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**Datasheet for the decision
of 3 December 2020**

Case Number: T 0194/17 - 3.2.03

Application Number: 05769658.5

Publication Number: 1782011

IPC: F25J3/04

Language of the proceedings: EN

Title of invention:

LOW TEMPERATURE AIR SEPARATION PROCESS FOR PRODUCING
PRESSURIZED GASEOUS PRODUCT

Patent Proprietor:

L'AIR LIQUIDE, Société Anonyme pour l'Etude
et l'Exploitation des Procédés Georges Claude

Opponent:

Linde GmbH

Headword:

Relevant legal provisions:

EPC 1973 Art. 100(a), 56, 100(b)
RPBA Art. 13(1)
EPC R. 103(1)(a)

Keyword:

Inventive step - (no)

Substantial procedural violation - (yes)

Amendment to appeal case - amendment overcomes issues raised
(no)

Reimbursement of appeal fee - (no)

Decisions cited:

Catchword:



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Case Number: T 0194/17 - 3.2.03

D E C I S I O N
of Technical Board of Appeal 3.2.03
of 3 December 2020

Appellant: Linde GmbH
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 10 November
2016 rejecting the opposition filed against
European patent No. 1782011 pursuant to Article
101(2) EPC.**

Composition of the Board:

Chairman C. Donnelly
Members: V. Bouyssy
 E. Kossonakou

Summary of Facts and Submissions

- I. European patent No. 1 782 011 (in the following: the patent) concerns a method of low temperature air separation for producing pressurized gaseous product.
- II. The patent as a whole was opposed on the grounds that its subject-matter extended beyond the content of the application as filed (Article 100(c) EPC 1973), that it was insufficiently disclosed (Article 100(b) EPC 1973) and that it lacked novelty and inventive step (Article 100(a) EPC 1973).
- III. The opposition division decided to reject the opposition against the patent. This decision was appealed by the opponent (in the following "appellant").
- IV. The parties were initially summoned to attend oral proceedings scheduled for 8 September 2020. In a communication pursuant to Article 15(1) of the Rules of Procedure of the Boards of Appeal (RPBA 2007) annexed to this summons, the Board indicated its preliminary opinion of the case.
- V. By letter of 24 July 2020 the respondent stated that it could not attend the oral proceedings due to current precautionary measures against the spread of the coronavirus (COVID-19).
- VI. With the agreement of the parties, the Board rescheduled the oral proceedings for 3 December 2020 to be held as a videoconference (ViCo).

VII. Oral proceedings before the Board were duly held by video conference on 3 December 2020.

VIII. *Final requests*

The appellant requested:

- that the appealed decision be set aside and the patent be revoked and
- that the appeal fee be reimbursed.

The patent proprietor (in the following "respondent") requested that the appeal be dismissed and the patent be maintained as granted or, alternatively, on the basis of one of the first to fourth auxiliary requests submitted with the letter of 27 November 2020.

IX. *Claims of the respondent's requests*

(a) *Main request*

Independent method claim 1 as granted reads as follows:

"A method of low temperature air separation which may be used for producing pressurized gaseous product comprising:

- a) cooling a compressed air stream in an exchanger (65) to form a compressed cooled air stream;
- b) forming a first pressurized gas stream by cryogenically compressing at least a portion of said compressed cooled air stream in a first compressor (50), wherein said first compressor comprises a first inlet temperature;
- c) cooling at least a portion of said first pressurized gas stream in said exchanger to form a first cooled pressurized gas stream;
- d) forming a second pressurized gas stream by

cryogenically compressing at least a portion of said first cooled pressurized gas stream in a second compressor (51), said second compressor comprising a second inlet temperature;

- e) cooling and at least partially liquefying said second pressurized gas stream;
- f) feeding said cooled, partially liquefied second pressurized gas stream to a system of at least one distillation column (80,81);
- g) feeding said distillation column system with a liquid feed stream (56,30,32,33,34) derived from air;
- h) extracting a liquid product (20) from said distillation column system;
- i) pressurizing at least part of said liquid product;
- j) vaporizing at least part of said liquid product; and
- k) warming at least part of said liquid product in said exchanger to yield a pressurized gaseous product characterized in that
- l) said first inlet temperature is about the boiling temperature of said liquid product."

