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

Publication in the Official Journal Yes / No

File Number: T 636/88 - 3.2.1

Application No.: 82 302 939.2

Publication No.: 0 067 064

Title of invention: Method of material distribution and apparatus for use in the method

Classification: B65B 1/32, B65G 67/60

D E C I S I O N
of 12 March 1992

Proprietor of the patent: NAT Shipping Bagging Services Ltd

Opponent:
(01) Dobson Park Engineering Ltd
(02) Chronos Richardson Ltd
(03) Librawerk Pelz & Nagel GmbH & Co. KG
(04) Weegwerktuigenfabriek Halk B.V.

Headword:

EPC Articles 52(2)(c), 52(3), 56 and 83 EPC

Keyword: "Method of doing business as such (no)" -
"Sufficiency (yes)" -
"Inventive step (yes)"

Headnote

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Beschwerdekammern | Boards of Appeal | Chambres de recours

Case Number : T 636/88 - 3.2.1

D E C I S I O N
of the Technical Board of Appeal 3.2.1
of 12 March 1992

Appellant : (Opponent 02)
Chronos Richardson Limited
Arnside Road
Bestwood
Nottingham NG5 5HD (GB)

Representative :
Weston, Robert Dale
c/o Phillips and Leigh
7 Staple Inn
Holborn
London WC1V 7QF (GB)

Appellant : (Opponent 04)
Weegwerktuigenfabriek Halk B.V.
Brede Hilledijk 110
Rotterdam (NL)

Representative :
Urbanus, Henricus Maria, Ir.
c/o Vereenigde Octrooibureaux
P.O. Box 87930
NL-2508 DH Den Haag (NL)

Respondent : (Proprietor of the patent)
NAT Shipping Bagging Services Limited
Bank of Bermuda Building
Hamilton (BM)

Representative :
Wilson, Nicholas Martin
Withers and Rogers
4 Dyer's Buildings
Holborn
London EC1N 2JT (GB)

.../...

Other party : (Opponent 01)
Dobson Park Engineering Limited
Dobson Park House
Colwick Industrial Estate
Nottingham (GB)

Representative :
Neill, Alastair William
Appleyard Lees & Co.
15 Clare Road
Halifax
West Yorkshire HX1 2HY (GB)

Other party : (Opponent 03)
Librawerk Pelz & Nagel GmbH & Co. KG
Vossenkamp 1
W-3300 Braunschweig (DE)

Representative :
Döring, Rudolf, Dr.-Ing.
Patentanwälte Dr.-Ing. R. Döring, Dipl.-Phys.
Dr. J. Fricke
Jasperallee 1a
W-3300 Braunschweig (DE)

Decision under appeal :
Decision of the Opposition Division of the European Patent Office dated 5 October 1988, and posted on 27 October 1988, **rejecting the oppositions filed against European patent No.** 0 067 064 **pursuant to Article 102(2) EPC.**

Composition of the Board :

Chairman : F. Gumbel
Members : S. Crane
F. Benussi

Summary of Facts and Submissions

I. European Patent No. 0 067 064 was granted on 24 April 1985 on the basis of European patent application No. 82 302 939.2 filed on 8 June 1982, priority being claimed from United Kingdom application No. 8 117 753 dated 10 June 1981.

II. Four oppositions were filed against the granted patent requesting its revocation in its entirety on the grounds of lack of novelty and/or inventive step (Article 100(a) EPC) and insufficiency of disclosure (Article 100(b) EPC).

Of the published prior art documents and alleged prior use activities only the following have played any significant role in the appeal proceedings:

(D1) EP-A-0 051 484
(D2) FR-A-583 185
(D3) FR-A-611 453
(D4) WO-A-80/02578

(P1) Prior use in 1980 and 1981 of bagging plant supplied by Vigan S.A., Belgium, in Antwerp and Iraq.

(P2) The sale by the legal predecessors of Chronos Richardson of mobile bagging units to the Indian High Commission in 1966.

(P3) The mounting in 1978 by Transterminal Dordrecht B.V. of weighing and bagging apparatus supplied by Halk B.V. into a 20 foot container.

(P4) The sale in 1981 by Halk B.V. of bagging plant mounted in a 40 foot container to Agritrade S.A., Belgium.

(P5) Prior use since 1978 of mobile bagging plant supplied by Halk B.V. to the company Rijsdijk of Rotterdam.

