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**Datasheet for the decision
of 1 June 2023**

Case Number: T 3182/19 - 3.3.02

Application Number: 11717997.8

Publication Number: 2563169

IPC: C12G1/022, A23L2/02, A23L2/38,
A23L2/52, A23L2/84, C12G3/02

Language of the proceedings: EN

Title of invention:
Method for the preparation of a fermented beverage

Patent Proprietor:
Chr. Hansen A/S

Opponents:
Lesaffre International
COMPAGNIE GERVAIS DANONE

Headword:

Relevant legal provisions:
EPC Art. 54
RPBA 2020 Art. 12(4), 12(6), 13(2)

Keyword:

Novelty

Late-filed request

Decisions cited:

Catchword:



Beschwerdekammern

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Case Number: T 3182/19 - 3.3.02

D E C I S I O N
of Technical Board of Appeal 3.3.02
of 1 June 2023

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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
10 October 2019 concerning maintenance of the
European Patent No. 2563169 in amended form.**

Composition of the Board:

Chairman P. O'Sullivan
Members: S. Bertrand
 L. Bühler

Summary of Facts and Submissions

I. The appeal lodged by opponent 1 ("appellant") is against the interlocutory decision of the opposition division that European patent No 2 563 169 in amended form according to auxiliary request 4 comprising the set of claims filed during the oral proceedings on 19 September 2019 and the invention to which it relates met the requirements of the EPC.

II. The following documents are relevant to the present decision:

D2 WO 2006/008245 A1

D11 A.M. Adams, "*The use of stored frozen yeast starter in wine production*", *Developments in Industrial Microbiology*, vol. 3, pp 341-346 (1962)

A52 Declaration of S Saerens dated 26 June 2020

III. Claim 1 according to auxiliary request 4 held allowable by the opposition division reads as follows:

"1. A method for producing a beverage comprising the following steps:

a) providing a fruit or vegetable material;

b) providing yeast in frozen form;

c) thawing the frozen yeast to get yeast in liquid form; and

d) directly inoculating the yeast in liquid form in an amount which is sufficient to initiate and maintain fermentation of the fruit or vegetable material."

- IV. In the impugned decision, the opposition division's conclusions included that the claims of auxiliary request 4 fulfilled the requirements of Articles 54, 56, 83, 84 and 123(2) and (3) EPC.
- V. In its statement of grounds of appeal, the appellant contested the reasoning of the opposition division and raised objections *inter alia* under Article 54 EPC against the claims of auxiliary request 4.
- VI. In its reply to the grounds of appeal, the patent proprietor ("respondent") submitted claim sets according to a main request and auxiliary requests 1 to 7. The main request is identical to auxiliary request 4 considered by the opposition division. It *inter alia* submitted document A52 (denoted D52 by the respondent).
- VII. In a further letter, the appellant objected to the admittance of auxiliary requests 3 and 7 and contested the allowability of all claim requests.
- VIII. In a further letter, the respondent provided additional submissions on the allowability of the claim requests and the admittance of A52.
- IX. The board issued a communication pursuant to Article 15(1) RPBA in preparation for the oral proceedings. The board gave its preliminary opinion, including that none of the sets of claims of the main request and auxiliary requests 1 to 7 were allowable.
- X. In a letter dated 12 May 2023, the respondent submitted new sets of claims according to a main request and auxiliary requests 1 to 3.
- XI. Oral proceedings before the board were held by videoconference on 1 June 2023 in the presence of the appellant and the respondent.

Opponent 2 is a party as of right and did not file any submission or request in appeal proceedings. With the letter of 28 April 2023, it stated that it would not take part in oral proceedings before the board. In accordance with Rule 115(2) EPC and Article 15(3) RPBA, the oral proceedings were held in its absence.

XII. The parties' requests relevant to the decision were as follows:

The appellant requested that the decision under appeal be set aside and that the patent be revoked in its entirety. It requested further that document A52 as well as the main request and auxiliary requests 1 to 3 filed with the letter dated 12 May 2023 not be admitted into the proceedings.

The respondent requested that the patent be maintained in amended form on the basis of one of the sets of claims of the main request and auxiliary request 1 to 3 filed with the letter of 12 May 2023. The respondent further requested that the main request and auxiliary request 1 to 3 be admitted into the proceedings.