Independent apparatus claim 8 reads as follows (the numbering of the characterising feature is introduced by the Board for ease of reference):

"An apparatus which may be used for producing pressurized gaseous product comprising:

- a) a system of at least one distillation column (80,81);
- b) a conduit (30,32,33,34,56) for feeding a liquid stream to said distillation column system, wherein said liquid stream is derived from air;
- c) a heat exchanger (65) comprising a warm end and a cold end;
- d) a first compressor (50) comprising a first inlet

- temperature;
- e) a second compressor (51) comprising a second inlet temperature;
- f) a conduit (1) for feeding a compressed air stream to said exchanger;
- g) a conduit (52) for removing compressed cooled air from at least one member selected from the group consisting of:
 - 1) an intermediate part of said exchanger; and
 - 2) the cold end of said exchanger;
- h) a conduit (52) for sending said compressed cooled air to said first compressor to create a first pressurized gas stream;
- i) a conduit (53) for sending at least a portion of said first pressurized gas stream to said exchanger to form a first cooled pressurized gas stream;
- j) a conduit (55) for sending at least a portion of said first cooled pressurized gas from said exchanger to said second compressor to form a second pressurized gas stream;
- k) a conduit (54) for sending at least part of said second pressurized gas stream to said exchanger;
- l) a conduit (56) for removing from said exchanger at least part of said second pressurized gas stream and feeding said second pressurized gas stream to said distillation column system;
- m) a conduit (20) for removing a liquid stream from said distillation column system;
- n) a means (21) for pressurizing at least part of said removed liquid stream to form a pressurized liquid stream; and
- o) a conduit (23) for sending at least part of said pressurized liquid stream to said exchanger, characterized in that
- p) the conduit (52) of feature g) is connected to the heat exchanger such that the first inlet temperature

is about the boiling temperature of said removed liquid stream."

(b) Auxiliary requests

Compared with claim 1 as granted added passages are indicated in bold, deleted passages in strike-through:

First auxiliary request

Claim 1 of the first auxiliary request comprises the following amendments:

1) said first **and second** inlet temperatures ~~is~~ **are about the boiling temperature of said liquid product.**

Second auxiliary request

Claim 1 of the second auxiliary request comprises the following amendments:

1) said first **and second** inlet temperatures ~~is~~ **are about the boiling temperature of said liquid product and at least part of said liquid feed stream (30) originates from a storage means (70).**

Third auxiliary request

Claim 1 of the third auxiliary request comprises the following amendments:

1) said first **and second** inlet temperatures ~~is~~ **are about the boiling temperature of said liquid product and at least part of said liquid feed stream (30) originates from a storage means (70) fed from an external source.**

Fourth auxiliary request

Claim 1 of the fourth auxiliary request comprises the following amendments:

1) said first **and second** inlet temperatures ~~is~~ **are about the boiling temperature of said liquid product and at least part of said liquid feed stream (30) originates from a storage means (70) fed from an external source and all said cooling is performed in the absence of turboexpansion.**

X. *Prior art*

The appellant relied on the following patent publications, which were filed in the opposition proceedings and are cited in the decision under appeal:

E1: US 5,475,980;

E9: WO 2005/057112 A1.

XI. The arguments of the parties, insofar as relevant for the present decision, can be summarised as follows:

Main Request

(a) Article 100(b) EPC

The appellant, stated that the issue of insufficient disclosure of dependent claims 6, 11 and 12 had been attacked under Article 100(b) EPC in their notice of opposition. However, the contested decision failed to address these objections. Although in the appellant's view this constituted a substantial procedural violation, they requested during the oral proceedings that the Board deal with the matter rather than remit the case. The appellant maintained its case as presented in the written procedure.

The respondent submitted that as regards claim 6, in the absence of turboexpansion, it is well known to add a cryogenic liquid to provide refrigeration as described in paragraph [0022] of the patent. For claims 11 and 12, the liquid feed stream is mentioned in claims 1 and 7 and the skilled person understands that the storage tank stores this stream. The liquid feed stream was originally mentioned in claim 11 of the PCT application in feature m) and the reader understands from the file which stream is meant in claims 11 and 12.

