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**Datasheet for the decision
of 22 January 2020**

Case Number: T 1236/15 - 3.3.09

Application Number: 03025704.2

Publication Number: 1418196

IPC: C08J5/18, C08L29/04, C11D17/04

Language of the proceedings: EN

Title of invention:
Water-soluble film

Patent Proprietor:
Mitsubishi Chemical Corporation

Opponents:
THE PROCTER & GAMBLE COMPANY
Witte, Weller & Partner Patentanwälte mbB

Headword:

Relevant legal provisions:
EPC Art. 100(a), 56
RPBA Art. 12(4), 13(1), 13(3)

Keyword:

Main request - inventive step (no)

Auxiliary requests - admissibility (no)

Decisions cited:

Catchword:



Beschwerdekammern

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Case Number: T 1236/15 - 3.3.09

D E C I S I O N
of Technical Board of Appeal 3.3.09
of 22 January 2020

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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 9 April 2015
revoking European patent No. 1418196 pursuant to
Article 101(3) (b) EPC.**

Composition of the Board:

Chairman N. Perakis
Members: M. Ansorge
 R. Romandini

Summary of Facts and Submissions

- I. This decision concerns the appeal filed by the patent proprietor against the opposition division's decision revoking European patent No. 1 418 196.
- II. With their notices of opposition, opponents 1 and 2 had requested revocation of the patent in its entirety on the grounds under Article 100(a) EPC (lack of novelty and lack of inventive step) and Article 100(b) EPC.
- III. The documents submitted during the opposition proceedings included:
- D1: JP 2001329130 A
 - D1b: English translation of D1
 - D3: EP 0 291 198 A2
 - D12: US 4 747 976 A
 - D14: Affirmation in lieu of oath of D.M. Lee dated 21 October 2014
 - D15: Expert opinion of D.M. Lee dated 22 October 2014
 - D16: WO 00/55068 A1.
- IV. The opposition division's decision was based on the claims as granted (main request) and sets of claims corresponding to twelve auxiliary requests.

Claim 1 as granted reads as follows:

"A water-soluble film made from a resin composition comprising (A) 100 parts by weight of an anionic group-modified polyvinyl alcohol having a viscosity of 10 to 35 mPa·s measured at 20°C with respect to a 4% by weight aqueous solution thereof, an average degree of hydrolysis of 80.0 to 99.9% by mole and a rate of anionic group modification of 1 to 10% by mole, (B) 20

to 50 parts by weight of a plasticizer, (C) 2 to 30 parts by weight of a filler, and (D) 0.01 to 2.5 parts by weight of a surfactant, characterized in that said plasticizer (B) is a mixture of glycerol with at least one of the compounds trimethylolpropane and diglycerol in a ratio of 15/85 to 85/15 by weight."

The sets of claims corresponding to the auxiliary requests before the opposition division are not relevant for the present decision.

V. The opposition division revoked the patent because it considered that:

- the subject-matter of claim 1 as granted did not involve an inventive step in view of D1 in combination with either D3 or D12 and in view of D12 in combination with D1;
- the subject-matter of claim 1 of auxiliary requests 1 to 7 did not involve an inventive step in view of the combination of D1 with D3;
- the subject-matter of claim 1 of auxiliary requests 8 to 11 did not involve an inventive step in view of the combination of D1 with D12; and
- the subject-matter of claim 1 of auxiliary request 12 contravened the requirements of Article 123(2) EPC.

VI. With its statement setting out the grounds of appeal, the patent proprietor ("the appellant") filed sets of claims corresponding to auxiliary requests I to V and requested that the decision be set aside (main request)

or, alternatively, that the patent be maintained on the basis of any of these auxiliary requests.

Moreover, it submitted the following document:

D17: Declaration of Masanori Okubo dated 17 August 2015 containing experimental data.

