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**Datasheet for the decision
of the Enlarged Board of Appeal
of 14 November 2012**

Case Number: R 0013/12
Appeal Number: T 0036/10 - 3.2.08
Application Number: 01904673.9
Publication Number: 1302554
IPC: C22C 14/00, C22F 1/18
Language of the proceedings: EN

Title of invention:

Titanium alloy and method for heat treatment of large-sized semifinished materials of said alloy

Patent Proprietor:

Public Stock Company "VSMPO-AVISMA Corporation"

Opponent:

Titanium Metals Corporation

Headword:

-

Relevant legal provisions:

EPC Art. 112a(2)(c), 113

Keyword:

"Petition for review clearly inadmissible [no]"
"Arguments not considered: violation of the right to be heard [no] - criticism of the substance of the decision falling outside the petition for review procedure [yes]- petition clearly unallowable."

Decisions cited:

R 0001/08, R 0021/10, R 0004/11, R 0006/11



Case Number: R 0013/12

DECISION
of the Enlarged Board of Appeal
of 14 November 2012

Petitioner: Public Stock Company "VSMPO-AVISMA
(Patent Proprietor) Corporation"
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Decision under review: **Decision of the Technical Board of Appeal**
3.2.08 of the European Patent Office of
1 March 2012.

Composition of the Board:

Chairman: W. van der Eijk
Members: M.-B. Tardo-Dino
M. Ruggiu

Summary of Facts and Submissions

- I. The petition for review concerns decision T 36/10 of Board of Appeal 3.2.08 to dismiss the appeal of the patent proprietor against the decision of the opposition division to revoke the European patent No. 1 302 554.
- The decision announced at the end of the oral proceedings was posted on 23 April 2012.
- II. The petition was filed by the patent proprietor and appellant on 3 July 2012 and the relevant fee paid on the same day.
- The request is based on a fundamental procedural violation pursuant to Article 112a(2)(c) in connection with Article 113 EPC.
- III. The previous proceedings to the extent they are relevant for the understanding of the present decision can be summarised as follows.

The decision under review

- IV. The subject-matter of Claim 1 of the main request was found to be not novel because it was anticipated by D1. The Board of Appeal compared the titanium-based alloy composition VT22M of D1 with the alloy claimed in the main request and concluded: "The comparison shows that the contents for Al, V, Mo and Cr of alloy VT22M are within the claimed ranges and that the range for iron overlaps with the claimed range. It is also noted that the upper limit of 0.5% for iron that is permitted for alloy VT22M matches exactly the maximum limit of the claimed titanium alloy. Using the formula set out in

the patent at issue, alloy VT22M which includes the maximum of 0.5% Fe. exhibits a Mo_{3kb} of 14.58 and thus satisfies the proviso of ≥ 13.8 " (point 2.1 of the reasons).

Then paragraphs 2.2, starting with "The appellant argued" and 2.3 starting with "The Board cannot agree" were dedicated to the petitioner's arguments.

- V. The petition was filed on the ground that the Board had neither considered nor discussed the petitioner's arguments, although these had been brought forward at length in writing and during the oral proceedings. Oral proceedings were requested.
- VI. The Enlarged Board summoned the petitioner for oral proceedings and sent a communication conveying its provisional view that the petition although not clearly inadmissible was clearly unallowable.
- VII. The petitioner sent its comments in reply with the letter dated 7 November 2012 (see below in the summary of the arguments).
- VIII. Oral proceedings were held on 14 November 2012. The outstanding requests of the petitioner were that:
- Decision T 36/10 be set aside and the proceedings be reopened before the Technical Board of Appeal in a different composition,
 - The fee for the petition be reimbursed.

At the end of the hearing the Enlarged Board announced its decision.

IX. The petitioner's arguments and contentions set out in its written submissions and expounded during the oral proceedings may be summarised as follows.

The Board of Appeal arrived at the conclusion that claim 1 of the main request lacked novelty over D1 without considering or discussing the key and decisive argumentation brought forward by the petitioner. More precisely the petitioner had outlined in its written submissions to the Board of Appeal of 8 October 2012[sic] and 1 February 2012, subsequently expounded during the oral proceedings that the person skilled in the art would interpret the alloy VT22M in D1 as clearly characterised by three features which must be present: feature 1: the composition Ti-5Al-5Mo-5V-3Cr; feature 2: Fe content should not exceed 0.5%; feature 3: the Mo equivalent is 13.5%. The skilled person would choose a Fe content not exceeding 0.5% which at the same time satisfies the feature of Mo equivalent of 13.5.

The Board of Appeal had ignored this argument and had chosen the opponent's interpretation according to which the feature describing the Mo equivalent and the feature describing the iron content were in contradiction. The decision had merely checked the presence of the same components as in D1 (see point IV of the facts and submissions above).

The petitioner insisted that this case was particular in the sense that it was not a case where the Board of Appeal had to deal with many and complex arguments; on the contrary, there was a single prior art document at stake to be assessed with regard to novelty which was the sole issue discussed with respect to claim 1 of the

main request. There had been a key argumentation presented by the petitioner and the decision did not reflect it.

Indeed a normal reader could not understand from the decision of the Board of Appeal the decisive argument made by the petitioner, namely that in D1 there was no unambiguous disclosure of all the three features to be present and that the interpretation submitted by the opponent contained a self contradiction. The decision did not mention any reference to the case law quoted by the petitioner to support its interpretation nor did it explain why it did not see any self-contradiction in the opponent's interpretation. Against this background the petitioner also argued more generally that the right to be heard was not restricted to the right to speak but implied that the Boards took the arguments into consideration. In this respect the case law mentioned in the Enlarged Board's communication (R 6/11) did not necessarily apply, because in this case the Enlarged Board was dealing with an alleged procedural defect under Article 112a(2)(d) and not (c) EPC as in the present case .

