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Datasheet for the decision of 5 March 2025

Case Number: T 0269/23 - 3.2.03

Application Number: 16735668.2

Publication Number: 3472513

IPC: F22B37/24

Language of the proceedings: EN

Title of invention:
A BOTTOM-SUPPORTED BOILER

Patent Proprietor:
Sumitomo SHI FW Energia Oy

Opponent:
Valmet Technologies Oy

Relevant legal provisions:
EPC Art. 54, 56, 111(1)
RPBA 2020 Art. 11, 12(3), 12(4), 12(5)

Keyword:

Novelty - main request (yes) - prior disclosure - implicit features (no)
Inventive step - main request (no) - ex post facto analysis - problem and solution approach - obvious combination of known features - closest prior art
Appeal decision - remittal to the department of first instance (yes)
Remittal - special reasons for remittal - absence of written submissions from both parties in relation to auxiliary requests - decision on remittal before examining admittance of auxiliary requests

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Case Number: T 0269/23 - 3.2.03

D E C I S I O N
of Technical Board of Appeal 3.2.03
of 5 March 2025

Appellant: (Opponent)	Valmet Technologies Oy Keilasatama 5 02150 Espoo (FI)
Representative:	Berggren Oy P.O. Box 16 Eteläinen Rautatiekatu 10A 00101 Helsinki (FI)
Respondent: (Patent Proprietor)	Sumitomo SHI FW Energia Oy Metsänneidonkuja 10 02130 Espoo (FI)
Representative:	Genip Oy Heikinkatu 7 48100 Kotka (FI)
Decision under appeal:	**Decision of the Opposition Division of the European Patent Office posted on 23 December 2022 rejecting the opposition filed against European patent No. 3472513 pursuant to Article 101(2) EPC.**

Composition of the Board:

Chairman	F. Bostedt
Members:	R. Baltanás y Jorge
	B. Goers

Summary of Facts and Submissions

I. European patent No. 3 472 513 B1 relates to a bottom-supported boiler.

II. An opposition was filed against the patent based on the grounds for opposition under Articles 100(b) EPC and 100(a) EPC in conjunction with Articles 54 EPC and 56 EPC.

III. The opposition division decided to reject the opposition.

This decision was appealed by the opponent ("the appellant").

IV. In a communication pursuant to Article 15(1) RPBA, the Board indicated its preliminary opinion.

Oral proceedings were held on 5 March 2025.

V. The final requests were as follows.

The appellant requests that the decision under appeal be set aside and the patent be revoked.

The patent proprietor ("the respondent") requests that the appeal be dismissed and, in the alternative, that the patent be maintained in amended form on the basis of the claims of one of auxiliary requests 1 to 6 filed with the reply to the appeal.

VI. Claim 1 of the **main request** corresponds to claim 1 as granted and reads as follows (feature numbering based on that adopted by the parties):

1.1 *A bottom-supported boiler (10)*
1.2 *comprising a boiler pressure body (22)*
1.3 *having a rectangular horizontal cross section*
1.4 *formed by joining four planar water tube walls (24) pairwise together*
1.5 *so as to form four corner sections (26),*
1.6 *and a support construction (14, 14’),*
1.7 *characterized in that the support construction comprises four vertical columns (30, 30’)*
1.8 *vertically supported to the ground (12),*
1.9 *the vertical columns being arranged outside the boiler pressure body*
1.10 *so that adjacent to each of the corner sections (26) is arranged one of the four vertical columns (30, 30’),*
1.11 *wherein each of the vertical columns is attached to*
1.12 *the respective corner section*
1.13 *so that vertical loads of the boiler pressure body (22) are transferred to the ground by the four vertical columns (30, 30’).*

VII. Prior art

The following documents have been cited, both in the statements setting out the grounds of appeal and during the opposition proceedings, and are relevant to this decision:

D1: US 3,811,415 A
D3: US 4,033,298 A

D9: CN 205118991 U

D9': English translation of D9

D12: DE 10 2010 002 737 A1

D14: US 3,927,714 A

VIII. The appellant's arguments relevant to this decision can be summarised as follows:

(a) Main request, novelty, D1

Document D1 disclosed all the features of claim 1, in particular the bottom support of the boiler (feature 1.1) and the vertical support of the columns to the ground (feature 1.8), so that vertical loads of the boiler pressure body were transferred to the ground by them (feature 1.13).

