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**Datasheet for the decision  
of 17 May 2011**

**Case Number:** T 1825/09 - 3.2.07

**Application Number:** 01972864.1

**Publication Number:** 1328448

**IPC:** B65D 81/26

**Language of the proceedings:** EN

**Title of invention:**  
Apparatus for moisture absorption

**Patent Proprietor:**  
Absortech International AB

**Opponent:**  
TCi-The CONNEXION

**Headword:**

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**Relevant legal provisions:**  
EPC Art. 123(2)

**Relevant legal provisions (EPC 1973):**

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**Keyword:**  
"Amendment (all requests): not allowable"

**Decisions cited:**

-

**Catchword:**

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Case Number: T 1825/09 - 3.2.07

**D E C I S I O N**  
of the Technical Board of Appeal 3.2.07  
of 17 May 2011

**Appellant:** Absortech International AB  
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**Decision under appeal:** Decision of the Opposition Division of the  
European Patent Office posted 9 July 2009  
revoking European patent No. 1328448 pursuant  
to Article 101(2) EPC.

**Composition of the Board:**

**Chairman:** H. Meinders  
**Members:** K. Poalas  
I. Beckedorf

## Summary of Facts and Submissions

- I. The appellant (patent proprietor) lodged an appeal against the decision of the Opposition Division revoking the European patent No. 1 328 448.
- II. The Opposition Division found that the ground of opposition of Article 100(c) EPC (unallowable amendments) holds against the subject-matter of claim 1 according to the main request and that the subject-matter of claim 1 according to the auxiliary request does not meet the requirements of Article 123(2) EPC.
- III. Oral proceedings before the Board took place on 17 May 2011.
- (a) The appellant requested that the decision under appeal be set aside and that the patent be maintained as granted or, alternatively, in amended form on the basis of claim 1 filed as auxiliary request with letter of 30 March 2009 with claims 2 to 20 as granted.
- (b) The respondent (opponent) requested that the appeal be dismissed.
- IV. Independent claim 1 according to the patent as granted reads as follows (amendments over claim 1 as originally filed are depicted in bold or struck through):

### *Main request*

"A moisture absorption apparatus for keeping the atmosphere in a transport container in a dry position,

comprising a desiccant container (1, 21) having a side wall (5, 25), and means to retain the desiccant in the container, further comprising a desiccant solution container (2, 22) having a side wall (14, 34) and a bottom (13, 33), the desiccant container (1, 21) being capable of receiving desiccant which forms a desiccant solution on contact with moist air, the desiccant container (1, 21) side wall (5, 25) having at least one air access opening (6, 26) and ~~a passage~~ **the desiccant container (1, 21) comprising at least one opening (4, 24) at its bottom** permitting desiccant solution to flow into the desiccant solution container (2, 22), the desiccant solution container (2, 22) having a top opening and being slidably displaceable on the desiccant container (1, 21) so as to allow the desiccant container (1, 21) to be **slidably** displaced in the desiccant solution container (2, 22) **from an active position in which the air access opening (6, 26) allows moist air of the environment to pass into the desiccant container (1, 21) to a transport or storage position in which** ~~to a depth sufficient for~~ the desiccant solution container side wall (14, 34) ~~to~~ fully covers the air access opening (6, 26) of the desiccant container (1, 21), **wherein the desiccant container (1, 21) can be transferred from the transport or storage position into the active position merely by displacement in the desiccant solution container (2, 22), wherein the desiccant container (1, 21) continuously retains its relative orientation to the desiccant solution container (2, 22) during this transfer, where the underside of the bottom (3, 23) of the desiccant container (1, 21) faces the upper side of the bottom (13, 33) of the desiccant solution container (2, 22),** the apparatus further comprising means to

prevent separation of the slidably displaced desiccant container (1, 21) from the desiccant solution container (2, 22)".

Independent claim 1 according to the auxiliary request differs from claim 1 according to the main request in that the expression "relative orientation" is changed into "relative **axial** orientation".

V. In the present decision any reference to the originally filed application concerns its corresponding PCT-publication: WO-A-02/28742.

VI. The appellant argued essentially and as far as it is relevant for the present decision as follows:

*Claim 1 according to both the main and the auxiliary request - Amendments, Article 123(2) EPC*

In order to assess the allowability of the amendments in claim 1 of both requests involving the feature of the retention of the "relative (axial) orientation" of the desiccant container with respect to the desiccant solution container during the displacement of the desiccant container, said feature in the patent has to be interpreted in the light of the description and the drawings of the patent in accordance with Article 69 EPC and its Protocol. After that, the novelty test has to be applied in order to answer the question whether the patent - in the context of said interpretation - extends beyond the originally filed application. As they are both identical in the aspects relevant to this issue, it can only be concluded that the amendments to claims 1 comply with Article 123(2) EPC.