(b) Article 100(a) - Claim 1, Novelty

The appellant submitted that, contrary to the contested decision, the skilled person would implicitly, but clearly and directly deduce from the explicit disclosure of two serial cold compressors in E1 at column 5, lines 7 to 13, that intermediate cooling takes place between those two cold compressors and that this would take place in the main heat exchanger. Thus, the subject-matter of claim 1 as granted lacks novelty in view of E1.

The respondent argued that feature c) of claim 1 is not directly and unambiguously derivable from E1 since there is no mention of intercooling between the compressors.

(c) Article 100 (a) claim 1, Inventive step

The appellant submitted that, should it be decided that the method of claim 1 differs from the above embodiment of E1 by feature c) there is in any case no inventive step.

The use of intercooling is obvious to the skilled person. It is asserted in the contested decision that, instead of the claimed solution, intercooling could be carried out by "using any other type of refrigeration" (section 2.4.7). However, the contested decision does not give a single example of such alternative intercooling.

The question of whether there are alternatives to intercooling between two cold compressors must be examined specifically on the basis of figure 1 of E1, supplemented by the two serial cold compressors as specified in the description (column 5, lines 7 to 15). There are two heat exchangers that are possible as cold sources for intercooling:

- HWT = main heat exchanger in which the liquid oxygen product from pump 6 is evaporated. The HWT ranges from about ambient temperature at the warm end to slightly above -180°C at the cold end (see Figure 2);
- UKG = supercooling counterflow 5 at temperatures below the cold end of the HWT.
- The temperature T2 at the outlet of the cold compressor 7 in figure 1 can also be read in figure 2; it is slightly below -100°C . This temperature is the starting temperature for intercooling in the case of two serial cold compressors. The flow compressed in the first cold compressor ("first pressurised gas flow" as defined by the European patent) must be cooled from just under -100°C to the inlet temperature (TI in Figure 2).

For intercooling, the skilled person has no choice at all; he must carry it out in the main heat exchanger HWT. There are no technically reasonable alternatives.

The process according to claim 1 is therefore not based on an inventive step.

The respondent was of the view that there is no clear reason why the skilled person would definitely conclude that a cooling step in the heat exchanger was necessary and advantageous. In this particular case, intercooling between the two compressors was not necessary since the heat was used to vaporise the liquid product stream in the main heat exchanger. The two compressors would simply be connected to the two available turbines; this would easily be achieved by replacing the brake 10 by a compressor.

There are also far simpler and more convenient ways of cooling, such as a conventional intercompression water cooler. In conclusion, there is no clear pointer to using the heat exchanger for any cooling between the two compressors in series.

(d) Auxiliary requests - Admission into the proceedings

The appellant requested that the first to fourth auxiliary requests not be admitted into the appeal proceedings, since although they essentially correspond to claims that had been filed during the opposition proceedings, the respondent had never submitted any supporting argumentation to explain the amendments. In their view the claims were also not prima facie clearly allowable. However, it was not up to them to speculate on why the subject-matter of any of the requests might or might not comprise allowable subject-matter. Furthermore, several of the amendments appear to be merely changes to the reference signs and grammar and therefore do not meet the requirement of Rule 57a EPC 1973.

The respondent requested that the case be remitted to the opposition division for further prosecution since the auxiliary requests filed with the grounds of appeal corresponded to those submitted during the opposition proceedings.

(e) Reimbursement of the appeal fee

The appellant requested reimbursement of the appeal fee, firstly since the opposition division failed to address its objections under Article 100 (b) EPC against claims 6, 11 and 12 ; and secondly for the infringement of the right to be heard with respect to the failure of the opposition division to listen to its arguments concerning the assertion that intercooling could be carried out by "using any other type of refrigeration".

Reasons for the Decision

1. Applicable provisions of the EPC

1.1 The patent is based on an International application which was filed under the PCT on 12 July 2005 and was still pending at the time of entry into force of the revised EPC (EPC 2000) on 13 December 2007.

