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**Datasheet for the decision
of 20 January 2023**

Case Number: T 0904/21 - 3.2.07

Application Number: 13719523.6

Publication Number: 2844605

IPC: B67D1/04, B67D1/06, B67D1/08,
B67D1/12, B67D1/14

Language of the proceedings: EN

Title of invention:
COMPACT BEVERAGE DISPENSING UNIT

Patent Proprietor:
Anheuser-Busch InBev S.A.

Opponent:
Heineken Supply Chain B.V.

Headword:

Relevant legal provisions:
EPC Art. 100(a), 56, 111(1)
EPC R. 99(2)
RPBA 2020 Art. 12(2), 12(3), 12(5), 12(6), 11

Keyword:

Grounds for opposition - lack of patentability (yes)

Inventive step - (no)

Late-filed auxiliary requests - should have been submitted in first-instance proceedings (yes) - admitted (no)

Auxiliary request 4 - substantiated (no) - admitted (no)

Decisions cited:

Catchword:



Beschwerdekammern

Boards of Appeal

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Case Number: T 0904/21 - 3.2.07

D E C I S I O N
of Technical Board of Appeal 3.2.07
of 20 January 2023

Appellant: Heineken Supply Chain B.V.
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Respondent: Anheuser-Busch InBev S.A.
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 3 May 2021
rejecting the opposition filed against European
patent No. 2844605 pursuant to Article 101(2)
EPC.**

Composition of the Board:

Chairman B. Paul
Members: A. Cano Palmero
C. Brandt

Summary of Facts and Submissions

- I. The opponent (appellant) lodged an appeal in the prescribed form and within the prescribed time limit against the decision of the opposition division rejecting the opposition which had been filed against European patent No. 2 844 605.
- II. The opposition had been filed against the patent in its entirety on the ground for opposition pursuant to Article 100(a) EPC (inventive step).
- III. In preparation for oral proceedings, scheduled upon the parties' requests, the Board communicated its preliminary assessment of the case by means of a communication pursuant to Article 15(1) RPBA 2020. The Board indicated that the decision under appeal was likely to be set aside.
- IV. With letter dated 19 December 2022, the patent proprietor (respondent) submitted arguments and withdrew its request for oral proceedings and informed the Board that it would not attend oral proceedings.
- V. Oral proceedings before the Board took place on 20 January 2023 in the absence of the respondent in accordance with Rule 115(2) EPC and Article 15(3) RPBA 2020. At the conclusion of the proceedings the decision was announced. Further details of the proceedings can be found in the minutes thereof.

VI. The final requests of the parties are as follows,

for the appellant:

that the decision be set aside and
that the patent be revoked in its entirety;

for the respondent:

that the appeal be dismissed, *i.e.* that the patent
be maintained as granted (main request),
or, in the alternative,
when setting aside the decision under appeal,
that the case be remitted to the opposition
division for further prosecution,
or, in the alternative,
that the patent be maintained in amended form
according to one of the sets of claims filed as
auxiliary requests 1 to 5 with letter dated
27 January 2022.

VII. The lines of argument of the parties relevant for the
present decision are dealt with in detail in the
reasons for the decision. These lines of argument are
focused on the following points:

- review of the decision under appeal on the ground of
opposition under Articles 100(a) and 56 EPC with regard
to the patent as granted;
- admittance into appeal proceedings of auxiliary
requests 1 to 5;
- remittal of the case to the opposition division for
further prosecution.

VIII. Independent **claim 1** according to the **patent as granted** reads as follows:

"A beverage dispensing unit comprising:

(A) A base portion (11), comprising:

(a) A support plate comprising a top surface (11a) and a bottom surface (11b) and an opening connecting said top and bottom surfaces,

(b) A peripheral wall (11c) jutting out of the bottom surface (11b) of the support plate and extending along at least a portion of the perimeter of said support plate and thus defining with said bottom surface (11b) an inner volume of the base portion, the free edge of the peripheral wall (11c) being suitable for stably supporting the support plate (11a) at a distance from a planar surface said peripheral wall rests upon, said distance corresponding to the height of the peripheral wall (11c);

(c) A source of pressurized gas (7) lodged in the inner volume of the base portion, and connecting means (6) suitable for fluidly connecting said source of pressurized gas to the interior of a beverage container (8) located outside the inner volume of the base portion; and

(B) An elongated tapping column (1) extending substantially normal to the top surface (11a) of the base portion, an inlet end thereof being fixed to said top surface (11a) and comprising an elongated inner channel (2) bringing in fluid communication via said opening, the inner volume of the base portion with a tapping valve head (3) located at the opposite top, outlet end of the

elongated tapping column, said channel (2) and tapping valve head (3) being suitable for receiving and for controlling the flow of liquid through a dispensing line (4) connected to the interior of said beverage container (8), characterized in that the peripheral wall (11c) has a height comprised between 50 and 300 mm."