According to granted claim 14 both containers have a generally cylindrical form and according to granted claim 15 they have both a generally parallelepipedal form. This means that with the containers according to claim 14 a relative rotation is allowed whereas with the containers according to claim 15 rotational movement is excluded. The skilled person gathers therefrom that since claim 1 by definition should cover both alternatives the expression in claim 1 of the main request that "the desiccant container continuously **retains its relative orientation** to the desiccant solution container" is to be seen as "the desiccant container continuously **retains its relative axial orientation** to the desiccant solution container", i.e. identical with the expression in claim 1 of the auxiliary request, but that it is left open what happens between the two in a rotatory sense.

Both expressions are to be understood as they are, i.e. stating that during this displacement the retention is **only** in the axial direction, but **not** as defining anything beyond that (as has done the opposition division), such as implying an impediment against rotatory movement. This is even more evident due to the additional requirement in claim 1 that during the desiccant container's transfer from the storage position to the active position **the underside** of its bottom **faces the upper side** of the bottom of the desiccant solution container. The person skilled in the art recognises that this requirement is only met if the desiccant container continuously retains its relative **axial** orientation with respect to the desiccant solution container. This additional requirement in

claim 1 also obviously forbids any tilting movement between the two containers.

In addition to that, both the originally filed application and the patent define that the desiccant container as well as the desiccant solution container are of tubular shape and slidably displaceable within each other to free, respectively cover, the air access opening, see page 3, line 2 and page 6, line 17 of the originally filed application. This is what the original application concentrates on and what makes technical sense. Preventing rotatory movement has no relationship with this main aspect of the invention.

Therefore, the patent with claim 1 according to both requests does not contain any new information over the application as originally filed.

VII. The respondent argued essentially and as far as it is relevant for the present decision as follows:

*Claim 1 according to both the main and the auxiliary request - Amendments, Article 123(2) EPC*

The originally filed application describes the containers only in their relative storage and active positions. This also applies to the containers depicted in the figures. For the storage position, see figures 1a and 2a and for the active position, see figures 1b and 2b. None of the figures shows the containers in an intermediate position, in particular not as to what happens with the axial orientation during the displacement of the desiccant container within the desiccant solution container. The only

information present in the originally filed application in this respect is that it is a sliding movement and that the former is lifted out of the latter. The displacement, more particularly the orientation of the cylinders during the displacement was apparently not considered relevant for the alleged invention in the originally filed application. With the present wording of claim 1 according to both requests it suddenly has become so.

In the originally filed application exists neither an explicit nor an implicit disclosure concerning the feature of claim 1 of both requests that "the desiccant container continuously **retains its relative (axial) orientation** to the desiccant solution container" during its displacement. This feature now does have a restrictive meaning for which there is no original disclosure.

There is no basis in the originally filed application for such a specific way of displacement as it is now claimed in claim 1 of both requests.

## **Reasons for the Decision**

*Claim 1 according to both the main and the auxiliary request - Amendments, Article 123(2) EPC*

1. Concerning the added features in claim 1 of both requests the appellant argued that the expression in claim 1 of the main request that "the desiccant container continuously **retains its relative orientation** to the desiccant solution container" is in fact



identical with the expression in claim 1 of the auxiliary request that "the desiccant container continuously **retains its relative axial orientation** to the desiccant solution container".

The Board concurs with the appellant on this point, so that for assessing the requirements of Article 123(2) EPC these claims 1 can be treated together and that any finding concerning claim 1 of the auxiliary request in respect of Article 123(2) EPC is equally applicable to claim 1 according to the main request.

2. The appellant also argued that both expressions are to be understood by the skilled person as defining that during its displacement within the desiccant solution container the desiccant container has to continuously retain its relative orientation to the desiccant solution container **only in the axial** direction, i.e. without any further restriction as far as it concerns the rotary direction.

The Board considers in this respect that the question at stake is indeed whether there is a direct and unambiguous disclosure in the originally filed application that the displacement of the desiccant container within the desiccant solution container takes place under the restriction that said first container continuously has to retain its relative orientation only in the axial direction.

3. The appellant argued that in the first place the claims 1 had to be interpreted in the light of the description, as prescribed by Article 69 EPC and its Protocol.

With that interpretation, as a next step, a comparison should be made with the original application, to see whether there was a difference in information content.

The Board, in the present case, has difficulties to accept that position. The claim is clear as such (the parties and the Board agree on the "retention of the relative orientation" to mean "retention of the relative orientation **only** in the axial direction), so it does not need further interpretation. Further, Article 69 EPC and its protocol are primarily meant for application by the national courts when deciding on the extent of protection (Article 138(1)(d) EPC) and in opposition they play a role as far as amendments are examined for compliance with Article 123(3) EPC. The latter is not an issue here for the main request (patent as granted) nor for the auxiliary request (amended by the more restrictive term "relative **axial** orientation").

The above means that the examination of these amendments, carried out in examination, respectively in opposition, is directed primarily at the application as originally filed and to the question whether it provides sufficient basis for this feature and any further amendments in connection with it.

4. The above also has the consequence that it is not claim 1 in combination with either claim 14 or 15, all as granted (the reference in claim 15 to claim 14 is a clear mistake) which should provide a basis for the "orientation only in the axial direction" feature, but the claims and the application as originally filed.

However in these, exactly because of the absence of this feature in claim 1, this aspect does not directly and unambiguously come to light. The originally filed application is simply indifferent as to the orientation of the containers with respect to each other.

