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**Datasheet for the decision  
of 11 October 2011**

**Case Number:** T 0323/10 - 3.2.07

**Application Number:** 03076942.6

**Publication Number:** 1375382

**IPC:** B65D 77/06

**Language of the proceedings:** EN

**Title of invention:**

Intermediate bulk container of low height

**Patent Proprietor:**

Royal Packaging Industries van Leer B.V.

**Opponent:**

PROTECHNA S.A.

**Headword:**

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**Relevant legal provisions:**

EPC Art. 56

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

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**Keyword:**

"Admissibility of late filed documents concerning alleged public prior use and prospectus - no, concerning patent documents - yes"

"New ground of opposition (lack of novelty) - not admitted"

"Inventive step - claim 1 main request (no), claim 1 auxiliary request - no objection"

**Decisions cited:**

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**Catchword:**

-



Case Number: T 0323/10 - 3.2.07

**D E C I S I O N**  
of the Technical Board of Appeal 3.2.07  
of 11 October 2011

**Appellant:**  
(Opponent)

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**Respondent:**  
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**Decision under appeal:**

**Decision of the Opposition Division of the  
European Patent Office posted 8 December 2009  
rejecting the opposition filed against European  
patent No. 1375382 pursuant to Article 101(2)  
EPC.**

**Composition of the Board:**

**Chairman:** P. O'Reilly  
**Members:** H.-P. Felgenhauer  
E. Dufrasne

## Summary of Facts and Submissions

I. The opponent (appellant) has filed an appeal against the decision of the opposition division rejecting the opposition against European patent No. 1 375 382. It requested that the decision under appeal be set aside and that the patent be revoked.

The respondent (patent proprietor) requested that the appeal be dismissed or, in the alternative, that the decision under appeal be set aside and that the patent be maintained on the basis of the auxiliary request filed with letter dated 30 September 2011.

The respondent furthermore requested D3 to D16 not to be admitted considering them as being late filed and some of them concerning alleged public prior uses originating from the opponent/appellant.

Both parties filed an auxiliary request for oral proceedings.

II. Claim 1 as granted (main request) reads as follows:  
"IBC (1, 21) comprising a base constructed as a pallet (6), a cage (3), fitted thereon, within which a plastic container (2) is placed, which container is provided at the top with a fill opening (12) with a filler cap (11), said pallet comprising a deck for supporting the bottom of said container, a supporting structure for said deck and a connection face for connecting the lower part of said cage, characterised in that, said connection face comprises the upper part of the supporting structure being at least 10 mm (c) below the upper face of said deck, wherein said supporting structure comprises a

layer of planks (15) below said upper deck (7) and extending in lateral direction beyond said deck to provide a support edge for connecting said cage, blocks (8) below said planks and runners".

Claim 1 according to the auxiliary request reads as follows:

"IBC (1, 21) comprising a base constructed as a pallet (6), a cage (3), fitted thereon, within which a plastic container (2) is placed, which container is provided at the top with a fill opening (12) with a filler cap (11), said pallet comprising a deck for supporting the bottom of said container, a supporting structure for said deck and a connection face for connecting the lower part of said cage, wherein, said connection face comprises the upper part of the supporting structure being at least 10 mm (c) below the upper face of said deck, wherein said supporting structure comprises a layer of planks (15) below said upper deck (7) and extending in lateral direction beyond said deck to provide a support edge for connecting said cage, blocks (8) below said planks and runners wherein said pallet is provided at the bottom with supporting means (8) and centering means (9), said supporting means being constructed to bear on the top of the cage of an underlying IBC and said centering means being constructed so as to fix the position of the cage of an underlying IBC, said centering means extending over a distance (d) that is greater than the difference in height between the top of the cage and the top of the container (b)".

III. The impugned decision is based on documents:

D1 DE-A-38 39 467 and

D2 DE-A-100 50 920.