XIII. The appellant's case can be summarised as follows:

- Main request
 - The main request should not be admitted into the proceedings.
 - The subject-matter of claim 1 of the main request lacked novelty in view of the disclosure of D2 (claim 13 and the passage on page 6, lines 10 and 11). The only selection required within D2 to arrive at the subject-matter of claim 1 of the main request was the selection of wine as the

fermentated beverage, since the fermentation to wine implied the use of yeast.

- Example "Winery B" on page 342 of D11 was prejudicial to the novelty of the subject-matter of claim 1 of the main request.
- Admittance of auxiliary requests 1 to 3
 - Auxiliary request 1 represented an amendment to the respondent's case. The reasoning given in the board's communication pursuant to Article 15(1) RPBA with regard to novelty in view of D2 had been submitted earlier by the appellant in its statement of grounds of appeal and could not be seen as new. It thus could not represent exceptional circumstances justifying admittance of the request within the meaning of Article 13(2) RPBA 2020.
 - Auxiliary request 2 constituted an amendment of the respondent's case. The objection of added matter in claim 10 of the main request on file before the opposition division was raised by the opponent 2 in the letter of 18 July 2019 and by the appellant in its letter of 19 July 2019. It could not represent a circumstance justifying the filing of auxiliary request 2 in the appeal proceedings.
 - Auxiliary request 3 was a combination of auxiliary requests 1 and 2 and the issues regarding admittance were the same as discussed for auxiliary requests 1 and 2.

XIV. The respondent's case is summarised in the Reasons below.

Reasons for the Decision

Main request

1. Novelty - claim 1
 - 1.1 The appellant raised novelty objections in view of *inter alia* D2 and D11.
 - 1.2 Claim 1 of the main request relates to a method for producing a beverage from a fruit or vegetable material and comprises the steps of providing yeast in frozen form, thawing the frozen yeast and inoculating the yeast in liquid form in an amount which is sufficient to initiate and maintain fermentation of the fruit or vegetable material.
 - 1.3 Novelty in view of D2
 - 1.3.1 D2 discloses a method of dosing a frozen inoculant (claim 13 of D2). The method comprises the steps of thawing a frozen concentrated culture and introducing a quantity of thawed culture into a liquid fermentation medium.

This method comprises the steps of providing a frozen inoculant and a fermentation medium. D13 further discloses that the method is "useful to obtain a fermentation of" *inter alia* wine (page 6, lines 10-11).

The board agrees with the appellant that the above explicitly and implicitly disclosed steps of the method of claim 13 of D2 correspond to steps a), b), c) and d) required by claim 1 of the main request, except that no

yeast and no fruit or vegetable material are disclosed in claim 13 of D2.

As set out above, the method of D13 is useful for the fermentation to wine. As submitted by the appellant, the fermentation to wine implies the use of yeast.

- 1.3.2 The respondent submitted that, considering the object of D2 to shorten the production time for fermented dairy products (page 2, line 35 to page 3, line 4), the skilled person would only derive from the reference to yeast in D2 that it can be used in cheese production, and not in the production of a beverage such as wine.

The board does not agree. The passage on page 6, lines 10-11 (see also claim 17 dependent on claim 13) reads as follows:

"The method is particularly useful to obtain a fermentation of milk, milk derived products, wine, juice, or even silage."

As set out above, the fermentation to obtain wine implies the use of yeast. Consequently, only the selection of wine among the products to be prepared or fermented is needed to arrive at the subject-matter of claim 1 of the main request.

- 1.3.3 The respondent further argued that claim 1 of the main request required, in the step of directly inoculating the yeast in liquid form (step d)), an amount of yeast that was sufficient to both initiate and maintain the fermentation. This amount was not disclosed in D2, since the method of D2 taught that the thawed yeast was to be introduced continuously into a flow of liquid to be inoculated. The continuous inoculation in D2 could not be regarded as an amount of yeast that was

sufficient to both initiate and maintain the fermentation.

The board notes first that the amount of yeast required by step d) of claim 1 of the main request is not precisely defined, e.g. as a specific range. Furthermore, as submitted by the appellant, the method disclosed in D2 to obtain a fermentation of wine implicitly discloses that the amount required by D2 should be enough to "both initiate and maintain the fermentation", as required by claim 1 of the main request. Furthermore, a continuous inoculation of thawed yeast is not excluded from step d) of claim 1 of the main request. Therefore, step d) does not represent a distinguishing feature over the disclosure of D2.