The skilled person carrying out the teaching of D1 would inevitably arrive at a result falling within the terms of claim 1 of the patent, the boiler defined in claim 1 thus being, at least implicitly, bottom-supported. There were a number of "pointers" in D1 which suggested that a bottom-supported boiler was inevitably disclosed, namely:

- the fact that the casing was constructed to withstand the load when the unit was in the operative upright position

- the correspondence of the disclosed "base portion" with a "bottom part", this base portion supporting the unit when the latter was lifted "on to" the site in such a way that the unit was rotated about the base portion (see column 3, lines 62 to 67) — the skilled person would

understand that the base portion and the site included a load-bearing structure adapted for tethering

- the fact that the skilled person would also understand that the "laterally supporting steel work" (see column 4, lines 3 and 4) additionally secured the unit in an upright position, e.g. against wind

Alternatively, the "laterally supporting steel work" disclosed in the description was not shown in the figures. The embodiment disclosed in the figures thus corresponded to a boiler to be used as such, i.e. without the "laterally supporting steel work" and simply supported on the ground.

(b) Main request, inventive step starting from D1

D1 did not disclose a top-supported boiler since the presence of "laterally supporting steel work" at its base as disclosed in lines 3 and 4 of column 4 did not necessarily rule out the possibility of the boiler being bottom-supported. An example of this possibility was disclosed for instance in D3, which showed such "laterally supporting steel work" in a bottom-supported boiler (see figure 1 of D3).

There was nothing in figure 2B of D1 to indicate that thermal expansion of the boiler's base could only take place downwards in a vertical direction. In the light of figure 2B, thermal expansion would take place upwards in a vertical direction if the boiler were bottom supported.

Moreover, the casing of the boiler disclosed in D1 was sufficiently rigid to withstand loading in either a vertical or horizontal position (see column 3, lines 21 to 24), thus making the device suited to be bottom-supported. This was the basic requirement for it according to the contested patent itself (see paragraphs [0007] and [0008] of the patent specification).

The objective technical problem relating to the distinguishing features was how to apply a support construction for the boiler of D1 with implementable structural details.

The skilled person would not need any particular motivation to consider the option of a bottom support instead of a top support, since they would simply select in a routine manner any type of known support available suitable for combination with the boiler of D1.

In their search for a solution to the problem posed, the skilled person would come across any of D9, D12 or D14, all of which disclose bottom supports compatible with the D1 boiler. The skilled person would have no reason to dispense with the connection between the downcomers (4) and the corners of the casing (1) disclosed in D1 since this was related to the main aim sought in this document, namely to increase the rigidity of the ensemble.

Furthermore, providing a bottom support as disclosed in any of D9, D12 or D14 did not require the abandonment of this advantageous feature. In any case, D12 explicitly disclosed that the boiler's casing was

supported at its corners by the downcomers as in D1 (see paragraph [0024]).

Finally, contested claim 1 did not exclude a lower supporting structure in contact with the downcomers as disclosed in D9 (see figure 1 of D9 and of the contested patent).

The skilled person would thus combine the teaching relating to a bottom support from any of D9, D12 or D14 with the boiler of D1 and arrive in an obvious manner at the subject-matter defined in contested claim 1.

(c) Remittal

The case should not be remitted to the opposition division since auxiliary requests 1 to 6 should not be admitted under Article 12(3), (4) and (5) RPBA. This was so because the auxiliary requests had not been substantiated either in the opposition proceedings or in the appeal proceedings. Moreover, they were not convergent and they were not *prima facie* allowable on grounds of obviousness and lack of clarity, the latter being caused by the addition of the wording "**mainly** upwards" in claim 1.