The following documents filed with the grounds of appeal are referred to:

D3 Drawing no. 3 - 6160 "Holzkufenpalette LX III UN" dated 31 August 1998

D4 Pages of prospectus "SCHÜTZ ECOBULKS. HANDLING, SHIPPING AND STORAGE"

D5 Pages of prospectus "Schütz ECOBULK ST"

D6 DE-A-297 08 783

D7 DE-U-91 06 314

D8 DE-A-38 19 911

D9 DE-U-94 07 343

as well as documents

D4.1 color copy of a page of the prospectus according to D4

D10 Extract of Bundesgesetzblatt Teil II Nr. 34 vom 2. Dezember 2010 "Anlage zur Bekanntmachung der Neufassung der Anlagen A und B des Europäischen Übereinkommens vom 30. September 1957 über die internationale Beförderung gefährlicher Güter auf der Straße (ADR)"

D11 Invoice of 21 May 2001

D12 Invoice of 10 December 2001

D13 Internal note of Schütz-Werke GmbH & Co. KG  
dated 12 March 1999

D14 Declaration under oath by Dr. Ing. E.  
Wildfeuer dated 8 September 2011.

D15.1 - D15.5 Copies of color fotos

D16 Declaration under oath by Dr. J. Hübbe dated  
6 September 2011 and filed during the appeal  
proceedings.

IV. The submissions of the appellant are essentially as  
follows:

- (a) Documents D3 to D16 should be admitted due to  
their relevance and since they easily can be dealt  
with.
- (b) The ground of opposition concerning lack of  
novelty should likewise be admitted since  
documents D3 and D4 are clearly novelty destroying  
with respect to claim 1 according to the main  
request.
- (c) The subject-matter of claim 1 according to the  
main request lacks an inventive step in view of  
the public prior uses referred to in connection  
with documents D3, D4 and D10 to D16.

(d) The subject-matter of claim 1 according to the main request furthermore lacks an inventive step in view of documents D8 and D9.

(e) No objections are raised with respect to claim 1 according to the auxiliary request.

V. The submissions of the respondent are essentially as follows:

(a) Documents D3 to D16 should not be admitted due to their late filing. Furthermore the alleged public prior uses according to D3 and D4 and D10 to D16 are not properly substantiated and sufficient evidence with respect to their public availability has not been provided. The latter applies correspondingly with respect to the prospectus D5.

(b) Admission of the ground of opposition of lack of novelty is not consented to.

(c) The subject-matter of claim 1 according to the main request involves inventive step in view of the public prior uses referred to in connection with D3, D4 and D10 to D16, with respect to prospectus D5 and also with respect to documents D8 and D9.

(d) This applies all the more to the subject-matter of claim 1 according to the auxiliary request.

VI. In the annex to the summons to oral proceedings dated 30 June 2011 (in the following: the annex) the Board gave its preliminary opinion i.a. concerning the



examination of inventive step starting from the IBC according to D8 (figure 8) as closest prior art and taking additionally the container according to D9 into account.

VII. Oral proceedings took place on 11 October 2011.

### **Reasons for the decision**

1. *New ground of opposition (lack of novelty)*

It remained undisputed that, as can be derived from the notice of opposition as well as the impugned decision which both treat solely lack of inventive step as the ground of opposition, lack of novelty (according to the grounds of appeal with respect to D3, D4 and D6) is a new ground of opposition introduced during the appeal proceedings.

According to the established case law referred to at the oral proceedings before the Board a new ground of opposition can only be admitted during appeal proceedings in the case that it is considered as *prima facie* highly relevant and that the patent proprietor consents to it.

The respondent does not consent to the new ground of opposition concerning lack of novelty being admitted. This new ground of opposition thus cannot be considered in the present appeal proceedings.

2. *Admittance of new documents in appeal proceedings*

2.1 Documents D3 to D9 have been filed for the first time with the grounds of appeal. Of these documents D3 and D4 relate to alleged public prior uses and D5 concerns a prospectus. D6 to D9 are patent and utility model documents.

With the appellant's letter dated 9 September 2011 documents D10 to D16 relating to alleged public prior uses have been filed.

2.2 With letter dated 20 September 2010 in its reply to the grounds of appeal the respondent questioned the admissibility of D3 to D5 arguing that these documents originate from the appellant and that no proof is given concerning their public availability.

With letter dated 30 December 2011 the respondent questioned the admissibility of documents D10 to D16 with similar arguments.