III. By a decision taken at the oral proceedings on 5 October 1988, and issued with written grounds on 27 October 1988, the Opposition Division rejected the oppositions.

On the question of inventive step the Opposition Division argued in its decision that this was to be seen in the very recognition of the desirability of providing readily transportable bagging apparatus.

IV. The first Appellants (Opponents 2) filed an appeal against this decision on 17 December 1988 and paid the appeal fee on the same day. Their Statement of Grounds of Appeal was filed on 25 February 1989. In this statement they referred to two further prior art documents which they wished to introduce into the proceedings. viz.

(D5) FR-A-2 398 666
(D6) FR-A-2 383 840

The appeal of the second Appellants (Opponents 4) was filed on 7 December 1988, the appeal fee being paid on the same day. Their Statement of Grounds of Appeal was filed on 24 February 1989.

Both Appellants requested that the decision of the Opposition Division be set aside and the patent be revoked in its entirety.

V. In a communication of the Board dated 28 August 1990 pursuant to Article 110(2) EPC the provisional view was expressed that document D5 put the line of reasoning of the Opposition Division into question and that the Board intended to allow its introduction into the proceedings. Document D6 on the other hand added little to the state of the art already on the file so that the Board intended to disregard it under Article 114(2) EPC.

VI. Oral proceedings before the Board were held on 12 March 1992. Opponents 1 and 3, although duly summoned, did not appear.

VII. In the course of these oral proceedings the Respondents (Proprietors of the patent) filed a new set of Claims 1 to 9 and an amended description on the basis of which, together with the drawings of the granted patent specification, they requested the maintenance of the patent in amended form.

Independent Claims 1 to 3 of the new set of claims are worded as follows:

1."A method of material distribution for distributing free flowing material comprising the steps of transporting the material in bulk in the hold of a transport ship from a remote location to a port quay, siting a bagging plant having a receiving hopper and a bagging apparatus provided with weighing means at the port quay, delivering the material from said bulk supply to the receiving hopper, metering the material from the receiving hopper to the weighing means determining the quantity of free flowing material for a bag by weight, delivering the weighed quantity of material into the bag and bagging the material ready for use, characterised by the steps of housing the bagging apparatus in a single transportable module of

standard container dimensions, delivering the material directly from said bulk supply to the receiving hopper by means of a grab, and after completion of bagging, transporting the bagging plant to another port where it is required."

2."A bagging plant (1;60) for use in the method of Claim 1, the plant comprising means for defining a receiving hopper (13;69) for receipt of the free flowing material and a bagging apparatus having weighing means (17;63), means (26) for metering the free flowing material from the receiving hopper to the weighing means (17;63) in order to deliver a pre-determined weight of free flowing material into a bag, and means (43;64) for closing the bags, characterised in that the bagging apparatus is housed in a first transportable module (8;61) of standard container dimensions and the means defining a receiving hopper is provided in a second transportable module of standard container dimensions which, in use, is positioned above and interlocks with the first transportable module, whereby the bagging plant is readily movable from one bagging site to another."

3."A bagging plant (1;60) for use in the method of Claim 1, the plant comprising means for defining a receiving hopper (13;69) for receipt of the free flowing material and a bagging apparatus having weighing means (17;63), means (26) for metering the free flowing material from the receiving hopper to the weighing means (17;63) in order to deliver a pre-determined weight of free flowing material into a bag, and means (43;64) for closing the bags, characterised in that the bagging apparatus is housed in a single transportable module (8;61) of standard container dimensions and the means defining a receiving hopper comprises a plurality of flaps hingedly connected to the top of the transportable module which may be

extended so as to define the receiving hopper whereby the bagging plant is readily movable from one bagging site to another."

Dependent Claims 4 to 9 relate to preferred features of the bagging plant according to Claims 2 and/or 3.

VIII. The arguments of the Appellants in support of their request for revocation of the patent, insofar as these are still relevant to the documents corresponding to the request of the Respondents, can be summarised as follows:

Claim 2 proposed bagging plant comprising a single container which housed the bagging apparatus as such and a second container, to be mounted on top of the first container, which comprised a hopper. Such bagging plant was, however, not disclosed in the originally filed application documents in which it was made clear in paragraph 2, page 9 that to avoid spillage it was necessary to use at least two superimposed pairs of containers side by side. Claim 2 therefore contravened Article 123(2) EPC.