Reasons for the Decision

1. *Admissibility*

- 1.1 The petitioner filed the request within two months of the notification of the decision under review and paid the prescribed fee in time, it was adversely affected by the decision and the petition identified grounds contained in Article 112a(2) EPC and complied with Rule 107(1) and (2) EPC.

1.2 The Enlarged Board accepts that it was only with the notification of the written decision that the petitioner was aware of the alleged violation of its right to be heard, namely that the Board of Appeal did not take into consideration its key and decisive arguments when arriving at the conclusion that claim 1 of the main request lacked novelty over D1, and that the exception under Rule 106 EPC applies.

2. *Allowability*

2.1 The petitioner made it quite clear during the oral proceedings that the core of the petition was not that it had not had sufficient opportunity to present its case -indeed it had done so at length. The crucial point was that the decision did not consider and discuss the key arguments it had presented. More precisely it could not find in the decision anything that reflected its arguments regarding the non ambiguous disclosure in D1 of the three features and the argument of the self-contradiction contained in the opponent's argumentation. The Board just said that D1 disclosed the different components.

2.2 It is undisputed that the right to be heard is not a purely formal right to speak, which would be a travesty of this right, but implies an obligation for the boards of appeal to consider the parties' argumentation. As a matter of fact this obligation is shaped by the circumstances of each case. This means that the boards have an obligation to discuss in their decisions issues and arguments to the extent that they are relevant for the decision and may disregard irrelevant arguments. In

this respect the Boards are not obliged to use specific words or the same wording as that used by the parties and it must be accepted that refutation of arguments may be implicitly inferred from the particular reasoning held by the boards (see R 21/10 of 16 March 2011, point 2.4).

2.3 In the case in suit, the Enlarged Board although having no jurisdiction "*ratione legis*" nor "*ratione materiae*" to review the substantive assessments, is satisfied that the decision under review considered the petitioner's arguments: it summarised the particular key argument submitted by the petitioner in paragraph V and, although not literally, mentioned it again in paragraph 2.2 of the reasons. The decision consists, as very often, of two steps. In paragraph 2.1 the Board explained how, in its view, D1 disclosed all the features of the claimed invention. Then in paragraph 2.3 the Board turned to the petitioner's argumentation and explained why this argumentation had to be refuted.

2.4 It is true that to refute the petitioner's arguments the Board adopted an approach to D1 that was broader than that suggested by the petitioner, in the sense that the Board did not stick to the specific example and relied on a more general teaching of D1. But this had been the core of the discussion, even before the opposition division, and the petitioner did not contend that it came as a surprise. The Enlarged Board does not see here more than an analysis of a document of the prior art made by the Board which is at variance with the interpretation proposed by the petitioner, this analysis rejecting explicitly this interpretation.

Indeed, the fact that the Board did not literally reproduce the specific words commonly used regarding the novelty assessment such as "unambiguous disclosure", or did not explicitly say that there was no contradiction in the opponent's argumentation as argued by the petitioner does not mean that the Board did not consider the petitioner's argumentation. A decision of the Boards of Appeal is meant to be read by trained people capable of understanding a reasoning in its substance even if this reasoning does not reproduce literally the words used in the parties' submissions. This is sufficient to satisfy the right to have its relevant arguments heard in the sense of "considered" (see R 1/08 of 15 July 2008, points 2.2 last paragraph and 3.1 about the limit of the Enlarged Board's competence when the complaint overlaps the substantive assessment of inventiveness).

2.5 Investigating further would involve assessing whether the Board had correctly understood the argumentation and, above all, given the correct answer. The Enlarged Board has often stated that the fact that the petitioner does not share the view of the Board of Appeal and does not accept the outcome of the decision is a matter for a review of the merits of the decision (a means of redress which does not exist in the EPC, the decisions of the Boards of Appeal being *res judicata*). Such a request, therefore, obviously, falls outside the ambit of the petition for review as intended by the legislator (see as example R 4/11 of 16 April 2012).

In this respect the Enlarged Board has to remain vigilant and thwart any attempt to blur the frontier

between what may clearly be a matter for a violation of the right to be heard under Article 113 and 112a(2) (c), (for instance an evident failure to consider an important factual submission), and anything else presented as a violation of the right to be heard but which actually pertains to the substantive merits of the decision by the Boards of Appeal.

Under no circumstances could an alleged violation of the right to be heard supply the parties with a means to put the Enlarged Board in a position where it is expected to check whether a board of appeal understood an argument correctly or drew the right conclusion from it.

In this respect R 6/11 of 4 November 2011 remains an accurate reference, because at least the alleged defects (c) and also (d) overlap the violation of the right to be heard as intended by the petitioner in the present case: under the heading of a violation of the right to be heard and other defect, the petitioner then was also challenging the very reasons of the decision, arguing that the Board of Appeal did not explain, or not enough, or not in a logical sequence, why the petitioner's arguments were not accepted. In the case in suit, as in R 6/11, the Enlarged Board is being expected to check the accuracy of the reasons given with respect to the petitioner's arguments. (see R 6/11 paragraph IX of the facts and submissions and paragraph 6 of the reasons dealing with the alleged violation (c) according to which the Board did not explain why it took a different view than the one submitted by the petitioner and also agreed by the adversary party).

3. It follows from the above that the petition is clearly unallowable.

Order

For these reasons it is unanimously decided that:

The petition for review is rejected as clearly unallowable.

The Registrar:

The Chairman:

P. Martorana

W. van der Eijk