- VII. With its reply to the appeal, opponent 1 ("respondent 1") requested that the appeal be held inadmissible and - in the event that the appeal were considered admissible - that the appeal be dismissed.
- VIII. With its reply to the appeal, opponent 2 ("respondent 2") requested that the appeal be dismissed and that D17 not be admitted into the proceedings.
- IX. By letter of 10 March 2017, the appellant filed auxiliary requests I to VII to replace the previous auxiliary requests on file, and the following documents:
- D19: JIS K 7127:1999 (ISO 527-3:1995) (with partial English translation)
D20: JIS K 7161:1994 (ISO 527-1:1993) (with partial English translation)
D21: English machine translation of JP 2005290255 A
D22: English machine translation of JP 2004083631 A.
- X. On 5 June 2019, the board issued a communication in preparation for the oral proceedings and gave a preliminary non-binding opinion. In particular with regard to the outstanding issue of inventive step, the subject-matter of claim 1 of the main request did not appear to involve an inventive step in view of either D12 or D1 as the closest prior art.

XI. With its letter dated 13 August 2019, respondent 1 requested that D17 not be admitted into the proceedings.

XII. By letter of 20 December 2019, the appellant submitted new auxiliary requests I to IIIc to replace the previous requests on file and filed the following documents:

D25: JP 20023896 A

D25A: English machine translation of D25.

Claim 1 of **auxiliary request I** is based on granted claim 1 with the difference that the expressions "at least one of the compounds" and "and diglycerol" were deleted, thus limiting the definition of the plasticizer mixture to glycerol and trimethylolpropane.

Claim 1 of **auxiliary request II** is based on claim 1 of auxiliary request I with the difference that the expressions "with the viscosity measured according to JIS K 6726 - 3.11.2" and "with the average degree of hydrolysis measured according to JIS K 6726 - 3.5" were introduced into claim 1.

Claim 1 of **auxiliary request IIIa** is based on claim 1 of auxiliary request II with the difference that the feature "an average degree of hydrolysis of 80.0 to 99.9% by mole" was replaced by "an average degree of hydrolysis of 90.0 to 98.5% by mole".

Claim 1 of **auxiliary request IIIb** is based on claim 1 of auxiliary request II with the addition of the following feature at the end of claim 1:

"wherein said average degree of hydrolysis is from 90.0 to 98.5% by mole".

Claim 1 of **auxiliary request IIIc** is based on claim 1 of auxiliary request IIIa with the addition of the following feature at the end of claim 1:

"wherein the resin composition comprising (A) does not comprise an anionic group-modified polyvinyl alcohol having a viscosity of 10 to 35 mPa·s measured at 20°C with respect to a 4% by weight aqueous solution thereof, an average degree of hydrolysis of 80.0 to below 90.0% by mole, and a rate of an anionic group modification of 1 to 10% by mole; and wherein the resin composition comprising (A) does not comprise an anionic group-modified polyvinyl alcohol having a viscosity of 10 to 35 mPa·s measured at 20°C with respect to a 4% by weight aqueous solution thereof, an average degree of hydrolysis of more than 98.5 up to 99.9% by mole, and a rate of an anionic group modification of 1 to 10% by mole".

XIII. On 22 January 2020 oral proceedings before the board were held as scheduled. During the oral proceedings the respondents objected to the admission into the proceedings of the appellant's auxiliary requests filed with the letter of 20 December 2019.

XIV. The arguments put forward by the appellant which are relevant for the present decision may be summarised as follows:

Admissibility of the appeal

- The appeal was admissible, since in the statement setting out the grounds of appeal reasons were

given as to why D12 was the closest prior art, not D1, and why the subject-matter of claim 1 involved an inventive step in view of D12 as the closest prior art.

Novelty

- The subject-matter of claim 1 was novel over D1 and D12. Late-filed documents D14 to D16 were not *prima facie* relevant and the opposition division had correctly exercised its discretion in not admitting them into the proceedings.

