the patent application does not disclose the impact-resistant resin compositions according to Claim 1 in a manner sufficiently clear and complete for them to be prepared by a person skilled in the art.

7. The subject-matter of Claim 1 not being sufficiently disclosed, the same applies to the subject-matter of dependent Claims 2 to 12, which are directed to preferred resin compositions according to Claim 1, as well as to the subject-matter of dependent Claim 13, which concerns a box body for a refrigerator formed from a resin composition according to any one of Claims 1 to 12.

8. The general objection of insufficient disclosure being an incurable defect, it is not necessary to deal with the issues of novelty and inventive step.

9. The apportionment of costs ordered by the Opposition Division is based on erroneous considerations.

9.1 As far as formalities are concerned, the Opposition Division included the decision on costs in the reasons of the decision, but did not mention it in the order concerning the rejection of the oppositions pursuant to Article 102(2) EPC. Whereas there is a special rule for the form and content of decisions of the Appeal Boards, namely Rule 66(2) EPC, there is none for the decisions of the Opposition Divisions. Rule 66(2), second sentence, lit. (h), stipulates that the decision shall contain the order of the Board of Appeal, including, where appropriate, a decision on costs. Rule 63(1), first sentence EPC, on the other hand, stipulates only that apportionment of costs shall be dealt with in the decision on the opposition. Nevertheless, the Board deems it advisable to include the decision on costs into the order concerning the rejection of the opposition, revocation of the patent, or maintenance of the patent in amended form. The reason is that the decision on costs is also part of the essentials of the proceedings and is normally in response to a request of one of the parties.

Also for the decisions according to Articles 102(2) and (3) EPC no order is prescribed in the Regulations. Nevertheless, the decision is given in the form of an order. The same should apply to the costs.

Also according to the Guidelines (part D, chapter IX, point 1.2) any apportionment of costs has to be incorporated in the operative part of the decision.

9.2 Article 104(1) EPC stipulates that each party to the proceedings shall meet the costs he has incurred. A departure from this principle requires special circumstances. For reasons of equity a different apportionment of costs caused by taking of evidence or by oral proceedings may be ordered. This is the case if costs are culpably incurred owing to improper behaviour or misuse of the proceedings.

In the present case no such improper behaviour has taken place. The Appellants merely availed themselves of their right to request oral proceedings. According to Article 116(1) "oral proceedings shall take place ... at the request of any party to the proceedings". The wording of this provision, which does not contain any restriction, makes it clear that it is a genuine right of any party to request oral proceedings if he considers it necessary. If a party does so request, it is not for the Opposition Division to examine whether this request is, in its view, justified or necessary, with the consequence of an apportionment of costs in case of negative finding.

Nor does the fact that one of the parties has to travel over a longer distance than another make the request for oral proceedings abusive. Otherwise a party having his residence or place of business close to or even in Munich could never request oral proceedings without the fear of

having to pay additional costs in case the other party comes from further away. Although there is one decision (T 167/84, OJ EPO, 1987, 369) which included the distance a party's representative had to travel into the considerations of equity, that decision deviates from the general principle established in earlier and later decisions (cf. T 170/83, OJ EPO, 1984, 605/612; T 276/86 - not published; T 383/87 - not published; T 125/89 - not published) that apportionment of costs may only take place in cases of improper behaviour or abuse of proceedings.

Additionally, an objection of abuse cannot be based on the fact that the problems to be discussed in oral proceedings are simple ones and could easily be presented in writing. If a party feels that he can more effectively present his arguments orally, he is entitled to do so, even if he has already filed detailed written arguments.

An auxiliary request for oral proceedings by one or more of the parties, together with the substantive request for, e.g., revocation of the patent or rejection of the opposition, is to be understood as a legally admissible safeguard of his/their rights and interests. Without such a request a party runs the risk that the case will be decided without previous communication of the Opposition Division indicating its provisional appreciation of the arguments presented. A party might want to reply to the arguments put forward by the other side, and can only be sure of having an opportunity to do so if he has requested oral proceedings.

As no abuse has occurred in this case, there is no reason for not following the principle that each party meets the costs he has incurred.

Order

For these reasons, it is decided that:

1. The decision under appeal is set aside.

2. The patent is revoked.

The Registrar: The Chairman:

E. Görgmaier F. Antony

T 23.10.91