5. Further, the Board wishes to establish that the feature in question as also held by the appellant, is to be considered a restrictive feature: it means "retaining the relative orientation **only** in the axial direction".

For such wording, or its restrictive meaning, there is, however, **no explicit** basis in the application as originally filed. The Board is, however, of the opinion that for the restrictive meaning the feature is intended to have, a more explicit basis is required in the present case, to fulfil the conditions of Article 123(2) EPC.

6. Such more explicit disclosure is also **not derivable** from the original description, in which:

The desiccant solution container:

is **slidingly displaceable** on the desiccant container, see claim 1, line 15 and the paragraph bridging pages 2 and 3, and

the desiccant container:

is inserted into the desiccant solution container and it can be **slidingly displaced** in respect of the desiccant solution container, see paragraph bridging pages 9 and 10 and claim 1, lines 16 to 18;

is **axially displaceable** within the desiccant solution container, see page 11, line 18;  
is **lifted out** of the desiccant solution container, see page 4, lines 11 and 12;  
is **drawn out** of the desiccant solution container, see page 10, lines 22 to 25.

These passages show nothing which points towards the restrictive meaning of this feature.

7. The description, nor the figures, also give no indication that what occurs during the displacement is of particular importance.

The originally filed application describes a moisture absorption apparatus having a desiccant container 1 which is axially displaceable within the desiccant solution container 2 between a storage position, at which the desiccant container 1 is fully inserted into the desiccant solution container 2, see figures 1a and 2a, and an active position, at which the desiccant container extends with its major part out of the desiccant solution container, see figures 1b and 2b. Said figures show the desiccant containers and desiccant solution containers with their axes in approximate alignment with each other, but only at the storage position and at the active position.

The Board follows in this respect the respondent arguing that the originally filed application does not include any information as to what happens with the orientation of the containers during this displacement. The displacement itself now receives particular attention, all the more so in an explicit, more

restrictive sense as regards the orientation of each container with respect to the other. Such displacement was apparently not considered as being relevant for the invention in the originally filed application, otherwise it would have received more emphasis.

8. Further, the Board finds that even accepting the absence of an explicit mention no implicit intention for keeping the relative orientation fixed only in the axial direction can be derived from the originally filed application, as no corresponding means to achieve this effect have been foreseen. To derive this from the single mention of a parallelepipedic form of the containers goes too far, as this shape may have other constructional (or even non-technical) reasons for the presence in the application and in dependent claim 15.
  
9. The appellant argued that with the tubular shape of the desiccant container and the desiccant solution container (see page 6, line 18) only made technical sense with the retention of the relative orientation only in the axial direction. In addition to this, the fact that the claim now stated that during the desiccant container's transfer from the storage position to the active position **the underside** of its bottom **faces the upper side** of the bottom of the desiccant solution container, any tilting was clearly excluded, which was another indication that the desiccant container had to continuously retain its relative axial orientation to the desiccant solution container during its displacement.
  
- 9.1 Concerning the first argument the Board notes that the appellant has not provided any evidence for this

assertion. The second argument cannot hold either, as this "facing relationship" is present even if the desiccant container tilts with respect to the desiccant solution container. Such tilting is feasible, without it being an obstacle to the axial displaceability, when reference is made to figures 2a and 2b. In these figures the desiccant container has no bottom flange (as in figures 1a and 1b), therefore when it is in a position between the storage position and the active position, it is in contact with the desiccant solution container 22 only via the inner flange 32, which will not prevent tilting, as it has only a circular line contact with the desiccant container. No means for otherwise preventing such tilting are mentioned in the description or are depicted in the drawings.

- 9.2 Finally, because of this discussion on the possibility of tilting, yet another aspect of the feature "retains its relative (axial) orientation" comes to light. In fact it can also mean that there is no tilting of one container relative to the other.

However, for such a (perfectly feasible) interpretation of this feature there is no basis whatsoever in the application as originally filed.

10. The Board notes, with respect to the decision under appeal, that it has not addressed the opinion expressed therein that the feature "retains its relative (axial) orientation" directly implies "retains the relative radial orientation" (see point 10.1). It could do so as the present decision could be arrived at without taking account of that aspect, a position also taken up by the appellant when stating that the claimed "retention"

feature under discussion left open the question whether there was any rotary restriction.

11. For the above mentioned reasons claim 1 of the auxiliary request does not meet the requirements of Article 123(2) EPC. This applies also to claim 1 of the main request, see point 1 above.

Neither request being allowable, the appeal must be dismissed.

12. The appellant referred during the appeal proceedings to the following decisions concerning parallel national proceedings before German courts:

Decision of the German Federal Patent Court  
(Bundespatentgericht): Case number 35 W (pat) 437/09;

Decision of the Regional Court Düsseldorf (Landgericht  
Düsseldorf): Case number 4a O 151/07.

The Board has taken into consideration said decisions, but has a different opinion in this respect, particularly in view of applying the EPC and its related case law.

**Order**

**For these reasons it is decided that:**

The appeal is dismissed.

The Registrar:

The Chairman:

G. Nachtigall

H. Meinders