Inventive step

- D17 should be admitted into the proceedings because it was filed as a reaction to the opposition division's decision on inventive step. D17 contained experimental results ("elastic modulus increase ratio" and "impact resistance") as film performance parameters suitable for objectively expressing or evaluating the "time lapse stability" of resin films.
- D19 to D22 (filed in support of D17) should be admitted into the proceedings because they showed that the tensile modulus, the haze and the bleed-out of plasticizer were the physical properties which were evaluated in general in relation to the "time-lapse stability" of a thermoplastic film containing a plasticizer.
- D25 should be admitted into the proceedings since it would be relevant if inventive step were assessed in view of D1 as the closest prior art. It illustrated the common general knowledge of the

skilled person in relation to the deterioration of the film properties when the polyvinyl alcohol was modified by an anionic group.

- D12 should be considered to represent the closest prior art, not D1. The skilled person starting from D12 would have found no indication in this document as to how to complete the incomplete disclosure of the exemplified film G of D12 and arrive at the water-soluble film of claim 1. On the one hand, the disclosure of D12 was not enabling in view of the missing features of film G, such as the kind of plasticizer, borate scavenger, antiblocking/release agent and antioxidant. On the other hand, D12 required the presence of an additional ingredient in the composition of film G, namely a borate scavenger, in order to achieve the water-solubility of the film in contact with borate-containing additives. The technical evidence of the patent in suit showed that the claimed film had advantageous properties (improved solubility) in comparison with film G of D12, the latter corresponding to comparative example 1 of the patent in suit. Furthermore, when considering all the examples and comparative examples of the patent in suit the skilled reader would have derived a synergism of different effects, this synergism resulting from the combination of all the features of claim 1 of the main request.

Auxiliary requests

- Auxiliary requests I to IIIc filed with the letter of 20 December 2019 should be admitted into the proceedings. They addressed the issues raised in the board's preliminary opinion, were converging

and corresponded to a reduced number of auxiliary requests.

XV. The arguments put forward by the respondents which are relevant to the present decision may be summarised as follows:

Admissibility of the appeal

- The appeal was inadmissible since the statement setting out the grounds of appeal did not contain any reason as to why the opposition division was wrong in considering that the subject-matter of claim 1 did not involve an inventive step over D1 in combination with D12. The grounds of appeal discussed only the opposition division's decision that the subject-matter of claim 1 lacked an inventive step over D12 in combination with D1.

Novelty

- The subject-matter of claim 1 lacked novelty over D1 and in view of the prior use as substantiated by the late-filed documents D14 to D16, which the opposition division had incorrectly refused to admit into the proceedings for allegedly not being *prima facie* relevant.

Inventive step

- D17 should not be admitted into the proceedings. It represented evidence related to the particular selection of plasticizers and their ratio and addressed the issue of a beneficial effect of the claimed film. However, this issue had already been raised before the opposition division, and so D17

should have been filed during the opposition proceedings.

- The late-filed documents D19 to D22 and D25 should not be admitted into the proceedings either.
- The subject-matter of claim 1 of the main request did not involve an inventive step irrespective of whether D1 or D12 was considered to represent the closest prior art. Considering D12 as the closest prior art, there was no evidence on file of a technical effect resulting from the distinguishing features of the claimed film over film G of D12. Therefore, the technical problem in view of D12 was merely the provision of an alternative water-soluble film. The claimed water-soluble film was an obvious alternative in view of D12 considered alone.

Auxiliary requests

- Auxiliary requests I to IIIc should not be admitted into the proceedings. They were filed at a very late stage of the proceedings and represented an entirely fresh case. They did not clearly and immediately overcome the opposition division's reasons for denying inventive step.

XVI. The appellant (patent proprietor) requested:

- as the main request, that the decision under appeal be set aside and that the patent be maintained as granted;
- alternatively, that the patent be maintained on the basis of one of auxiliary requests I, II, IIIa,

IIIb and IIIc filed with the letter
of 20 December 2019.