1.2 According to Articles 1(1) and 6, first sentence of the Decision of the Administrative Council of 28 June 2001 on the transitional provisions under Article 7 of the Act revising the EPC of 29 November 2000 (Special edition No. 4, OJ EPO 2007, 217), Articles 54(2), 56, 87, 100, 111 and 113 EPC 1973 as well as Articles 52, 54(3) and 153 EPC (2000) apply. With respect to potentially colliding European applications pursuant to

Article 54(3) EPC, however, the provisions of Article 54(4) EPC 1973 continue to apply. By analogy, with respect to potentially colliding Euro-PCT applications pursuant to Article 54(3) EPC, the provisions of Article 158(2) EPC 1973 and Rule 106 EPC 1973 continue to apply. Since Rules 57a and 67 EPC 1973 are linked respectively to Articles 100 and 111 EPC 1973, they are to be applied in the present case (by analogy with J 10/07, OJ EPO 2008, 567).

2. *Applicable Rules of Procedure of the Boards of Appeal*

2.1 The revised version of the Rules of Procedure of the Boards of Appeal (RPBA 2020) came into force on 1 January 2020 (Articles 24 and 25(1) RPBA 2020).

2.2 Subject to the transitional provisions (Article 25 RPBA 2020), the revised version also applies to appeals pending on the date of the entry into force.

2.3 In the present case the statement of grounds of appeal was filed before 1 January 2020. Thus, Article 12(4) to (6) RPBA 2020 does not apply, and instead Article 12(4) RPBA 2007 applies to the grounds of appeal (Article 25(2) RPBA 2020).

2.4 Since the summons to the oral proceedings has been notified before 1 January 2020, Article 13 RPBA 2007 is to be applied for questions regarding any amendment to the respondent's appeal case in response to the summons.

3. *Main request - Article 100(b) EPC 1973*

3.1 The appellant submitted that the patent does not sufficiently disclose how feature p) of apparatus claim

8 as well as the preferred embodiments of the invention defined in claims 6, 11 and 12 can be put into practice.

3.2 The Board shares the respondent's view that these objections are not persuasive:

3.2.1 With respect to feature p) of claim 8, the Board agrees with the appellant insofar as the wording of this feature is not limited to the normal mode of operation of the apparatus. In the context of this claim for an apparatus, feature p) must be construed as a functional feature specifying that the conduit of features g) and h) must be suitable for feeding the first compressor with cooled air having a temperature near the boiling temperature of the liquid stream which is removed from the distillation column system (feature m)). Thus, feature p) may be construed in a broad manner when assessing novelty or inventive step.

However, when seeking to put into practice the apparatus of claim 8, the skilled person would read feature p) in the context of the patent as a whole and they would immediately understand that feature p) relates to the normal mode of operation of the apparatus for producing pressurized gaseous products. The Board shares the respondent's view that the skilled person would know, without exceeding their normal skill and knowledge, how to implement feature p). This is confirmed by the teaching of E1 (column 3, lines 58 to 65 and process step c) in claims 1, 10, 18, 24, 28, 37).

3.2.2 With respect to claim 6, paragraph 22 of the patent makes clear that, in the absence of any turboexpanders, the addition of cryogenic liquid 30 shall provide

essentially all the refrigeration required by the process.

3.2.3 With respect to claims 11 and 12, it is clear in the light of the patent as a whole that the term "said fluid feed stream" refers to the liquid feed stream which is fed to the distillation column system when the two cold compressors are in operation.

3.3 Therefore, the ground of opposition under Article 100(b) EPC 1973 does not prejudice the maintenance of the patent as granted.

4. *Main request, Claim 1 - Novelty*

4.1 The appellant contends that the subject-matter of claim 1 lacks novelty in light of E1.

4.2 It is in dispute among the parties whether E1 discloses feature c) of claim 1. Whilst it follows from column 5, lines 7 to 10 of E1 that, in contrast with the embodiment shown in figure 1, the single cold compressor 7 may be replaced by two cold compressors connected in series, it cannot be directly and unambiguously derived from E1 that the first compressor's outlet gas would then be cooled in the main heat exchanger 4, before being introduced into the second compressor.