The essential feature of the claimed invention was the housing of the bagging apparatus in a transportable module of "standard container dimensions". The skilled man was not however told by the patent specification what set of standards were relevant. Furthermore, these standards were constantly being revised. This could lead to a situation in which a non-infringing product might become an infringement or vice versa with the passage of time. The disclosure of the invention was therefore insufficient since the patent specification did not put the skilled man into the position of being able to produce bagging plant that fell and stayed within the ambit of the claims.

On the question of inventive step, it was manifestly untrue that the Respondents had been the first to recognise the desirability of shipping free-flowing material in bulk and bagging it at destination. Thus, the documents filed in support of the prior use of the Vigan bagging plant (P1) showed that this had been done on a large scale before the relevant application date. Further evidence was provided by the introductory description of document D1, which although belonging to the state of the art according to Article 54(3) could nevertheless be taken into account as providing relevant background information.

Furthermore, document D5 and prior use P4 showed that the desirability of having readily mobile, autonomously operable bagging plant had also been recognised. If in the light of this teaching the skilled man sought to improve the transportability of the Vigan plant it would be obvious for him to house this plant in containers of standard dimensions rather than the non-standard containers actually used. In this context the skilled man had to be considered as one having general knowledge of developments in the field of shipping and freight. At the relevant application date it was known to mount all manner of equipment in standard transport containers so that this equipment could be readily deployed in areas lacking the necessary infrastructure. Where the equipment involved was too large for one container then a plurality of interlocked containers could be used. There were no technical difficulties associated with the housing of bagging plant in a standard container.

It was not denied that the Respondents had had commercial success with their business of offering bagging services on a contractual basis. However, what they had done was develop a new method of doing business, their operation

and the equipment used in it was not distinguished from the state of the art in any inventive way at the technical level.

IX. The arguments put forward in reply by the Respondents were essentially the following:

The invention was particularly concerned with the problem of delivering free-flowing material, such as grain and fertilizer, at remote locations with very limited handling facilities, especially in underdevoloped countries. Up to the conception of the invention such material had been bagged before shipping which led to inefficient use of cargo space, extra handling costs, and the possibility of damage to the bags on loading and unloading.

The Respondents had provided a solution to this problem by the provision of a baggage plant which could be readily transported to the remote location when needed, receive and bag material shipped there in bulk, and after bagging be readily transported to the next location at which it was needed. There was nothing in the prior art to suggest either this method of distributing material or the bagging plant the Respondents had developed to perform the method.

The Vigan bagging plant was movable on wheels around a quay but not transportable in the sense of the invention as it did not constitute standard freight. Once delivered by the manufactures to its port of use it would remain there, and not be moved from port to port as the need arose. Document D5 showed bagging plant mounted on a heavy goods trailer for transport by road. There was no suggestion that the intended use was for bagging bulk material delivered by ship to a port, the much more likely field of use was in the bagging of harvested grain on

farms. In any case the bagging plant was wholly unsuitable for shipping to a remote overseas location. There was nothing in this document that could encourage the skilled man to contemplate a re-design of the Vigan bagging plant by the use of standard containers to make this readily transportable.

In the Vigan bagging plant the bagging apparatus was mounted in two container sections, both of non-standard dimensions, one mounted above the other. In the bagging plant according to the present claims all of the bagging apparatus was however housed in a single container. This in itself provided a significant contribution to transportability. This first container could be associated with a large volume hopper, either disposed in a second container or formed from flaps hinged to the first container, without the overall height of the assembly becoming excessive. This large volume hopper could be filled directly from the ship by means of a ship's own grab thus avoiding the use of an intermediate conveyor as used with the Vigan plant. Such conveyors would not generally be available at the remote locations where the bagging plant is in use.

Reasons for the Decision

1. Both appeals meet the requirements of Articles 106 to 108 and Rules 1(1) and 64 EPC. They are therefore admissible.

2. Formal allowability of the amended documents

Independent method Claim 1 contains all the features of granted independent method Claim 11 and incorporates restrictions relating to the particular field of application of the method, the structure of the bagging

plant employed in the method, the way in which this bagging plant is deployed and supplied with the material to be bagged, and the fact that the bagging plant is transported to another port on completion of the bagging operation. All of these additional features are derivable from the original disclosure.