- XVII. Respondent 1 (opponent 1) requested that the appeal be held inadmissible and - in the event that the appeal were considered admissible - that the appeal be dismissed. It also requested that the decision under appeal be reviewed with regard to the admissibility of D14 to D16, which allegedly substantiated a novelty-destroying prior use. Finally, it requested that neither D17 nor any of the appellant's auxiliary requests be admitted into the proceedings.
- XVIII. Respondent 2 (opponent 2) requested that the appeal be dismissed, that none of D17, D19 to D22 and D25 be admitted into the proceedings and that the appellant's submission, including all auxiliary requests, filed with the letter of 20 December 2019 not be admitted into the proceedings.

Reasons for the Decision

1. Admissibility of the appeal
 - 1.1 Respondent 1 contested the admissibility of the appeal because the appellant had not set out in its statement setting out the grounds of appeal why the subject-matter of claim 1 of the main request involved an inventive step when D1 was considered to represent the closest prior art. The appellant had merely disputed the opposition division's decision that D1 represented the closest prior-art document.
 - 1.2 In the decision under appeal the opposition division considered that D1 represented the closest prior art

and that the subject-matter of claim 1 did not involve an inventive step in view of the obvious combination of D1 with either D3 or D12 (the contents of D3 and D12 were considered to be the same). The opposition division also considered that the subject-matter of claim 1 lacked an inventive step even if D12 was chosen as the closest prior art because of the obvious combination with D1.

- 1.3 The board considers that the appellant dealt with all the crucial aspects of the contested decision and provided reasons as to why, in its view, the opposition division's decision should be set aside. It is acknowledged that in its statement setting out the grounds of appeal the appellant did not provide a detailed assessment as to why the claimed subject-matter involved an inventive step when starting from D1 as the closest prior art. However, the appellant explained in detail why D12 should be considered to represent the closest prior art compared with D1 and why the claimed subject-matter involved an inventive step when starting from D12. In the board's view this was sufficient to properly address the most essential issue in the appealed decision, namely that of inventive step.

In view of the above, the board decided that the appeal was admissible.

MAIN REQUEST

2. Admission of D17
 - 2.1 Both respondents requested that D17 not be admitted into the proceedings on the ground that it should have been filed before the opposition division.

2.2 D17 is an experimental report submitted by the appellant in the context of the assessment of inventive step and deals, in particular, with improved effects achieved by the claimed water-soluble film in terms of "time-lapse stability". According to the appellant, D17 demonstrates mechanical properties (elastic modulus increase ratio and impact resistance) which are representative of an improved time lapse stability of a claimed film.

2.3 D17 was filed by the appellant with the statement setting out the grounds of appeal, i.e. as a reaction to the opposition division's finding that the subject-matter of claim 1 was an obvious alternative in view of the film disclosed in D12 because there were no data available to show any technical effect resulting from the selection of the mixture of glycerol with diglycerol and/or trimethylolpropane.

2.4 The issue concerning the absence of a technical effect over the film of D12 had already been raised by respondent 1 in its notice of opposition (see point 4.5) and repeated in its letter dated 24 October 2014 (page 3, last paragraph). Thus, this objection was known to the appellant from the very beginning of the opposition proceedings and the appellant should have reacted earlier by submitting the experimental evidence of D17 before the opposition division.

Furthermore, from the minutes of the oral proceedings before the opposition division (see point 12) it is apparent that the appellant itself considered D12 to represent the closest prior art and should have filed

the experimental evidence of D17 at that time since it had been aware of respondent 1's objection.

In the present situation, waiting until the opposition division had decided on the issue of inventive step to file experimental evidence allegedly demonstrating a technical effect over D12 with the statement setting out the grounds of appeal in order to overcome the adverse decision of the opposition division is not considered fair and appropriate behaviour.

Thus, exercising its discretion under Article 12(4) RPBA 2007, the board did not admit D17 into the appeal proceedings.

