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**Datasheet for the decision
of 28 June 2022**

Case Number: R 0009/21

Appeal Number: T 3272/19 - 3.3.03

Application Number: 10185812.4

Publication Number: 2277946

IPC: C08L33/04

Language of the proceedings: EN

Title of invention:
ACRYLIC BLENDS

Patent Proprietor:
Mitsubishi Chemical UK Limited

Opponent:
ARKEMA FRANCE

Headword:
Fundamental violation of the right to be heard

Relevant legal provisions:
EPC Art. 112a(2)
EPC R. 106, 124(1)
RPEBA Art. 13, 14(1)

Keyword:

Petition for review - clearly inadmissible

Obligation to raise objections - objection raised (no)



Große Beschwerdekammer
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Grande Chambre de recours

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Case Number: R 0009/21

D E C I S I O N
of the Enlarged Board of Appeal
of 28 June 2022

Petitioner: Mitsubishi Chemical UK Limited
(Patent Proprietor) Cassel Works
New Road
Billingham TS23 1LE (GB)

Representative: Appleyard Lees IP LLP
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Other party: ARKEMA FRANCE
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Representative: SSM Sandmair
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Decision under review: **Decision of the Technical Board of Appeal 3.3.03
of the European Patent Office of
11 February 2021.**

Composition of the Board:

Chairman I. Beckedorf
Members: W. Sekretaruk
P. Scriven

Summary of Facts and Submissions

- I. The proprietor's petition for review is directed against the decision of Board of Appeal 3.3.03 ("the Board") in case T 3272/19. By that decision, the interlocutory decision of the opposition division, dated 8 October 2019, concerning the maintenance of European patent 2277946 in amended form, was set aside and the case was remitted to the opposition division for further prosecution. The Board's written decision was posted to the proprietor's representative on 31 March 2021.
- II. The petition for review is based on Article 112a(2)(c) EPC. In its reasoned statement, the petitioner was of the opinion that an objection, in the meaning of Rule 106 EPC in respect of the alleged procedural defect, had not been possible before the Board, as the alleged deficiencies only became apparent in the reasons for the decision.
- III. On the same day as its petition for review, the petitioner also filed a request for correction of the minutes of oral proceedings before the Board. The requested correction would replace

The Chairman informed the parties of the preliminary opinion of the Board that the conclusion to be drawn with regard to the main request would apply mutatis mutandis to auxiliary requests 1 to 4. The parties agreed on the preliminary opinion of the Board.

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The Chairman asked the parties to confirm whether their arguments in relation to Auxiliary Requests 1 to 4 were the same as for the Main Request with respect to novelty over 09. The parties confirmed that their arguments for Auxiliary Requests 1 to 4 were the same.

The Board refused this request in a decision dated 8 November 2021.

- IV. In response to a communication from the Enlarged Board of Appeal ("the Enlarged Board") under Articles 13 and 14(2) RPEBA, the petitioner submitted that it was inconceivable on the facts of the case that the petitioner would have agreed that the the Board's conclusion on the main request would apply mutatis mutandis to the subject-matter of claim 1 of the auxiliary request. The added definition of "high Tg" required different reasoning in respect of novelty. It followed that it was impossible for the petitioner to gain knowledge, during the oral proceedings, that the addition of the definition to claim 1 of auxiliary request 1 had not been considered. Accordingly, the petitioner could not have raised relevant objections. The Enlarged Board should accept the substitute text as submitted by the Petitioner in its request for correction as the correct form of the minutes. If not, then at the least, in view of the highly contentious nature of the statement in the minutes, the Enlarged Board could not base any finding on admissibility solely on the contested passage. If the contested statement in the minutes were not taken into account, then there was no evidence indicating that it should

have become apparent to the Petitioner, during the oral proceedings, that the Board of Appeal had not considered the effect of the addition of the definition of "high Tg" to claim 1 of Auxiliary Request 1.

- V. The Petitioner finally requests that
1. the petition be allowed for the grounds set out in its submission in response to the Enlarged Board's communication;
 2. the decision T 3272/19-3.3.03 of the Technical Board of Appeal be set aside;
 3. the proceedings be re-opened before the Technical Board of Appeal in respect of Auxiliary Requests 1, 2 and 4;
 4. the fee for petition be reimbursed;
 5. the Board provide a decision on the petition based on the written submissions.
- VI. An earlier request for oral proceedings was withdrawn.

Reasons for the Decision

1. The case is ready for decision without holding oral proceedings. The petitioner explicitly withdrew its request for oral proceedings and requested a decision based on the written submissions. The oral proceedings to which the petitioner had been summoned were cancelled.
2. The petition meets the requirements with respect to the time limit and payment of the petition fee.
3. The petition, however, is clearly not admissible because no objection under Rule 106 EPC was raised

before the Board against the alleged procedural defect. Contrary to the petitioner's view, it would indeed have been possible to raise such an objection during the oral proceedings.

4. Rule 106 EPC reads:

A petition under Article 112a, paragraph 2(a) to (d), is only admissible where an objection in respect of the procedural defect was raised during the appeal proceedings and dismissed by the Board of Appeal, except where such objection could not be raised during the appeal proceedings.

5. Whether an objection was validly raised during oral proceedings is normally entered into in the minutes which, as prescribed by Rule 124(1) EPC, must contain the relevant statements of the parties. The minutes of the oral proceedings authenticate the facts they relate to. On the petitioner's own submissions no objection which could qualify as an objection under Rule 106 EPC was raised during oral proceedings.
6. It has to be noted that a request for correction of the minutes was refused by the Board. The Enlarged Board has to rely on the minutes as they stand.
7. Before the closure of the debate, the parties were informed about the intended decision of the Board and its basic reasoning. This conclusion can be drawn from the minutes of the oral proceedings in its original version, as the Board refused a request for correction by its reasoned decision of 8 November 2021. The Board affirmed that the minutes correctly reflected the part

of the oral proceedings referred to in the petitioner's request for correction of 10 June 2021.

8. The first two paragraphs on page 3 of these minutes before the Board read:

The Chairman informed the parties of the preliminary opinion of the Board that the conclusion to be drawn with regard to the main request would apply mutatis mutandis to auxiliary requests 1 to 4. The parties agreed on the preliminary opinion of the Board.

After deliberation the Chairman informed the parties of the

a) ...

b) the Board's conclusion that the subject-matter of claim 1 of the main request was not novel over the disclosure of document D9, and that

c) the Board's conclusion on the main request applied mutatis mutandis to the subject-matter of claim 1 of each of auxiliary requests 1 to 4.

At this point in time, *i.e.* before the discussion of auxiliary request 5, or in answer to the Chairman's later question as to whether the parties had any further comments or requests (page 4 of the minutes), the petitioner could have raised the objection that, because of the difference in the wordings between the claims of the main and auxiliary requests, the conclusion relating to the main request could not apply *mutatis mutandis* to the auxiliary requests.

9. Because the petitioner failed to raise a possible objection under Rule 106 EPC during the oral proceedings before the Board in respect of the alleged procedural deficiency giving rise to the petition for

review, the petition clearly lacks an indispensable precondition for its admissibility. The petition for review, therefore, has to be rejected as inadmissible, leaving no room for any of the petitioner's requests 1 to 4 (point V. above) to be allowed.

Order

For these reasons it is decided that:

The petition for review is unanimously rejected as clearly inadmissible.

The Registrar:

The Chairman:



N. Michaleczek

I. Beckedorf

Decision electronically authenticated