Independent apparatus Claim 2 contains all the features of granted apparatus Claim 1 with the further restrictions that the bagging apparatus is housed in a single container of standard dimensions and that the bagging plant comprises a hopper provided in a second container of standard dimensions positionable above and interlockable with the container holding the bagging apparatus. The Board cannot accept the view of the Appellants that bagging plant comprising only two containers as defined in Claim 2 cannot be derived from the original application documents. It is true that in the specific embodiments of this type described either two or three bagging units are arranged side by side for the stated reason of avoiding the danger of spillage of the bulk material being supplied to the bagging plant. The skilled man would however immediately appreciate that bagging plant consisting of a single two-container unit could be viably used if suitable precautions against spillage were taken, for example by use of a smaller grab.

Independent apparatus Claim 3 comprises all of the features of granted Claim 1 combined with the features of granted Claim 8 relating to the provision, as in the embodiment of Figures 5 and 6, of a hopper on top of the container housing the bagging apparatus by means of extendable flaps hinged to the container.

Dependent Claims 4 to 9 are essentially equivalent to Claims 3 to 6, 9 and 10 of the granted patent.

The amendments to the description do not extend beyond those necessary to bring these into line with the revised set of claims and to take better account of the prior art.

There are therefore no objections under Article 123(2) and (3) EPC to the amendments made. Furthermore, the objections raised under Article 123(2) EPC with respect to the granted patent specification have been eliminated by these amendments. The documents according to the request of the Respondents are therefore formally admissible.

3. Exclusions from patentability (Articles 52(2)(c) and 52(3) EPC)

It may well be true, as argued by the Appellants, that the commercial success enjoyed by the Respondents is the result of them having conceived a business system of the contractual bagging of bulk material which enabled the shipment of such material to ports, especially in underdeveloped countries, not equipped with bagging plant. This cannot however detract from the fact that the method defined in present Claim 1 clearly has technical character in that it involves the use of technical equipment (the bagging plant) to achieve a technical end (the production of sealed, weighed bags of the material involved). Moreover the method takes a form which, as explained in detail below, necessitates the use of bagging plant having no counterpart in the prior art. Claim 1 does not therefore relate to a method of doing business as such and is accordingly not excluded from patentability.

4. Sufficiency of disclosure

The Appellants have not argued that the skilled man would be faced with any technical difficulties in housing bagging apparatus in a standard freight container, in fact, in relation to the question of inventive step, they argue quite the opposite. The attack on the sufficiency of the disclosure in the patent specification is instead based on two considerations: Firstly, that it is not stated which set of standards are relevant and secondly, that all standards are periodically revised. These two factors lead in the opinion of Appellants to a lack of reliable reproducability of the invention.

It is true that the patent specification omits to mention with which standards the freight containers utilised should comply. The offer of the Respondents to limit the patent to the use of ISO (International Standards Organisation) containers could not therefore be accepted since this could contravene the requirements of Article 123(2) EPC, other standards being known to exist. Since the whole thrust of the patent specification is to providing bagging plant which can be readily transported by conventional road, rail and sea methods the skilled man would however have no difficulty in recognising that ISO containers would be best suited to his purposes. Furthermore, any changes in standards do not happen arbitrarily overnight but are the result of protracted discussion and negotiation between the interested circles. At any one point in time therefore the skilled man would have no difficulty in choosing appropriate standard freight containers for the performance of the invention.

The complex question of whether non-infringing articles can become infringing articles through a change in the relevant standards has no bearing on the issue of sufficiency and is one on which the Board cannot comment.

In summary the Board is accordingly of the opinion that the ground of opposition under Article 100(b) EPC is not a bar to maintenance of the patent in the requested amended form.

5. State of the art

5.1 Published documents

Document D1 was published on 12 May 1982, after the priority date of 10 June 1981 to which the contested patent is entitled, and has a priority date of 4 November 1980. It therefore belongs to the state of the art according to Article 54(3) EPC. This document discloses bagging apparatus mounted on a fixed vehicle or a vehicle trailer unit or which as an alternative may mounted in a container which is vehicle transportable. No details of this suggested alternative are given. The bagging apparatus operates according to the gross-weighing technique in which the bag is attached to the weighing scales and filled until the required weight is attained.

Document D2 concerns the use of bagging apparatus mounted on a trolley for movement along a quay. The bagging apparatus of document D3 is mounted on a pontoon which may be moored against a bulk carrier ship in a harbour. The bagged product is transferred by a conveyor to a barge for delivery. Document D5 relates to bagging apparatus mounted on a vehicle trailer and designed to be partly collapsible such that the unit complies with standard road gauge requirements and may be readily moved from bagging site to bagging site. The unit may also be provided with an electrical generator so that it is fully autonomous.