2.5 D19 to D22 were filed by the appellant to further substantiate which physical properties were generally evaluated in terms of the time-lapse stability of a thermoplastic resin film. These documents were filed to demonstrate that the properties measured in D17 were able to show improved time-lapse stability. Thus, in this respect D19 to D22 were only filed in support of D17. Since D17 was not admitted into the proceedings, there was no need to decide on the admission of D19 to D22.

2.6 D25 was also filed by the appellant to support its argument on inventive step if D1 were to be considered to represent the closest prior art. Since the inventive step was denied starting from D12 as the closest prior art (see below), there was no need to decide on the admission of D25 either.

3. Inventive step

3.1 The closest prior art

The subject-matter of claim 1 concerns a water-soluble film comprising an anionic group-modified polyvinyl alcohol as a main component, which according to the patent in suit is suitable for packaging chemicals containing a boric acid substance and which exhibits excellent water solubility without being gelled, even in an aqueous solution of a boric acid substance (see paragraphs [0001] and [0006]).

There was agreement among the parties that D12, which relates to water-soluble polymeric films with an anionic group-modified polyvinyl alcohol as the main component and which retains its water solubility in the presence of an alkaline or borate-containing cleaning composition (column 3, lines 5-9) and thus lies within the same technical field, could qualify as an appropriate starting point in the assessment of inventive step. The board sees no reason to deviate from this congruent opinion. Thus, D12 is considered to represent the closest prior-art document in the present case.

There was also agreement among the parties that the example relating to film G of D12 (column 8, line 68 to column 9, line 2; Table 1) qualifies as the embodiment which comes closest to the claimed subject-matter.

Film G of D12 relates to a water-soluble film which contains a copolymer comprising vinyl alcohol units (derived from hydrolysed vinyl acetate units) and anionic units (derived from maleic anhydride) having a

degree of hydrolysis of 97% to 95% by mole (in view of Table 1, which discloses 3 to 5% by mole of residual acetate), a rate of anionic group modification of 2.3% by mole (maleate), and a viscosity of 17 cPs when dissolved in 25°C water to a level of about 4%. It was common ground among the parties that this copolymer used in film G falls within the scope of component (A) of claim 1 of the main request.

Film G was made following example A of D12 (column 8, lines 8-36) and therefore further contains a plasticizer, a borate scavenger, an antiblocking/release agent and an antioxidant. However, these additional components are not specified in the experimental part of D12; only the amount of copolymer in the film is disclosed to be about 70.3% and the amount of plasticizer is given as 21.5%.

The water-soluble film of claim 1 differs from film G of D12 in that:

- the plasticizer is a mixture of glycerol with at least one of the compounds trimethylolpropane and diglycerol;
- the ratio of glycerol to trimethylolpropane and/or diglycerol is 15/85 to 85/15 by weight;
- the amount of filler is 2 to 30 parts by weight; and
- a surfactant is present in the amount of 0.01 to 2.5 parts by weight.

The appellant considered that there was an additional difference relating to the amount of plasticizer.

However, the amount of plasticizer calculated on the basis of the disclosure of D12 (21.5%; column 8, line 35) falls within the claimed range. Thus, the board does not agree with the appellant in this respect.

The appellant also considered that claim 1 did not require a borate scavenger, whereas a borate scavenger was an ingredient of the film G of D12. The board does not agree with the appellant in this respect because claim 1 has open wording (use of the term "comprising") which does not exclude the presence of a borate scavenger.

3.2 The technical effect

3.2.1 The next point to be assessed is whether there is an effect resulting from the above-identified distinguishing features.

The patent in suit discloses the "stability for a long term" (paragraph [0010]) and the "time-lapse stability of films" as effects (paragraphs [0031] and [0032]).