2.3 In addition to the above objections with respect to D3 to D5 and D10 to D16 the respondent questioned for the first time at the oral proceedings before the Board the admissibility of documents D6 to D9.

2.4 The Board, considering that documents D6 to D9 have been referred to in the grounds of appeal, that they are patent and utility model documents for which no further evidence concerning their public availability is required and that the respondent had previously argued (letter dated 20 September 2010) in substance

with respect to these documents decides to admit these documents.

2.5 Documents D3 to D5 and D10 to D16 on the contrary are not admitted, i.a. due to the lack of evidence concerning the public availability of the various alleged public prior uses and the prospectus D5. In view of the decision given below, according to which the subject-matter of claim 1 does not involve an inventive step in view of documents D8 and D9, the issue of admissibility of D3 to D5 and D10 to D16 requires no further attention.

3. *Subject-matter of claim 1 according to the main request*

3.1 Claim 1 according to the main request (in the following: claim 1) is directed to an IBC (intermediate bulk container) comprising

- a base constructed as a pallet,
- a cage fitted thereon,
- a plastic container placed into the cage.

The pallet comprises

- (a) a deck for supporting the bottom of the container,
- (b) a supporting structure for said deck and
- (c) a connection face for connecting the lower part of said cage,
- (d) wherein the connection face comprises the upper part of the supporting structure being at least 10 mm (c) below the upper face of said deck,

(e) wherein the supporting structure comprises a layer of planks below said upper deck and extends in lateral direction beyond said deck to provide a support edge for connecting said cage, and

(f) blocks below said planks and runners.

3.2 According to the respondent the core of the invention concerns the position of the connection face for connecting the lower part of said cage according to feature (c), which according to feature (d) leads to the upper part of the supporting structure being at least 10 mm (c) below the upper face of the deck.

3.3 It is undisputed that this arrangement has a **first effect**, namely that the lower part of the cage is lowered by a distance of at least 10 mm below the deck and consequently below the bottom of the container supported by the deck.

3.4 According to the respondent this arrangement furthermore has a **second effect**, namely that the upper end of the cage is lowered as compared to the upper end of the container such that, in the wording of the description, "the top of the container comes closer to the top of the cage" (paragraph [0009]).

It has not been disputed by the respondent that this lowering of the upper end of the cage relative to the top of the container presupposes that the cage has, irrespective of the structure of the pallet, a certain given length. According to the respondent a feature defining such a constant length for the cage is

implicitly defined by the combination of features of claim 1 considering, that in practice IBC's like the one defined by claim 1 have standardized overall dimensions which correspondingly leads to the elements of the IBC, like the cage, having standardized dimensions.

The Board considers that the argument of the appellant, that claim 1 does not necessarily define a standardized IBC or one having standard dimensions is correct. Consequently, the second effect cannot be considered as being achieved by the IBC as defined by claim 1 since, as indicated above, it is not a result of the features of this claim.

- 3.5 It has neither been alleged nor has evidence been provided that a further effect(s) associated with the part of feature (d) according to which the supporting structure is at least 10 mm below the upper face of the deck and feature (e) concerning the structure of the supporting structure leading to the arrangement according to feature (d) has to be taken into consideration.

4. *Closest prior art*

- 4.1 The parties have been of different opinions as to which of documents D8 or D9 qualifies as closest prior art.

Apart from the fact that in the present case the IBC needs to involve an inventive step irrespective of whether D8 is considered as disclosing the closest prior art and D9 as further prior art or vice versa the Board, in line with the argumentation of the respondent,

considers, in view of the structure of the pallet, the embodiment of an IBC according to the second embodiment of D8 (as shown in connection with figures 7 and 8) as closest prior art. Such an approach has already been referred to in the annex (cf. section 10.3).

- 4.2 The IBC according to the second embodiment of D8 discloses (in the following with reference numerals of D8) with respect to the IBC as defined by claim 1 an IBC comprising a base constructed as a pallet 44, a cage 3, fitted thereon, within which a plastic container 2 is placed, which container is provided at the top with a fill opening 11 with a filler cap, said pallet 44 comprising a deck for supporting the bottom 8 of said container 2 (feature (a)), a supporting structure for said deck (feature (b)) and a connection face for connecting the lower part of said cage 3 (feature (c)).