IX. Since the wording of the claims according to auxiliary requests 1 to 5 is not relevant for the present decision, there is no need to reproduce it here.

Reasons for the Decision

1. *Patent as granted - inventive step in view of document E1 (US 4,350,267), Articles 100(a) and 56 EPC*

1.1 The appellant contested the reasoned finding of the opposition division of point 20.1 of the reasons for the decision under appeal, that the subject-matter of claim 1 according to the patent as granted is inventive in view of the teaching of E1 in combination with the common general knowledge.

1.2 Distinguishing features

1.2.1 It seems uncontested that E1 does not disclose the feature of the characterising portion of claim 1, namely that the peripheral wall of the base portion has a height comprised between 50 and 300 mm.

1.2.2 The opposition division also concluded in point 20.1.3 of the reasons of the decision under appeal that E1 also failed to disclose that a source of pressurized gas is lodged in the inner volume of the base portion. the respondent concurs with this finding, specially

indicating that this feature cannot be directly and unambiguously derived from E1.

- 1.2.3 The Board cannot follow this finding for the following reasons. While it can be agreed with the opposition division (see point 20.1.5 of the reasons) that "[a] source of pressurised gas protruding partly outside of this defined inner volume is [thus] not considered to be lodged in the inner volume of the base portion", the Board also agrees with the appellant (see pages 3 and 4 of the statement of grounds of appeal) that E1 shows in column 1, lines 50 to 62, and in column 3, lines 8 to 10, that the cover module (which corresponds to the base portion according to claim 1 as granted) **includes** a container of pressurized gas. Further, in column 3, lines 29 to 34 it is disclosed that the source of pressurized gas may be a toroidal pressure vessel **"installed within the cover module"** and which pressure vessel **"fits within the available space"**.

The Board is convinced that the skilled reader derives directly and unambiguously from these passages that the source of pressurized gas is meant to be fixed and contained within the volume defined by the cover module of E1. The conclusion of the opposition division and the arguments of the respondent of points 11 to 13 of its reply to the statement of grounds of appeal and of points 5 to 11 of its letter of 19 December 2022, that E1 does not exclude that the container of pressurized gas is not fixed to and "may also extend" outside the cover module is a mere allegation. It cannot constitute a convincing reason to conclude that E1 does not directly and unambiguously disclose a beverage dispensing unit in which a source of pressurized gas is lodged in the inner volume of the base portion.

1.2.4 The Board thus concludes that E1 discloses a beverage dispensing unit from which the subject-matter of claim 1 as granted solely differs in the feature that the peripheral wall of the base portion has a height comprised between 50 and 300 mm.

1.3 Technical effect and objective technical problem

1.3.1 In point 20.1.6 of the reasons for the decision under appeal the opposition division identified as technical effect associated to the claimed height of the peripheral wall of the base portion that the height of the overall dispensing unit is limited. Since the height of a conventional counter or worktop and the height of a traditional tapping column lie within a relatively small height range difference (as shown by **Annex 5** [A5]), the technical problem solved by the claimed height range of the peripheral wall portion, in combination with the feature that the source of pressurised gas is lodged in the inner volume of the base portion, could be seen as to provide a beverage dispensing device that can be used ergonomically when placed on an existing counter top (see point 20.1.8 of the reasons). This formulation of the technical problem is shared by the respondent in its submissions (see reply to the statement of grounds of appeal, point 19 and point 17 of the letter dated 19 December 2022).

1.3.2 The Board is not convinced that the height of the peripheral wall, being the sole distinguishing feature, solves the technical problem identified by the opposition division. As correctly argued by the appellant, the height of the dispensing unit and therefore its ergonomic use when being placed on a counter or worktop not only depends on the height of

the base portion, but also on the height of the elongated tapping column.

The Board is furthermore not convinced that annex A5 could constitute sufficient proof for alleged standardised heights of an elongated tapping column as claimed. Indeed, as correctly indicated by the appellant, from the pictures and hyperlinks present in A5 it cannot be generalised that the heights of elongated tapping columns available in the field of beverage dispensing units follow an alleged standard.

It follows that even when considering annex A5 and taking into account that claim 1 is silent on the height of the elongated tapping column, it cannot be agreed with the opposition division and with the respondent that the height of the peripheral wall solves the technical problem of improving the ergonomic use of the dispensing unit.

- 1.3.3 The Board therefore does not agree with the conclusions of the opposition division and with the arguments of the respondent (see reply to the statement of grounds of appeal, point 19 and point 17 of the letter dated 19 December 2022) and rather concurs with the appellant that the objective technical problem in view of the sole distinguishing feature regarding the height of the base portion must rather be seen as providing a compact beverage dispensing unit.

1.4 Obviousness

- 1.4.1 The respondent argued in points 21 to 27 of its reply to the statement of grounds of appeal that the cover module 22 of E1 has the purpose to enclose the beverage container within a refrigerated space further defined

by the base and a sleeve, and that therefore such cover module is not intended to be separated from the rest of the modules and be placed on a countertop, so that the skilled person would not be hinted to modify this cover module so that its height is in the range of 50 to 300 mm.