Thus, the Board agrees with the respondent that feature (c) of claim 1 requiring cooling at least a portion of the first pressurized gas stream in said exchanger to form a first cooled pressurized gas stream, is not disclosed by E1.

5. *Main request - Claim 1, Inventive step*

5.1 The appellant argued that the above distinguishing feature does not involve an inventive step.

5.2 The Board is not persuaded that the technical problem to be solved can be seen as that set out in the decision under appeal (see point 2.4.5) of how to improve fluid feed, since this formulation ignores the actual effect of the distinguishing feature, which is to allow for a more isothermal compression and thus a more energy-efficient compression. In view of this, the objective technical problem is considered to be one of how to improve the method of E1 in terms of energy efficiency.

5.3 It is accepted common general knowledge in the art that intercooling between compression stages is standard practice in order to improve efficiency.

Faced with the above problem, the question is then whether the skilled person would need to exercise an inventive step in order to decide to carry out this intercooling in the main heat exchanger. As set out by the appellant, two heat exchangers are potentially available in the installation of figure 1 of E1 which could be used as cold sources for intercooling:

- the main heat exchanger (MHE) 4 in which the liquid oxygen product from pump 6 is evaporated. The MHE ranges from about ambient temperature at the warm end to slightly above minus 180°C at the cold end (see Figure 2);
- the subcooler 5 for supercooling in counterflow at temperatures below the cold end of the MHE.

5.4 The temperature T2 at the outlet of the cold compressor 7 in figure 1 can also be read in figure 2 as being slightly below minus 100°C. This temperature is the starting temperature for intercooling in the case of two serial cold compressors. The flow compressed in the first cold compressor ("first pressurised gas flow" as defined by the European patent) must be cooled from just under minus 100°C to the inlet temperature T1 (just under minus 120°C in Figure 2). By contrast the subcooler 5 operates at temperatures lower than the cold end of the MHE.

E1 also indicates at column 5, lines 10 to 12 of E1 that "the sum of the compression heat is about equal to the excess of cold produced by the vaporization of oxygen". This is a direct indication that the compression heat should be dissipated in the MHE rather than in some alternate cooling device such as a conventional intercompression water cooler as suggested by the respondent in their reply to the grounds. A water cooler would in any case be unsuitable for such temperatures.

5.5 The Board also considers that if the authors of E1 had intended the two compressors of the variant suggested at column 5, lines 7 to 13 be simply connected to the two available turbines (for example by replacing the brake 10 by a compressor as suggested by the respondent), then this would have been stated.

5.6 In conclusion, the Board is of the opinion that it would not only be (i) obvious for the skilled person to carry out intercooling, but also (ii) to carry out this intercooling in the main heat exchanger 4 of E1.

5.7 Therefore, the subject-matter of claim 1 as granted lacks an inventive step.

6. *Auxiliary requests - Admission into the appeal proceedings*

6.1 The auxiliary requests essentially correspond to those filed with the response to the grounds of appeal.

6.2 In its provisional opinion, the Board explicitly drew the respondent's attention to the appellant's submission that the auxiliary requests failed to meet the requirements of Rule 57a EPC 1973 since they were not accompanied by any reasons as to why they overcome a ground of opposition (see paragraph 14.2).

6.3 However, despite this indication and the Board's provisional opinion indicating a probable negative outcome for the respondent as regards inventive step (see paragraph 13.5), at no stage in the written appeal proceedings were any supporting arguments presented setting out why the auxiliary requests overcome a ground of opposition or their technical relevance. Such requests - which are not self-explanatory - are considered by the Board as being submitted only on the date of their substantiation, i.e. during the oral proceedings.

6.4 According to the established case-law of the boards of appeal, such late filed requests will only be admitted if they are prima facie (clearly) allowable (Articles 13(1) and 13(3) RPBA 2007).