- 1.3.4 Finally, the respondent submitted that the fermentation to wine did not necessarily imply the use of yeast. The paragraph bridging pages 5 and 6 referred to the use of wine fermenting bacteria, and not yeast.

The board does not find the respondent's submission convincing. The paragraph bridging pages 5 and 6 reads "*In a further embodiment of the invention, the invention is used with cultures of wine fermenting bacteria, for example Oenococcus oeni (Leuconostoc oenos), Lactobacillus plantarum or Pediococcus sp.*" As submitted by the appellant, the bacteria used in the above passage are used to refine the wine, i.e. by transforming malic acid present in the wine into lactic acid, and not to perform an alcoholic fermentation, i.e. the fermentation of sugars into ethanol using yeast. This was not disputed by the respondent. Furthermore, this passage discloses a specific embodiment ("*In a further embodiment*"), and hence does not indicate that wine may only be obtained by the use of wine fermenting bacteria. Consequently, this passage

does not limit the general disclosure of D2 (page 6, lines 10-11) referring to the fermentation to wine, and thus to the use of yeast.

The board thus concludes that D2 anticipates the subject-matter of claim 1 of the main request.

1.4 Novelty in view of D11

1.4.1 D11 (example "Winery B", page 342) discloses a method of preparing wine comprising the step of providing "4000 gal of crushed grapes and juice", providing "a frozen starter", adding the frozen starter to a "pasteurized juice" and after 24 hours, mixing the fermenting juice with said crushed grapes and juice.

The cells were filtered and warm water was passed through the cakes to remove most of the nutrient medium. The excess moisture content of the cakes was reduced by passing air under pressure through the cakes. The cakes were crumbled to a coarse aggregate which was stored at -30°C .

The method of preparing wine in D11 corresponds to a method of producing a beverage as required by claim 1 of the main request. The step of providing "4000 gal of crushed grapes and juice" in D11 corresponds to a step of providing a fruit or vegetable material, i.e. step a) according to claim 1 of the main request. The step of providing a frozen starter represents the step of providing a frozen yeast according to claim 1 of the main request (step b)). The step of adding the frozen starter to a "pasteurized juice" implies a step of thawing the frozen starter and thus step c) according to claim 1 of the main request is disclosed in D11. Finally, the step of mixing the fermenting juice to

crushed grapes and juice is identical to step d) required by claim 1 of the main request.

Thus, D11 discloses all the steps required by claim 1 of the main request.

- 1.4.2 The respondent argued that the yeast was dehydrated in D11, as disclosed in the preparation of the yeast on pages 341 and 342. Specifically, in the preparation of the yeast as set out above, the removal of excess moisture implied the dehydration of the yeast. Adding the dehydrated yeast to the pasteurized juice for 24 hours implied that the yeast was rehydrated and became activated. Such an rehydration/activation was excluded in the method of claim 1.

The board disagrees. First, the board notes that "activation" in the sense of the patent refers to the necessity to rehydrate dehydrated yeast to render it metabolically active (paragraph [0003]). However, as submitted by the appellant, the yeast of D11 is frozen, and not dehydrated as disclosed in the preparation of the starter from wine yeast in paragraph bridging pages 341 and 342 of D11. More specifically, the preparation comprises the step of passing air under pressure through the cake to reduce excess of moisture content. This passage does not disclose or demonstrate a dehydration, but merely the removal of excess water from the cake. Therefore dehydration and subsequent rehydration/activation of the yeast do not occur in D11.

- 1.4.3 The board thus concludes that D11 anticipates the subject-matter of claim 1 of the main request.
- 1.5 Since the subject-matter of claim 1 of the main request lacks novelty in view of D2 or D11, the main request is not allowable.

2. Admittance of the main request

The appellant objected to the admittance of the main request. The board decided to admit the main request into the proceedings. Since it was found not to be allowable and since the decision is in favour of the appellant, there is no need to give any reason for its admittance into the proceedings.

Auxiliary request 1

3. Admittance of auxiliary request 1

3.1 Auxiliary request 1 was filed by the respondent with letter dated 12 May 2023, i.e. after notification of the summons to attend oral proceedings. Claim 1 of auxiliary request 1 corresponds to a combination of claims 1 and 5 of the main request, i.e. the method is limited to a method for producing beer.