The supporting structure comprises, according to parts of feature (e) a layer of planks and blocks below said planks and runners (cf. figures 7, 8).

The connection face is formed by the deck for supporting the bottom 8 of the container 2 via a supporting ring 9 (cf. figure 8). The upper face of the deck and the connection face are thus on the same level.

5. *Distinguishing features / problem to be solved*

- 5.1 The IBC according to claim 1 differs from the one according to the second embodiment of D8 in that according to feature (d) the connection face comprises the upper part of the supporting structure being at

least 10 mm below the upper face of said deck and in that according to a part of feature (e) the supporting structure comprises a layer of planks below the upper deck and extends in lateral direction beyond said deck to provide a support edge for connecting said cage.

The distinguishing features thus concern the arrangement of the upper part of the supporting structure and of the upper face of the deck such that the connection face is on a lower level as compared to the upper face of the deck and the manner by which these two different levels are achieved.

5.2 As indicated above in point 3.3 the arrangement of the upper part of the supporting structure and of the upper face of the deck leads only to the (first) effect, that the lower part of the cage is arranged below the deck by a distance of at least 10 mm.

5.3 Consequently starting from the second embodiment of D8 as closest prior art, the problem solved by the IBC according to claim 1 can be considered only in lying in the provision of an IBC having a pallet such that the connection face for the lower part of the cage is arranged lower than the upper face of the deck by a given distance, namely at least 10 mm, since no further effect can be attributed to the distinguishing features (cf. sections 3.3 - 3.5 above).

6. *Obviousness of the IBC of claim 1 according to the main request*

6.1 It is evident starting from the IBC according to the second embodiment of D8 that, in order to solve the

problem (section 5.3 above), the known pallet can be modified as such quite arbitrarily with respect to the level(s) at which the supporting structure for the deck and the connection face for the lower part of the cage are arranged.

- 6.2 Concerning the arrangement as defined by feature (d) reference can be made to D9 (cf. figure 5) which gives an example for a pallet having the supporting structure for the deck and the connection face for the lower part of the cage arranged at different levels, the connection face being at a lower level as defined by feature (d).

It is true that, as pointed out by the respondent, D9 concerns a different type of pallet, namely one made of sheet metal, which differs from the one according to claim 1 which comprises a deck, a supporting structure for the deck which comprises a layer of planks, blocks and runners.

- 6.3 Starting from the closest prior art according to the second embodiment of D8 it need only to be asked, whether the person skilled in the art would have modified the pallet of the closest prior art, thereby taking into account that according to D9 the connection face is lower than the upper deck. This question has to be answered in the affirmative since it is apparent that the arrangement concerned is independent of the fact that the pallet of D9 is of sheet metal.

Furthermore it is apparent that, without any effect associated with it, the particular value of at least 10 mm defined by a part of feature (e) needs to be



considered as being the result of an arbitrary choice, which cannot contribute to inventive step being involved in solving a technical problem.

Finally for the particular structure defined by a part of feature (e) leading to the arrangement of the upper face of the deck and the connection face no particular effect has been referred to (cf. section 3.4 above). For this reason and also since the nature of the measures required by feature (e) are straight forward it is evident that starting from the second embodiment of D8 a modification of the pallet, such that the connection face is arranged below the upper face of the deck, comes within regular design practice.

6.4 The subject-matter of claim 1 of the main request thus does not involve an inventive step (Article 56 EPC).

7. *Claim 1 according to the auxiliary request*

Claim 1 according to the auxiliary request comprises the features of claims 1 and 7 of the patent as granted.

The appellant neither argued with respect to the admissibility of this claim nor with respect the invoked ground of opposition of lack of inventive step.

The Board likewise does not see any reason for an objection.

## Order

### For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the department of first instance with the order to maintain the patent on the basis of:
  - claims 1 to 7 of the auxiliary request filed with letter dated 30 September 2011;
  - description, columns 1 to 4, as filed during the oral proceedings; and
  - figures 1 to 3 of the patent as granted.

The Registrar:

The Chairman:

G. Nachtigall

P. O'Reilly