The arguments concerning the admittance of auxiliary requests 1 to 6 were presented for the first time during the oral proceedings before the Board due to the fact that the case had been entrusted to the authorised representative at a late stage of the proceedings.

The respondent's alleged surprise at the Board's interpretation of D1 during the oral proceedings could not justify a remittal, since this possibility was to be expected in view of the arguments contained in the

statement of grounds of appeal and in the preliminary opinion of the Board.

IX. The respondent's arguments relevant to this decision can be summarised as follows:

(a) Main request, novelty, D1

The boiler disclosed in D1 was a top-supported boiler and not a bottom-supported one as defined in claim 1. The "laterally supporting steel work" at the boiler's base (see column 4, lines 3 to 8) was a typical arrangement in top-supported boilers and the boiler in D1 was thus, at least implicitly, disclosed as a top-supported boiler.

Features 1.1 (bottom-supported boiler), 1.8 (columns vertically supported to the ground) and 1.13 (vertical loads of the boiler pressure body transferred to the ground by the four vertical columns) were therefore not disclosed in D1.

(b) Main request, inventive step starting from D1

Top-supported boilers such as the one disclosed in D1 differed so substantially in their construction from bottom-supported boilers that the skilled person would never have envisaged combining teaching relating to the latter with D1.

In column 4, lines 3 and 4 of D1, it was disclosed that the boiler was "*secured at the base with laterally supporting steel work*". No vertical support of the boiler was disclosed in D1, only horizontal, as was the case for top-supported boilers.

It was true that fixation at the bottom of a bottom-supported boiler as shown in figure 1 of D3 implied lateral support since this was always necessary to avoid uncontrolled horizontal movement of the boiler on the supporting surface (see figure 4 of D3). However, this did not change the fact that D1 did not disclose any vertical support at the base of the boiler, but only lateral support.

Furthermore, figure 2B of D1 showed that the expansion of the boiler had to take place downwards in a vertical direction since this was the direction in which there was clearance for the distributors (5) and the contiguous rectangular element to expand when they heated up. This direction of expansion made it impossible for the boiler of D1 to be bottom-supported, so it necessarily had to be top-supported.

Figure 2B of D1 also showed that the lower part of the boiler lacked so many of the features necessary to support a boiler from the bottom that the device could not be considered suited to be bottom-supported.

Moreover, the devices disclosed in D9, D12 and D14 did not comprise vertical columns attached to the respective corner sections of the casing (features 1.11 and 1.12). For example, in the case of D12, the weight of the boiler's casing was supported by the manifold (620). In order to arrive at the subject-matter of claim 1, the skilled person would have to select specific features from D1 and from the respective secondary teaching represented by one of D9, D12 or D14. This purposive selection of features - which had to be mutually compatible - from different documents was only possible with the benefit of hindsight.

Finally, even if D1 did not disclose a top-supported boiler, there was no particular motivation for the skilled person to select a bottom support for the boiler of D1 instead of a top support. This would also be a purposive selection made with the benefit of hindsight.

(c) Remittal

The case should be remitted to the opposition division since this was the only way of performing a proper examination of the auxiliary requests. It was noted that there had been no need to discuss the auxiliary requests during opposition proceedings in view of the rejection of the opposition at that stage. Moreover, the development of the oral proceedings in appeal led to a situation other than might have been expected by the respondent, and was therefore surprising, in particular as regards the Board's interpretation of D1.

Reasons for the Decision

1. Main request

1.1 Sufficiency of disclosure - Article 100(b) EPC

The appellant did not contest on appeal the opposition division's finding rejecting the ground for opposition relating to sufficiency of disclosure (Article 100(b) EPC).

This issue is thus not part of the present appeal proceedings.