3.2 Auxiliary request 1 does not correspond to any of the requests filed during the appeal proceedings. Auxiliary request 1 thus represents an amendment to the respondent's case. The admittance of the request is governed by Article 13(2) RPBA 2020, which applies to the case at hand in accordance with the transitional provisions set out in Article 25(3) RPBA 2020 (the summons to oral proceedings was notified after 1 January 2020).

According to Article 13(2) RPBA 2020, any amendment to a party's appeal case made after notification of a summons to oral proceedings shall, in principle, not be taken into account unless there are exceptional circumstances, which have been justified with cogent reasons by the party concerned.

The respondent submitted that the limitation to beer in claim 1 of auxiliary request 1 was filed in direct response to the Board's preliminary opinion regarding novelty over D2 set out in its communication pursuant to Article 15(1) RPBA . Therein, the Board held with respect to the disclosure of D2, that "since the fermentation to wine or juice implies the use of yeast, it follows that only a single selection of wine or juice among the products to be prepared or fermented is needed to arrive at the subject-matter of claim 1 of the main request". This was a new argument justifying the filing of auxiliary request 1.

The board disagrees. As submitted by the appellant, the reason given in the board's communication with regard to novelty in view of D2 was submitted by the appellant in its statement of grounds of appeal (point 7.3.1, second paragraph on page 18). Specifically, the appellant submitted that "*Au vu de la divulgation générique de D2 quant à la finalité du procédé et du dispositif associé, l'homme de métier aurait déduit que ceux-ci sont adaptés à l'obtention de boissons fermentées tel que le vin par utilisation de levure ... L'homme du métier n'aurait donc pas eu à procéder à une double sélection pour arriver au procédé selon la revendication 1*" (translation by the board: "*In view of the generic disclosure in D2 of the purpose of the process and the associated device, a person skilled in the art would have deduced that they are suitable for obtaining fermented beverages such as wine by using yeast... The skilled person would therefore not have had to make a double selection to arrive at the process according to claim 1*"). Thus the reason why the board preliminarily considered that D2 was prejudicial to the novelty of the subject-matter of claim 1 of the previous main request was not a new argument. It thus

cannot represent exceptional circumstances within the meaning of Article 13(2) RPBA 2020.

Hence, no convincing justification for the submission of the claim set according to auxiliary request 1 at such a late stage of the appeal proceedings was provided by the patent proprietor.

- 3.3 For these reasons, the board decided not to admit auxiliary request 1 into the proceedings in accordance with Article 13(2) RPBA 2020.

Auxiliary request 2

4. Admittance of auxiliary request 2

- 4.1 Claim 1 of auxiliary request 2 reads as follows:

"1. A method for producing a beverage selected from wine from grape juice, beer, cider, sake, kefir and soft-drinks comprising the following steps:

- a) providing a fruit or vegetable material;*
 - b) providing yeast in frozen form, **wherein the yeast is obtainable by fermenting yeast, harvesting the yeast by centrifugation to provide a liquid yeast bio-mass, and freezing the liquid yeast bio-mass at a temperature of between -10 °C and -60 °C, wherein the frozen yeast contains at least 10⁹ CFU per gram; and wherein a cryoprotectant is added after or before centrifugation;***
 - c) thawing the frozen yeast to get yeast in liquid form; and*
- directly inoculating the yeast in liquid form in an amount which is sufficient to initiate and maintain fermentation of the fruit or vegetable material."* (emphasis added by the board to show the difference with claim 1 of the main request)

Claim 1 of auxiliary request 2 differs from claim 1 of the main request in that the frozen yeast has been defined by the number of colony-forming unit (CFU) per gram, the presence of a cryoprotectant and its process of preparation (step b) of the claim.

Auxiliary request 2 was filed by the respondent with the letter dated 12 May 2023, i.e. after notification of the summons to attend oral proceedings. Auxiliary request 2 corresponds to the previous auxiliary request 7 filed with the reply to the grounds of appeal, except that the typo "*selected from selected from*" was corrected to read "*selected from*".

- 4.2 Since auxiliary request 2 corresponds to the previous auxiliary request 7 filed with the reply to the grounds of appeal, its admittance is governed by Article 12(4) and (6) RPBA 2020, which applies to the case at hand, as the statement of grounds of appeal was filed on 17 February 2020, hence after the date of entry into force of the RPBA 2020 (1 January 2020).

It was undisputed that auxiliary request 2 differed from the requests underlying the impugned decision. Auxiliary request 2 thus constitutes an amendment of the respondent's case pursuant to Article 12(4) RPBA 2020. Its admittance is thus subject to the board's discretion.