Furthermore, the respondent indicated in point 19 to 23 of its letter dated 19 December 2022 that even under consideration of the technical problem of providing a more compact beverage dispensing unit, the skilled person would only consider the already disclosed solutions in E1 of removing the refrigerator base portion and/or providing a telescoping dispensing tower. In contrast, the skilled person would have no motivation to modify the height of the peripheral wall of the cover module 22, since this would automatically mean that the height of the sleeve would have to be adjusted to maintain the overall height of the insulated container constant, which would not solve the problem of providing a more compact dispenser.

- 1.4.2 The Board is not convinced by the respondent's arguments for the following reasons.

Contrary to the respondent's view, the Board notes that the cover module 22 is not inextricably linked to the sleeve 16 of E1. Indeed, column 4, lines 29 to 33 and figure 7 confirm that the sleeve 16 and the cover module 22 can be two independent parts of the dispenser that can be separated.

The Board is furthermore convinced that the skilled person, in view of the technical problem of providing a compact beverage dispensing unit and with the help of its common general knowledge, would be motivated to

adapt the height of the cover module and make it as compact as possible within the limitation of including the container of pressurized gas, irrespective of the other solutions that might be suggested in the teaching of E1 regarding other parts of the dispenser.

Therefore, starting from the combination of cover module 22, dispensing tower, pressurized gas container and valve of E1 as closest prior art, the Board concurs with the appellant (see page 6 of the statement of grounds of appeal) that the height of the peripheral wall of the cover module, specially within the range claimed of 50 to 300 mm, is an obvious design choice which would be selected by the skilled person depending on the circumstances, thereby arriving at the subject-matter of claim 1 as granted without exercising an inventive skill.

2. *Auxiliary requests 1 to 5 - Admittance*

2.1 With its communication under Article 15(1) RPBA 2020, point 6, the Board informed the parties that auxiliary requests 1, 2, 3 and 5 were likely not to be admitted and that auxiliary request 4 had not been duly substantiated.

2.1.1 In reply to that communication, the respondent requested in point 3 of its letter dated 19 December 2022, that in case that the main request is refused, the case be remitted for further prosecution according to Article 11 RPBA 2020, since no decision of the opposition division existed for the auxiliary requests. According to the respondent, a continuation of the proceedings before the Board in respect of the auxiliary requests would constitute a violation of the

primary objective of the appeal proceedings pursuant to Article 12(2) RPBA 2020.

2.1.2 The Board notes that, in the present case, the possibility of a remittal for further prosecution based on the auxiliary requests can only be contemplated under the necessary condition that these requests are previously admitted into the appeal proceedings. This is not the case here, for the following reasons.

2.2 The Board notes that **auxiliary requests 1, 2, 3 and 5** have been filed for the first time with the reply to the statement of grounds of appeal.

2.2.1 Their admittance is thus subject to Article 12(6), second sentence, RPBA 2020 which recites that "[t]he Board shall not admit requests ... which should have been submitted ... in the proceedings leading to the decision under appeal, unless the circumstances of the appeal case justify their admittance.

2.2.2 The respondent has failed to indicate in its submissions any circumstances for justifying the admittance of these requests. The Board, in the absence of any justifying circumstances, does **not admit auxiliary requests 1,2,3 and 5 into the appeal proceedings under Article 12(6), second sentence, RPBA 2020.**

2.3 With regard to **auxiliary request 4**, which corresponds to auxiliary request 3 filed during opposition proceedings on 12 March 2020, the Board notes that the respondent has failed to indicate in its submissions, to what extent the additional features of granted claim 2 could contribute to the inventive step of the independent claim, in particular how the objection as

regards inventive step raised by the appellant in its statement of grounds of appeal could be overcome by such an amendment.

- 2.3.1 Against this background, the Board considers that auxiliary request 4 has not been duly substantiated according to the requirements of Rule 99(2) EPC and Article 12(3) RPBA 2020. **The Board, exercising its discretion under Articles 12(3) and 12(5) RPBA 2020, does not admit auxiliary request 4 into the appeal proceedings.**

3. *Conclusions*

- 3.1 It follows that the appellant has convincingly demonstrated the incorrectness of the decision under appeal that the ground of opposition pursuant Article 100(a) (inventive step) does not prejudice the maintenance of the patent as granted. The decision under appeal is thus to be set aside.
- 3.2 Furthermore, in the absence of any admissible auxiliary request, a remittal of the case to the opposition division for further prosecution under Article 111(1) EPC and Article 11 RPBA 2020 cannot take place.
- 3.3 In the absence of any admissible or its substance allowable request, the patent is to be revoked.

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:



G. Nachtigall

B. Paul

Decision electronically authenticated