6.5 In this case, the amendments introduced in the auxiliary requests do not clearly overcome the objection of lack of inventive step in light of E1. In

fact, in the oral proceedings, the respondent acknowledged that the amendments of the first auxiliary request did not change the assessment of inventive step when starting from E1. Also the respondent's submissions relating to sufficiency of disclosure (see paragraph XII (a) above) would tend to indicate that it is well known to add a cryogenic liquid from a reservoir to provide refrigeration in the absence of turbo expansion.

6.6 Thus, since the amended sets of claims of all the auxiliary requests were not prima facie (clearly) allowable, the Board decided not to admit them into the proceedings.

7. In the absence of any allowable claim request, the patent must be revoked.

8. The non admittance of the auxiliary requests into the proceedings results in the respondent's request for remittal being deprived of content. The request is thus refused.

9. *Substantial procedural violations and reimbursement of the appeal fee*

9.1 In the decision under appeal (point 2.4.6 of the reasons), the opposition division held that the subject-matter of claim 1 involved an inventive step when starting from E1 as closest prior art, because it was not obvious for the skilled person to modify E1 by performing an intermediate cooling step in the heat exchanger. The opposition division based its decision on the argument that, "although it may be required to cool the air stream after the first compressor in order to remove the heat of compression, such a cooling step

can be performed using any kind of refrigeration e. g. from the product streams or from an external source". The appellant submits that this crucial argument was neither discussed at the oral proceedings, nor mentioned in the written proceedings. However, it appears that this argument was at least implicitly submitted in the respondent's response to the notice of opposition. Indeed, on page 4, paragraph 2 of its response, the respondent argued that, when starting from E1, the skilled person would contemplate placing a water cooled refrigerant between the two stages to allow isothermal compression and thereby improve efficiency. This argument of the respondent was also mentioned in the annex to the summons to oral proceedings. In conclusion, the Board is of the view that the appellant had sufficient opportunity to present counter-arguments, as required by Article 113(1) EPC 1973, and that no procedural violation occurred in this respect.

9.2 In the notice of opposition (point 5), the appellant raised objections of insufficiency of disclosure against claims 6, 11 and 12 as granted. However, the written decision is silent as to why the opposition division did not find these objections convincing. Hence, the decision is not sufficiently reasoned in this respect which constitutes a substantial procedural violation (Article 113(1) EPC 1973).

9.3 The Board notes that a substantial procedural violation of this order could in principle be sufficient reason for setting aside the contested decision, remitting the case to the opposition division (Article 111(1) EPC 1973 and Article 11 RPBA) and reimbursing the appeal fee (Rule 67 EPC 1973). However, in the oral proceedings, the appellant requested that the case not

be remitted to the opposition division and that it be decided by the Board itself.

- 9.4 In view of the principle of procedural economy, the length of the opposition (appeal) proceedings to date, the already advanced age of the patent and the fact that the violation concerns dependent claims, the Board acceded to the appellant's request.
- 9.5 Pursuant to Rule 103(1)(a) EPC, in order for a refund of the appeal fee to be ordered, three requirements must be met: (1) the appeal is allowed, (2) a substantial procedural violation occurred (3) which renders the reimbursement equitable.
- 9.6 According to the established case law of the boards of appeal, in order to render the reimbursement of the appeal fee equitable, a causal link must exist between the alleged procedural violation and the filing of the appeal (see the Case Law of the Boards of Appeal of the EPO, 9th edition, July 2019, V.A.9.7.1, in particular T 272/08 and T 840/07).
- 9.7 In the present case, the appellant's objections under Article 100(b) EPC regarding claims 6, 11 and 12 were one issue among many others. Moreover, the appellant requested the Board to examine these objections itself rather than remit the case. The Board subsequently found that these particular objections did not prejudice the maintenance of the patent (see paragraphs 3.2.2 and 3.2.3 above). Therefore, there is no link between either the filing of the appeal or its success and the substantial procedural violation, which would justify a reimbursement.

9.8 Consequently, the request for reimbursement of the appeal fee is refused.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The patent is revoked.
3. The request for reimbursement of the appeal fee is refused.

The Registrar:

The Chairman:



H. Jenney

C. Donnelly

Decision electronically authenticated