**Internal distribution code:**

(A) [ - ] Publication in OJ
(B) [ - ] To Chairmen and Members
(C) [ - ] To Chairmen
(D) [ X ] No distribution

**Datasheet for the decision of 4 December 2018**

**Case Number:** T 2194/14 - 3.2.07

**Application Number:** 06813081.4

**Publication Number:** 1945527

**IPC:** B65D43/10, B44D3/12, B65D51/16

**Language of the proceedings:** EN

**Title of invention:**
CONTAINER WITH A REMOVABLE LID AND METHOD FOR APPLYING THE LID

**Patent Proprietor:**
Emballator Ulricehamns Bleck AB

**Opponent:**
Ardagh MP Group Netherlands B.V.

**Headword:**

**Relevant legal provisions:**
EPC Art. 111(1)
RPBA Art. 12(4)

**Keyword:**
Remittal to the department of first instance - (yes)

**Decisions cited:**

**Catchword:**

Europäisches Patentamt
European Patent Office
Office européen des brevets

**Beschwerdekammern**

**Boards of Appeal**

**Chambres de recours**

Boards of Appeal of the
European Patent Office
Richard-Reitzner-Allee 8
85540 Haar
GERMANY
Tel. +49 (0)89 2399-0
Fax +49 (0)89 2399-4465

**Case Number: T 2194/14 - 3.2.07**

# D E C I S I O N
# of Technical Board of Appeal 3.2.07
# of 4 December 2018

| | |
|---|---|
| **Appellant:** (Opponent) | Ardagh MP Group Netherlands B.V.<br>Zutphenseweg 51<br>7418 AH Deventer (NL) |
| **Representative:** | Jacobacci Coralis Harle<br>32, rue de l'Arcade<br>75008 Paris (FR) |
| **Respondent:** (Patent Proprietor) | Emballator Ulricehamns Bleck AB<br>Box 8<br>523 21 Ulricehamn (SE) |
| **Representative:** | Zacco Sweden AB<br>P.O. Box 5581<br>114 85 Stockholm (SE) |
| **Decision under appeal:** | **Decision of the Opposition Division of the European Patent Office posted on 29 September 2014 rejecting the opposition filed against European patent No. 1945527 pursuant to Article 101(2) EPC.** |

**Composition of the Board:**

| | |
|---|---|
| **Chairman** | I. Beckedorf |
| **Members:** | V. Bevilacqua |
| | A. Pieracci |

## Summary of Facts and Submissions

I. The appellant (opponent) filed an appeal within the prescribed time limit and in the prescribed form against the decision of the opposition division to reject the opposition against European patent No. 1 945 527, requesting that the appealed decision be set aside and that the patent be revoked.

II. With the reply letter dated 3 June 2015 the respondent (patent proprietor) submitted amended claims (auxiliary requests 1 to 8) and defended the patent as granted and in this amended form. As a further auxiliary request the respondent requested that the case be remitted to the opposition division for examination of auxiliary requests 1 to 8.

III. By communication pursuant to Article 15(1) RPBA, the Board provided the parties with its preliminary opinion on the above requests.

IV. When responding to this preliminary opinion, the patent proprietor filed new auxiliary requests 1a and 1b, and renumbered auxiliary request 1 as auxiliary request 1c.

V. Oral proceedings were held on 4 December 2018. For the further course of the oral proceedings, in particular the issues discussed with the parties, reference is made to the minutes.

At the end of oral proceedings the appellant confirmed its original request, namely

> that the decision under appeal be set aside and that the patent be revoked.

The respondent, while withdrawing all other requests, requested:

that, when setting aside the decision under appeal, the case be remitted to the opposition division for further prosecution on the basis of auxiliary requests 3 to 8.

The present decision was announced at the end of oral proceedings.

VI. Since no decision is taken on the patentability of the respondents requests, i.e. auxiliary requests 3 to 8, there is no need to reproduce the wording of the respective independent claims.