The appellant relied on the experimental report D17 in order to explain which technical interpretation the skilled person would give to the "time-lapse stability" and the "stability for a long term" and to try and demonstrate improved effects of the claimed film. Since D17 was not admitted into the proceedings, this interpretation and those effects cannot be taken into consideration and have no influence on the formulation of the objective technical problem. The only remaining interpretation derivable from the patent in suit is that these expressions relate to the solubility of the films.

3.2.2 To demonstrate an effect of the claimed film over that of D12 on the basis of solubility, the appellant referred to the comparison of the examples of the patent in suit with comparative example 1 of the patent in suit, the latter allegedly being equivalent to film G of D12. The board does not consider this comparison to be relevant because the film of comparative example 1 of the patent in suit differs in numerous ways from film G of D12, e.g. with regard to the viscosity, the rate of modification and the amount of borate scavenger. Moreover, it does not contain any plasticizer, any antiblocking/release agent and any antioxidant. Thus, it cannot be considered as an appropriate representative of film G of D12.

3.2.3 The appellant also alleged that a synergism could be derived from the comparison of all the comparative examples with the examples of the patent in suit concerning the maintenance of the solubility over time, even under the effect of sodium perborate, and the maintenance of the plasticizing effect at a temperature lower than the film's typical temperature of use. However, neither comparative example 1 of the patent in suit nor the remaining comparative examples 2 to 10 can be considered to correspond to film G of D12. Thus, the comparison of the examples with comparative examples of the patent in suit does not show any synergism over the film of D12. In the absence of any appropriate comparison with respect to film G of D12, the board cannot agree with the appellant in this respect either.

3.2.4 The appellant also alleged that a comparison with film G of D12 was not possible because the disclosure of D12 was not enabling in view of the lack of information with respect to the type of plasticizer, borate

scavenger, antiblocking/release agent and antioxidant used for the manufacture of film G.

It is acknowledged that film G of D12 does not specifically mention which plasticizer, borate scavenger, antiblocking/release agent and antioxidant are used. D12 does, however, disclose suitable plasticizers, surfactants and borate scavengers which the skilled person could use to complete the missing information (column 6, line 61 to column 7, line 36). Furthermore, the skilled person in this technical field would be aware of typical antiblocking agents and antioxidants to use in this context. Thus, the skilled person is able to rework film G of D12 taking into account the entire disclosure of D12. Thus, the board cannot agree with the appellant in this respect.

3.2.5 For the reasons outlined above, the board concurs with the opposition division that the distinguishing features of claim 1 do not result in any technical effect.

3.3 The technical problem and its solution

In the absence of any technical effect the objective technical problem in view of D12 is the provision of an alternative water-soluble film. There is no doubt that this technical problem is solved (see examples 1 to 4 of the patent).

3.4 Obviousness

3.4.1 The question which remains to be answered is whether the skilled person departing from film G of D12 would find any motivation in the state of the art to arrive at the film of claim 1 in an obvious manner.

The skilled person is taught by D12 (column 6, line 66, to column 7, line 7) that any plasticizer known in the art for use with polyvinyl alcohol may be used, including glycerol and trimethylolpropane as well as mixtures thereof, in an amount of preferably 15 to 30% by weight. Furthermore, the skilled person would contemplate that any ratio of those plasticizers is suitable to manufacture an alternative water-soluble film. D12 discloses that a surfactant may be used in an amount of preferably 0.01 % to 0.05% (see column 7, lines 8 to 14), but also other commonly used film additives (such as the claimed fillers) may be used in an amount sufficient to perform their intended functions as known in the art (see column 7, lines 29 to 33). Thus, D12 teaches adding these ingredients to the composition of a water-soluble film and the skilled person would obviously contemplate adding them to the composition of film G when looking for an alternative. Thus, the claimed film is obvious in view of the general disclosure of D12.

3.4.2 The appellant alleged that film G of D12 required the presence of a borate scavenger to achieve solubility of the film in contact with borate-containing additives.