Document D4 relates to the fitting out of one or more standard freight containers as a mobile laboratory.

5.2 Prior use

The public prior use of the Vigan bagging plant (P1) is not in dispute. This bagging plant comprises two container units one mounted above the other with the top one housing the automatic weighing apparatus and the bottom one the bag holding, closing and conveying means. The top unit is provided with hinged flaps which may be folded up to form a hopper. The lower unit is equipped with wheels allowing the plant to be moved around a quay. Neither of the container units is of standard freight container dimensions.

In use bulk material is transferred from the hold of the ship to the hopper by means of a vacuum conveyor housed in a further separate wheeled container unit.

Prior art P2 concerns the delivery of mobile weighing and bagging apparatus mounted in an open wheeled frame. This prior use was not referred to at the oral proceedings before the Board and teaches no more than was known from document D2.

The evidence filed in support of prior art P3 consists of a short telex message from the company alleged to have mounted bagging apparatus in a standard freight container and photographs purportedly showing the mounting operation in progress. The evidence of an employee from the company concerned was also offered. The Board deemed it unnecessary to hear this witness since there was no suggestion that the allegedly prior used bagging plant was employed in a manner corresponding to that required by present Claim 1 or was associated with a hopper of the form specified in either of present Claims 2 or 3. This

alleged prior use was also not referred to at the oral proceedings before the Board.

As regards the alleged prior use P4 the Board shares the view of the Opposition Division that the evidence filed relates to confidential commercial negotiations preparatory to the supply of bagging apparatus housed in a standard freight container. Nothing speaks for the fact that actual delivery of the bagging apparatus took place before the relevant date of the contested patent. This view was not disputed a the oral proceedings before the Board.

Prior use P5 relates to the use of bagging apparatus mounted on a barge or pontoon and adds nothing significant to the teaching of document D3.

5.3 General knowledge

It is common ground between the parties that at the relevant date of the contested patent it was well known to equip ISO containers in various ways to provide readily transportable autonomous or semi-autonomous installations.

This trend seems to have started with the use of ISO containers as living accommodation. By 1981 this "housing" aspect had been extended and ISO containers had been fitted out amongst other things as kitchens, workshops, laboratories and hospitals. Furthermore ISO containers had been fitted out amongst other things as mobile electric generating plant, refrigeration plant, ice-making plant and water-purification plant.

6. Novelty

It is apparent from the description of the state of the art given above that the subject-matter of Claims 1, 2 and 3 is new. Since the novelty of the claimed subject-matter is no longer in dispute further elucidations on this point are unnecessary.

7. Inventive step

The closest state of the art for the evaluation of inventive step is in the opinion of the Board the prior used Vigan bagging plant (P1). The manner in which this bagging plant was used corresponds to what is defined in the preamble of present Claim 1. It was sited on a quay and received material to be weighed and bagged from the hold of a bulk carrier ship. By virtue of being wheeled the plant is movable around the quay from one berth to another. Transport from one port to another would however require its shipment as non-standard freight since the container units in which it is housed are not of standard dimensions.

In the light of this state of the art, which shows that the bagging of bulk material at ports permanently equipped with suitable bagging plant was known, the technical problem underlying the claimed invention is to be seen as the development of a method of distribution of free-flowing material to poorly equipped ports which enabled the transport of the material in bulk, and the development of bagging plant suitable for use in the method.

The method proposed in present Claim 1 solves this problem in that the bagging apparatus is housed in a transportable module of standard container dimensions, that the receiving hopper is fed directly by means of a grab, and that after completion of bagging the bagging plant is transported to another port.

Having regard to the disclosure of document D5 the Respondents can no longer fairly claim for themselves, as in the opposition proceedings, that they were the first to realise the potential advantage of having autonomous bagging plant that could be transported from one site of use to another. The vehicle trailer unit disclosed in document D5 is designed to meet statutory gauge requirements so that it can be moved by road; transport overseas of such a unit by ship would however only be possible as non-standard freight and is clearly not envisaged. Nor is there any explicit mention in document D5 of the use of the bagging plant at a port to receive and bag material delivered from a bulk carrier ship. In this latter respect the Appellants have also referred to the introductory description of document D1, in which the absence of bagging facilities at smaller ports is mentioned as one of the reasons for the provision of the mobile bagging plant proposed in that document, as further evidence that the problem underlying the subject-matter of the contested patent was known at the relevant date. In the view of the Board, however, having regard to the last sentence of Article 56 EPC, no account whatsoever can be taken of any part of the disclosure of document D1 since this belongs to the state of the art according to Article 54(3) EPC.