1.2 Novelty, D1 - Article 54 EPC

1.2.1 Uncontested features

It was not contested that D1 discloses:

a boiler pressure body (1) (feature 1.2)
having a rectangular horizontal cross section (see figures 5 and 6) (feature 1.3)
formed by joining four planar water tube walls pairwise together (see figures 5 and 6, and also column 2, lines 15 to 27) (feature 1.4)
so as to form four corner sections (see figures 3, 5 and 6) (feature 1.5),
and a support construction (see column 2, lines 15 to 27, and figure 3) (feature 1.6),
wherein the support construction comprises four vertical columns ("*downcomers*" (4)) (feature 1.7),
the vertical columns (4) being arranged outside the boiler pressure body (see figures 3, 5 and 6) (feature 1.9)
so that adjacent to each of the corner sections is arranged one of the four vertical columns (4) (see figures 3, 5 and 6) (feature 1.10),
wherein each of the vertical columns is attached to the respective corner section (see figure 3) (features 1.11 and 1.12).

1.2.2 Feature 1.1 (bottom-supported boiler)

The appellant argued that the skilled person carrying out the teaching of D1 would inevitably arrive at a result falling within the terms of claim 1 of the patent, meaning that the boiler defined in claim 1 was at least implicitly bottom-supported. According to the appellant, there were a number of "pointers" in D1

which suggested that a bottom-supported boiler was inevitably disclosed.

This is not persuasive.

D1 discloses that "[t]*he casing is stressed to withstand loading to both when the unit is in the operative upright position and when the unit is in a horizontally extending position permitting transportation*" (see column 3, lines 21 to 24). This only means that the casing is self-supported in its operative upright position and in a horizontal transport position, i.e. that it can withstand the load arising from its own weight during handling without requiring a further supporting structure.

This has nothing to do with how the unit is supported on the ground when in the operative upright position.

Concerning the argument about the skilled person allegedly understanding the disclosure of D1 to mean that the base portion and the "site" included a load-bearing structure adapted for "tethering", D1 discloses that "[t]*o erect the unit from the horizontal position a crane and spreader bar attachment coupled to the plates is utilized to lift the unit on to site either by offsetting the point of suspension or by tethering the base portion of the unit, the unit upon hoisting is rotated about the base portion*" (see column 3, lines 62 to 67). This does not imply a rotation supported by any structure on the ground - let alone a permanent structure on which the unit might rest in the operative position - but simply a rotation of the unit from the horizontal to the vertical position by any means known to the skilled person, e.g. by a crane taking the unit

from a transport trailer onto which the base portion would rotate as the unit was lifted.

The only explicit disclosure of a connection of the unit's base portion to the ground in D1 is where it is stated that it is secured by means of "**laterally** supporting steel work" (see column 4, lines 3 and 4; emphasis added). This does not rule out the possibility of the unit of D1 being supported from the top, since in this case lateral support is also necessary to avoid oscillations of the unit. In other words, the above-mentioned explicit disclosure in D1 does not entail an implicit disclosure of a bottom-supported boiler.

Moreover, the fact that the "laterally supporting steel work" disclosed in lines 3 and 4 of column 4 is not represented in the figures of D1 does not mean that the figures disclose an embodiment not comprising the laterally supporting steel work. From the description of the figures, the skilled person learns how the device corresponding to the particular embodiment is to be used, and this includes the fact that "[o]*nce in the upright position the unit is secured at the base with laterally supporting steel work...*" as the passage in question explicitly discloses. This is not disclosed as an optional feature. In addition, the embodiments do not support the respondent's view. Nowhere in the embodiment of figures 1 and 2 is a means shown for securing the vertical columns to the (not further defined) "laterally supporting steel work" or to any other supporting structure, whether at the bottom, or at the top.

Whether this "laterally supporting steel work" forms the typical horizontal restriction for a top-supported boiler or works in combination with a bottom support or

anything in between (see e.g. the struts (40) in figure 1 of D3) is thus not disclosed in D1.