However, claims 1 and 2 of D12 do not require the presence of a borate scavenger in the water-soluble film, which means that its presence in the film composition is optional. The disclosure in column 7, lines 15 to 23 of D12 that "(t)o improve solubility of the film in contact with borate-containing additives, a borate scavenger may be added" (emphasis added by the board) is understood to mean that a borate scavenger may be added, but is not necessarily added to achieve

solubility. Thus, the board cannot agree with the appellant in this respect.

- 3.5 In conclusion, the subject-matter of claim 1 of the main request does not involve an inventive step, so this request is not allowable.
4. In view of the fact that the ground for opposition under Article 100(a) EPC (lack of inventive step) prejudices the maintenance of the patent in suit on the basis of the main request, the board does not consider it necessary in its decision to elaborate on the finding that the subject-matter of claim 1 of the main request is novel and that the decision of the opposition division relating to the late-filed documents D14 to D16 is upheld, meaning that these documents are not admitted into the proceedings.

AUXILIARY REQUESTS I TO IIIc

5. Admission of auxiliary requests I to IIIc
- 5.1 Regarding the respondents' request that auxiliary requests I to IIIc not be admitted into the proceedings, the appellant responded by stating that they should be admitted into the proceedings since (i) they addressed the issues raised in the board's communication, (ii) they were converging and (iii) they condensed the number of auxiliary requests.
- 5.2 Auxiliary requests I to IIIc were submitted with the appellant's letter of 20 December 2019. They were filed after the statement setting out the grounds of appeal had been submitted, after a date for oral proceedings had been set and after the board had issued an official communication giving its preliminary opinion. Thus,

their admission has to be assessed in view of the provisions of Articles 13(1) and (3) RPBA 2007.

5.3 The appellant's argument was essentially that auxiliary requests I to IIIc were filed as a direct reaction to the preliminary opinion of the board, in particular in relation to the board's assessment of Article 123(3) EPC for some auxiliary requests.

5.4 It may be that the auxiliary requests were filed in reply to the board's communication. However, the board's communication was issued on 5 June 2019 and the appellant's auxiliary requests were filed on 20 December 2019. This means that the reply was filed extremely late and gave the respondents less than one month to consider the new requests. Indeed, the EPO was officially closed between 21 December 2019 and 2 January 2020. Furthermore, the auxiliary requests had not been sent by courtesy directly to the respondents.

Moreover, the appellant reintroduced requests that had been withdrawn in the course of the appeal proceedings. Auxiliary request I reverted back to the initial auxiliary request II as filed with the statement setting out the grounds of appeal (which corresponded to the sixth auxiliary request before the opposition division). However, that initial auxiliary request II together with the further initial auxiliary requests were replaced during the appeal proceedings by other auxiliary requests (letter of 10 March 2017), which were again replaced by other auxiliary requests (letter of 4 February 2019). As a consequence, the initial auxiliary request II had been implicitly withdrawn from the appeal proceedings and had no longer been pursued until it was finally resubmitted with the letter

of 20 December 2019 (ultimately as auxiliary request I). The same occurred with auxiliary requests II to IIIc, which were based on auxiliary request I (dated 20 December 2019).

Furthermore, some of the auxiliary requests do not appear able to overcome the objections raised against the main request (e.g. claim 1 of auxiliary requests I and II), and some raise new issues which unnecessarily complicate the case at a very late stage of the proceedings (e.g. auxiliary requests IIIa to IIIc trying to resolve the rather complex issue of Article 123(3) EPC which had been raised by respondent 1 in its letter of 25 May 2017 and thus had been known to the appellant for about 2.5 years).

Under the present circumstances, in view of the complexity of the new submission, the current state of the proceedings and the need for procedural economy, the board exercised its discretion under Articles 13(1) and (3) RPBA 2007 and did not admit auxiliary requests I to IIIc into the proceedings.

6. Thus, there is no allowable request on file.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chair:



D. Magliano

N. Perakis

Decision electronically authenticated