The proposal for transportable bagging plant made in document D5 is satisfactory in its own right for the purposes mentioned therein. The skilled man would therefore have no incentive to consider housing the bagging apparatus in a container since this would not have any benefits with respect to the road transport envisaged. The question is much more whether, once transportability of a bagging plant had been recognised as desirable, the

skilled man would have been encouraged, given his general knowledge of the benefits of containerisation, to replace the non-standard container units of the Vigan bagging plant by units of standard container dimensions. However, in the opinion of the Board the answer to this question is for the following reasons not decisive for determining inventive step : The method of present Claim 1 requires that the bagging apparatus be housed in a single container of standard dimensions. The Vigan bagging apparatus would however require two such containers. Clearly the use of a single container for the bagging apparatus is a significant contributory factor to the question of transportability especially when, as the method of the patent envisages the bagging plant is to be moved on a regular basis to a new port of use as required. Furthermore, present Claim 1 requires that the receiving hopper of the bagging plant is suitable for direct delivery of the bulk material by means of a grab. This is not true of the small hopper provided on the Vigan bagging plant which is designed to receive a continuous stream of bulk material from a separate vacuum conveyor unit. Again, this is a significant contributory factor to the solution of the technical problem identified above since the poorly equipped ports at which delivery is to take place would most probably not possess suitable conveying equipment. In other words, even if the skilled man were to adopt standard containers to house the Vigan bagging plant he would not thereby be put into a position to operate the method of Claim 1 as a matter of course.

The remaining state of the art cited in the proceedings is in the opinion of the Board no more relevant than that considered in detail above and is not capable of suggesting to the skilled man either in general terms the use of containerised bagging apparatus in a method according to present Claim 1 or more specifically the

adaptations to the Vigan bagging plant to make it suitable for use in that method.

Having regard to the above the Board comes to the conclusion that the method of present Claim 1 cannot be derived in an obvious manner from the state of the art and accordingly is to be seen as involving an inventive step (Article 56 EPC).

Independent Claims 2 and 3 relate to bagging plant for use in the method of Claim 1. The closest prior art for the evaluation of the inventive step involved in the subject-matter of these claims is again to be seen in the prior used Vigan bagging plant.

According to Claim 2 the bagging apparatus is housed in a first transportable module of standard container dimensions and the receiving hopper is provided in a second such module. Since the bagging plant must be suitable for use in the method of Claim 1 there is an implicit requirement that the receiving hopper be of a size capable of accepting direct delivery of the bulk material from a grab. For the reasons discussed above with respect to the method of Claim 1 the Board is of the opinion that there is nothing in the state of the art that could lead the skilled man to modify the prior used Vigan bagging plant in such a way that it fell within the terms of present Claim 2.

In the bagging plant according to Claim 3 the hopper is defined by a plurality of extendable flaps hingedly connected to the top of the single module of standard container dimensions in which the bagging apparatus is housed. As pointed out above with respect to Claim 2 the requirement that the bagging plant be suitable for use in the method of Claim 1 necessitates that the receiving

hopper be of a size substantially larger that that provided on the top unit of the Vigan bagging plant. The bagging plant of Claim 3 constitutes a self-contained unit in which the bagging apparatus as well as a large volume receiving hopper can be transported together as one piece of standard freight and quickly put into an operative condition at the site of use. The state of the art contains nothing that could lead the skilled man to this configuration.

The respective subject-matter of present Claims 2 and 3 is therefore seen by the Board as involving an inventive step.

8. Having regard to what is said in points 3, 6 and 7 above the Board has reached the conclusion that the subject-matter of present Claims 1, 2 and 3 constitutes a patentable invention within the terms of Articles 52 to 57 EPC. The patent can therefore be maintained on the basis of these claims in combination with dependent Claims 4 to 9 which relate to preferred features of the bagging plant according to Claims 2 and/or 3.

Order

For these reasons, it is decided that:

1. The decision under appeal is set aside.

2. The case is remitted to the first instance with the order to maintain the patent on the basis of the documents submitted at the oral proceedings (Claims 1 to 9, amended description) and the drawings as granted.

The Registrar: The Chairman:

S. Fabiani F. Gumbel