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**Datasheet for the decision  
of 17 July 2015**

**Case Number:** T 0327/13 - 3.2.03

**Application Number:** 00122935.0

**Publication Number:** 1149649

**IPC:** B22D41/50, B22D41/52, B22D11/10

**Language of the proceedings:** EN

**Title of invention:**  
Exchangeable continuous casting nozzle

**Patent Proprietors:**  
Akechi Ceramics Kabushiki Kaisha  
TOKYO YOGYO KABUSHIKI KAISHA

**Opponent:**  
VESUVIUS GROUP S.A.

**Headword:**

**Relevant legal provisions:**  
EPC Art. 107, 108 sentence 3

**Keyword:**  
Admissibility of appeal - party adversely affected by  
decision (no) - appeal sufficiently substantiated (no)

**Decisions cited:**  
T 0528/93, T 0760/08, T 1708/08

**Catchword:**



**Beschwerdekammern  
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Case Number: T 0327/13 - 3.2.03

**D E C I S I O N  
of Technical Board of Appeal 3.2.03  
of 17 July 2015**

**Appellant:** Akechi Ceramics Kabushiki Kaisha  
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**Appellant:** TOKYO YOGYO KABUSHIKI KAISHA  
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**Representative:** Debled, Thierry  
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**Decision under appeal:** **Interlocutory decision of the Opposition  
Division of the European Patent Office posted on  
6 December 2012 concerning maintenance of the  
European Patent No. 1149649 in amended form.**

**Composition of the Board:**

<b>Chairman</b>	G. Ashley
<b>Members:</b>	V. Bouyssy
	E. Kossonakou

## **Summary of Facts and Submissions**

- I. European patent No 1 149 649 (in the following: "the patent") concerns a slide nozzle device comprising an exchangeable continuous casting nozzle.
- II. The patent as a whole was opposed on the grounds of Article 100(c) and Article 100(a) EPC, the latter for lack of novelty and lack of inventive step in view of patent documents (D1, D2, D6) and an alleged public prior use.
- III. The Opposition Division held that the patent proprietors' main request could not be allowed because the subject-matter of amended claim 1 lacked novelty over D1, but that, account being taken of the amendments in the patent proprietors' auxiliary request 1, the patent and the invention to which it relates meet the requirements of the EPC.
- IV. This interlocutory decision has been appealed by the patent proprietors (in the following "the appellants").
- V. With the summons to oral proceedings, the Board sent a communication pursuant to Article 15(1) RPBA indicating to the parties its preliminary opinion that the appeal is inadmissible because it does not meet the requirements of Articles 107 and 108 EPC.
- VI. Oral proceedings before the Board were held on 17 July 2015. The opponent (in the following "the respondent") was not present, and the oral proceedings were conducted in its absence (reference is made here to the minutes of the oral proceedings).

VII. Requests

The appellants requested that the decision under appeal be set aside and the patent be maintained as amended on the basis of either the main or the auxiliary request filed with the statement setting out the grounds of appeal dated 8 April 2013.

The respondent has not made any submission, other than it agrees with the opinion of the Board on the admissibility of the appeal.

VIII. Claims

a) Main request

Independent claim 1 reads as follows (compared with claim 1 as granted, added features are indicated in bold, deleted features in strike-through):

- "1. A slide nozzle device comprising:  
an exchangeable continuous casting nozzle which comprises:
- (a) a nozzle including a flange portion made of a refractory material, the nozzle having a first through hole for receiving molten metal and a tube body of a refractory material that continues from said flange portion and has a second through hole continuing from said first through hole;
  - (b) a metal protecting body including a metal casing portion surrounding said flange portion;
  - (c) a metal skirt portion surrounding an upper portion of said tube body; **and**

(d) metal reinforcing portions disposed around a junction between said metal casing portion and said metal skirt portion to reduce breakage of the tube body connected with the flange portion;~~and,~~

the slide nozzle device further comprising at least one supporting member for securing said exchangeable continuous casting nozzle in said slide nozzle device, the supporting member as well as the reinforcing members being in parallel with the direction for inserting of said exchangeable continuous casting nozzle,

**wherein said metal reinforcing portion comprises a portion having a curved portion which is identical in curvature with said metal skirt portion, and a plate-like portion fixed to said curved portion, said reinforcing portion being fixed to said metal casing portion and said metal skirt portion from the outside."**

Independent claim 2 reads as follows (compared with claim 1 as granted, added features are indicated in bold, deleted features in strike-through):

"2. A slide nozzle device comprising:

an exchangeable continuous casting nozzle which comprises:

(a) a nozzle including a flange portion made of a refractory material, the nozzle having a first through hole for receiving molten metal and a tube body of a refractory material that continues from said flange portion and has a second through hole continuing from said first through hole;

- (b) a metal protecting body including a metal casing portion surrounding said flange portion;
- (c) a metal skirt portion surrounding an upper portion of said tube body; **and**
- (d) metal reinforcing portions disposed around a junction between said metal casing portion and said metal skirt portion to reduce breakage of the tube body connected with the flange portion;~~and,~~

the slide nozzle device further comprising at least one supporting member for securing said exchangeable continuous casting nozzle in said slide nozzle device, the supporting member as well as the reinforcing members being in parallel with the direction for inserting of said exchangeable continuous casting nozzle,

**wherein said metal reinforcing portions are two metal reinforcing portions disposed on either side of the metal skirt portion, the two metal reinforcing portions being disposed along the direction for inserting of said exchangeable continuous casting nozzle,**

**said metal reinforcing portion comprising a portion shaped like a half rectangular shape in horizontal section, fixed to said metal casing portion and said metal skirt portion from the outside,**

**said portion shaped like a half rectangular shape having two extended portions each extending towards the metal skirt portion in a planar view, end surfaces of the two extended portions being both attached to an outer side surface of the metal skirt portion in a non-tangential direction to support the metal skirt portion at four points with the two metal reinforcing portions."**



b) Auxiliary request

Claim 1 is unchanged. Claim 2 differs from claim 2 of the main request in that the last feature has been replaced by the two limitations:

- **"said metal skirt portion being a cylindrical body having a circular shape in horizontal section";**  
and
- **"tips of the two extended portions being both attached to an outer peripheral surface of the metal skirt portion in a non-tangential direction".**

IX. The written and oral arguments of the appellants, insofar as they are relevant for the present decision, can be summarised as follows:

The Opposition Division's decision to maintain claim 3 as granted (in the context of claim 1 of auxiliary request 1) is not challenged; however, the appellants are adversely affected by the Opposition Division's decision not to maintain claim 2 as granted, although its subject-matter is novel and inventive in view of D1 (WO 00/35614 A1, filed with the notice of opposition and cited in the decision under appeal).

Clearly the appellants are adversely affected by the Opposition Division's decision to dismiss their main request. It also follows from T 528/93 that, only when a request is withdrawn during the opposition proceedings and re-filed in appeal, is the appellant not adversely affected by the decision of the Opposition Division as far as this request is concerned. In the present case, the appellants did not withdraw their main request and thus, following the

reasoning of T 528/93, they are adversely affected by the decision of the Opposition Division to dismiss it.

It is established case law, see for instance T 760/08 (point 2 of the reasons) and T 1708/08 (point 1.3 of the reasons), that the statement of the grounds for appeal satisfies the requirements of Article 108 EPC, third sentence, even if it does not state any specific reason why the decision is contested, provided there is a change in the subject of the proceedings due to the filing of new claims and where the reasons for the decision are no longer relevant in view of the new claims. The appellants filed two new sets of claims which remedy the deficiency of the appellants' main request as identified by the Opposition Division in its decision. Thus, the appeal should be considered as being sufficiently substantiated.

### **Reasons for the Decision**

1. The contested decision
- 1.1 The Opposition Division refused the proprietors' main request for lack of novelty of claim 1 in view of D1, and held that claim 1 of the proprietors' auxiliary request 1 was allowable.
- 1.2 The subject-matter of claim 1 of the main and auxiliary request 1 addressed in the decision corresponds essentially to that of granted claim 1 and granted dependent claim 3, respectively.

2. Admissibility of the appeal
  - 2.1 Article 107 EPC, first sentence, states that any party to proceedings adversely affected by a decision may appeal.
  - 2.2 The Board considers that, to establish whether a party has been adversely affected by a decision, it is not enough to consider the end result in isolation, but to consider the party's complete case, as is defined in Article 12(2) RPBA, in conjunction with the substance of the decision.
  - 2.3 In the present case it is clear that the appellants are adversely affected by the Opposition Division's decision not to accede to the then main request. However, as follows from the statement setting out the grounds of appeal and the two new set of claims filed with it as main and auxiliary request, that this decision has not been contested with the appeal.
    - 2.3.1 On page 1 of the grounds of appeal, the appellants state their satisfaction with "the Decision in that claim 3 as granted was maintained". The appeal is actually against the decision of the Opposition Division that "claim 2 as granted was not maintained". The appellants have filed two new sets of claims with the grounds of appeal, each comprising a new independent claim 2 that includes "the subject matters of claims 1 and 2 as granted with further limitations being added thereto" (see page 1, paragraph 1 of the grounds of appeal). In pages 2 to 5 of the grounds of appeal, the appellants only indicate why the subject-matter of this newly filed independent claim based on claim 2 as granted is novel and inventive in view of D1.