VII. The appellant objected to admitting into the proceedings of auxiliary requests 3 to 8 and argued that, should those requests be admitted, reasons of procedural economy spoke against remitting the case to the opposition division. The appellant's relevant arguments are dealt with in detail in the Reasons for the Decision.

VIII. The respondent argued that there was no reason for excluding auxiliary requests 3 to 8 from appeal proceedings. As the opposition division did not deal with these requests, a remittal for further prosecution was in line with the settled case law of the Boards of Appeal. The respondent's relevant arguments are dealt with in detail in the Reasons for the Decision.

## Reasons for the Decision

1. Auxiliary requests 3 to 8 - Admittance into the proceedings

1.1 As noted by the appellant and as acknowledged by the respondent, the independent claims of auxiliary requests 3 to 8 contain features extracted from different parts of the description of the application as filed.

The subject-matter of these claims corresponds to that of the claims of auxiliary requests 3 to 8 submitted during proceedings before the opposition division with letter of 12 August 2014.

1.2 The appellant requested not to take these auxiliary requests into consideration, as they were directed towards embodiments which were not decided upon in the appealed decision, thereby raising fresh and divergent issues.

1.3 This procedural request of the appellant cannot be allowed by the Board.

It is settled case law (Case Law of the Boards of Appeal, 8th edition 2016, IV.E.4.1.2, see also Article 12(1) and (2) RPBA) that a respondent-patent proprietor can file requests at a timely stage of the appeal proceedings, in particular together with its reply to the statement of grounds of appeal.

The admission into the proceedings of such requests depends on the Board's discretion under Article 12(4) RPBA, and is not excluded by general principles of law.

In the present case, auxiliary requests 3 to 8 cannot be excluded under Article 12(4) RPBA because none of respective auxiliary requests 3 to 8 submitted during proceedings before the opposition division with letter of 12 September 2014 was withdrawn during opposition proceedings or not admitted by the opposition division. Because the opposition of the appellant was rejected by the opposition division, which found that none of the grounds for opposition submitted by the appellant-opponent prejudiced the maintenance of the patent as granted, there was obviously no need to address any of the corresponding auxiliary requests on their merits and/or their admissibility.

2. Remittal to the opposition division

2.1 The appellant requested not to remit the case to the opposition division, arguing that this would unduly lengthen the proceedings, because lack of patentability of the claims of auxiliary requests 3 to 8 was *prima facie* apparent.

2.2 The Board disagrees.

Under Article 111(1) EPC the Board may either decide on the appeal in exercising any power within the competence of the opposition division that issued the decision under appeal, or remit the case to the opposition division for further prosecution. The appropriateness of remittal to the opposition division is a matter for discretionary decision by the Board, which assesses each case on its own.

In the present case, although the appellant requested the Board to take a final decision rather than to remit

the case to the opposition division, the case is remitted for further prosecution.

The appealed decision established that none of the grounds of opposition raised by the appellant held against the patent as granted.

Requests corresponding to present auxiliary requests 3 to 8 were available at that time, but have not been the subject of the appealed decision.

Due to the withdrawal of the main request by the respondent, the appealed decision is to be set aside.

Contrary to what the appellant alleged, no lack of patentability of auxiliary requests 3 to 8 is *prima facie* apparent to the Board.

It is, however, not for the Board to conduct the necessary detailed examination of said auxiliary requests for the first time, as appeal proceedings primarily serve the parties' right to a review in a judicial manner of the contested decision (G 9/91 and G 10/91, OJ 1993, 408, 420).

In order not to deprive the respondent, who expressly requested it, of the opportunity to defend auxiliary requests 3 to 8 before two instances, the Board considers it appropriate, taking the above into account and weighing it against the arguments against remittal expressed by the appellant, to make use of its discretionary power under Article 111(1) EPC and to remit the case to the opposition division for further prosecution.

**Order**

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

1. The decision under appeal is set aside.

2. The case is remitted to the opposition division for further prosecution on the basis of auxiliary requests 3 to 8 filed with letter dated 3 June 2015.

The Registrar: The Chairman:

G. Nachtigall I. Beckedorf

Decision electronically authenticated