Under Article 12(6) RPBA 2020, requests which should have been submitted in the proceedings leading to the decision under appeal are not to be admitted unless the circumstances of the appeal case justify their admittance.

The respondent submitted that step b) of claim 1 of auxiliary request 2 included the feature "*wherein a cryoprotectant is added after or before centrifugation*" to overcome the opposition division's finding of added subject-matter (page 6 of the decision, third paragraph) in claim 10 of the main request then on file. The relevant objection, namely that the freezing temperature between -10°C and -60°C was linked with the presence of a cryoprotectant, was raised by the opponents for the first time during the oral proceedings before the opposition division. The respondent could not be expected to respond on the spot and could not submit auxiliary request 2 during the oral proceedings.

The board disagrees with the respondent. As submitted by the appellant, the objection of added matter in claim 10 of the main request then on file, that the freezing temperature between -10°C and -60°C was necessarily linked with the presence of a cryoprotectant (which was not stipulated in claim 10), was raised by the opponent 2 in the letter of 18 July 2019 (top of page 4 of the letter) and by opponent 1/appellant in its letter of 19 July 2019 (point 3.5.2 of the letter), while the claim set of the main request then on file was filed on 17 July 2019. The objection was thus raised two months before the oral proceedings before the opposition division, immediately after the main request then on file had been filed. Hence, the objection was not raised for the first time during the oral proceedings before the opposition division, contrary to the respondent's submission. Furthermore, the respondent in its letter of 3 September 2019 submitted that there was no added matter in the claim (points 4 and 5 of the letter) regarding the freezing temperature between -10°C and

-60°C. The respondent further submitted that, if the opposition division considered the freezing temperature between -10°C and -60°C to add subject-matter, it would request the opportunity to overcome the objection by deleting said temperature range from the claims of all request.

During the oral proceedings, the opposition division came to the conclusion that claim 10 of the main request then on file did not meet the requirements of Article 123(2) EPC (last paragraph of the minutes and third paragraph on page 6 of the decision). The same conclusion was drawn for auxiliary requests 1 to 3 (point 3 of the decision). In response to the conclusion, the respondent filed an auxiliary request 4 in which claim 10 of the main request was deleted.

By submitting the relevant arguments set out above with the letter dated 3 September 2019, the respondent demonstrated that it had had the time and opportunity to reply to the opponents' objections submitted with the letters dated 18 and 19 July 2019 as set out above.

Furthermore, the respondent was also given the opportunity at oral proceedings to overcome the objection, which it did by submitting then auxiliary request 4 in which the relevant claim comprising the temperature range was deleted.

Thus, contrary to the respondent's submission, the submission of previously auxiliary request 7 (corresponding to present auxiliary request 2) with the statement of grounds of appeal is not justified by the oppositions division's finding of added subject-matter. Rather, the respondent could and should have submitted this request in reply to the opponent's objections, for

example with the letter dated 3 September 2019, or at the very latest, during oral proceedings before the opposition division, during which this opportunity was provided. However, it chose not to. Hence, there are no circumstances justifying the submission of auxiliary request 2 with the statement of grounds of appeal.

- 4.3 For these reasons, the board decided not to admit auxiliary request 2 into the proceedings in accordance with Article 12(4) and (6) RPBA 2020.

Auxiliary request 3

5. Admittance of auxiliary request 3

5.1 As for auxiliary requests 1 and 2, auxiliary request 3 was filed by the respondent with the letter dated 12 May 2023. Auxiliary request 3 is a combination of auxiliary requests 1 and 2.

5.2 During the oral proceedings, the chairman informed the respondent that the issues regarding the admittance of auxiliary request 3 into the proceedings were the same as discussed for auxiliary requests 1 and 2. This was not disputed by the respondent.

5.3 Therefore, the board decided not to admit auxiliary request 3 into the proceedings for the same reasons as provided for auxiliary requests 1 and 2.

6. Admittance of A52

6.1 A52 is an expert's declaration submitted by the respondent in the context of the effect achieved by the claimed subject-matter and its relevance to inventive step. As inventive step is not relevant to the present

decision, there was no need to decide on its admittance during the oral proceedings before the board.

7. None of the respondent's requests is admissible and allowable.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The patent is revoked

The Registrar:

The Chairman:



N. Maslin

P. O'Sullivan

Decision electronically authenticated