2.3.2 The appellants do not defend the main request as filed before the Opposition Division, wherein claim 2 as granted figured. The grounds of appeal do not address this request at all, let alone indicate any reason for setting aside or amending the decision of the Opposition Division's decision that claim 1 of this request lacks novelty over D1. On the contrary, it is apparent from the grounds of appeal that the appellants no longer dispute that D1 discloses a slide nozzle device having all the features set out in claim 1 as granted, as well as in claim 1 of the main request as filed before the Opposition Division (see sections 2 and 3). Hence, the appellants do not challenge the refusal of this claim by the Opposition Division.

2.3.3 Each of the new sets of claims according to the main and auxiliary requests comprise:

- an independent claim 1, which corresponds to a combination of claims 1 and 3 as granted;
- an independent claim 2, which corresponds to a combination of claims 1 and 2 as granted, with further features taken from Figure 2; and
- dependent claims 3 and 4, which correspond to dependent claims 8 and 9 as granted.

Thus, these new claim sets differ essentially from the set of claims according to the auxiliary request 1 as filed during the opposition proceedings only in that an additional new independent claim based on claim 2 as granted has been incorporated.

2.3.4 All this can only be understood to mean that the patent proprietors are not adversely affected by the Opposition Division's decision to dismiss the main request filed in the opposition proceedings, but by the

non-maintenance of an independent claim based on claim 2 as granted, in addition to the duly filed (and maintained) independent claim based on claim 3 as granted.

However, the subject-matter of claim 2 as granted was not the subject of an individual request in the opposition proceedings, so that it has not been addressed as such in the decision of the Opposition Division. It is reminded that requests stand or fall as a whole, not as individual claims. In the present case, it was enough for independent claim 1 not to be allowable for the entire main request to fall, so that it cannot be considered that claim 2, which defines an alternative preferred embodiment to that defined in claim 3 as granted, has been dealt with *per se* with the rejection of the main request.

2.3.5 The present appeal thus amounts to an attempt to remedy the non-filing of an independent claim based on granted claim 2 in the opposition proceedings, and so aims to extend the protection conferred by auxiliary request 1 allowed by the Opposition Division to the alternative solution of claim 2. This runs contrary to the purpose of appeal proceedings: their function is to give a judicial decision upon the correctness of the decision under appeal. It is certainly not to reopen the opposition proceedings and, as attempted in the present case, give a patent proprietor the opportunity to improve its position by adding an independent claim to a claim set already allowed by the Opposition Division.

2.4 Therefore, in view of the appellants' case, the Board considers that they cannot be regarded as "adversely affected" by the decision of the Opposition Division

and thus are not entitled to appeal under Article 107 EPC.

2.5 The appellants referred to T 528/93 in support of their submissions. In this case, a request was withdrawn during opposition proceedings and was thus not the subject of the contested decision; the board decided that a virtually identical request filed during appeal proceedings was not the subject of the appeal, because the appellant was not adversely affected by the decision of the opposition division as far as this request was concerned. The appellants in the present case relied on this legal argument and argued that, when the premise of T 528/93 is false, i.e. when a patent proprietor does not withdraw a claim request in opposition, then the conclusion of T 528/93 is inevitably false, i.e. the proprietor is adversely affected by a decision dismissing this request. In this Board's opinion this argument is logically flawed: it is an example of the so-called "denying the antecedent" logical fallacy (in terms of formal logic: if P, then Q; not P, therefore not Q). In addition, the Board finds that the circumstances are not comparable, since - as explained above - in the present case the appellants' main and auxiliary requests were filed for the first time with the grounds of appeal, so that the issue of (non) withdrawal cannot play a role in the evaluating the case.

2.6 Finally, the present appeal is not sufficiently substantiated to satisfy the requirements of Article 108, third sentence, together with Rule 99(2) EPC. It is established case law, see e.g. T 760/08 and T 1708/08 as cited by the appellants, that an appeal can be based on new amended claims in so far as the amendments are intended to address the reasons of the

contested decision. In the present case, however, it is readily apparent that the new sets of amended claims are not intended to address the reason in the Opposition Division's decision to refuse the main request (see point 2.3 above).

2.7 In conclusion, the appeal does not meet the requirements of Articles 107 and 108 EPC and is thus not admissible.

### **Order**

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

The appeal is rejected as inadmissible.

The Registrar:

The Chairman:



C. Spira

G. Ashley

Decision electronically authenticated