In view of the above, D1 does not disclose a bottom-supported boiler (feature 1.1) in a **direct and unambiguous** manner.

1.2.3 Feature 1.8 (four vertical columns vertically supported to the ground)

The opposition division considered that, "*even though it is not clear from figures 1b and 2b how exactly the downcomers are supported to the ground*", the disclosure in column 4, lines 3 to 5 of D1 anticipated feature 1.8 "*since the downcomers are disclosed to be supported to the ground by means of the supporting steel work*".

This is not persuasive.

The disclosure in lines 3 to 5 of column 4 only relates to "**laterally** supporting steel work" (emphasis added), whereas feature 1.8 defines a **vertical** support to the ground of the four columns.

1.2.4 Feature 1.13 (vertical loads of the boiler pressure body are transferred to the ground by the four vertical columns)

The opposition division considered that the vertical loads of the boiler pressure body are transferred to the ground by the four vertical columns through the supporting steel work of D1, and cited the passages in column 3, lines 21 to 24 and 62 to 68, and in column 4, lines 3 to 7 in support of this.

This is not correct.

As explained in points 1.2.2 and 1.2.3 above, it is not disclosed that the **laterally** supporting steel work of D1 transfers **vertical** loads of the boiler pressure body to the ground. In addition, the supporting steel work which is explicitly mentioned in D1 to be "lateral" is not directly and unambiguously disclosed as being suitable for a transfer of "vertical" loads.

The meaning of the disclosure in lines 21 to 24 and 62 to 68 of column 3 has already been discussed in point 1.2.2 above, and it does not relate to the transfer of loads to the ground by the downcomers (4) ("vertical columns").

1.2.5 Conclusion

The subject-matter of claim 1 differs from D1 in features 1.1 (bottom-supported boiler), 1.8 (four vertical columns vertically supported to the ground) and 1.13 (vertical loads of the boiler pressure body are transferred to the ground by the four vertical columns).

1.3 Inventive step starting from D1 - Article 56 EPC

1.3.1 Boiler support disclosed in D1

The opposition division considered that D1 was not the "closest prior art" since it did not relate to a bottom-supported boiler.

The respondent argued along the same lines that D1 disclosed a top-supported boiler which differed so substantially in its construction from bottom-supported boilers that the skilled person would never have

envisaged combining teaching related to the latter with D1.

This is not persuasive.

D1 is silent about the type of support of the disclosed boiler. Furthermore, the boiler disclosed therein can be seen as being suitable for both bottom and top support (see point 1.3.3 below). As explained in point 1.2.2 above, D1 does not directly and unambiguously disclose a bottom-supported boiler. However, it does not directly and unambiguously disclose a top-supported one either.

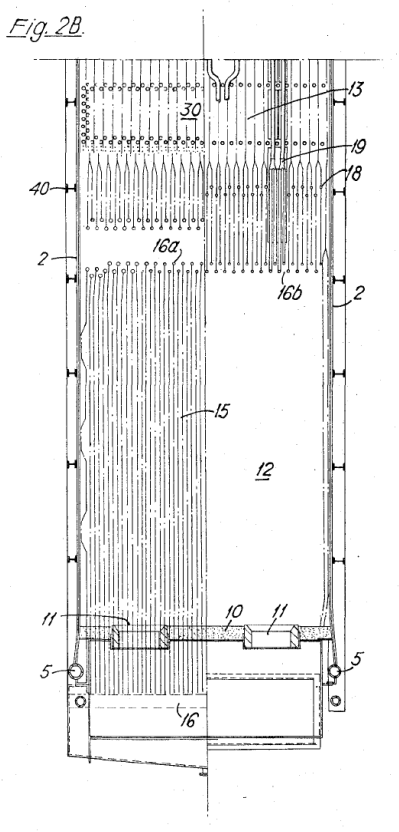
The contested decision asserts that D1 has a "different construction principle" compared to the prior art disclosing bottom-supported boilers and states that the skilled person starting from D1 "*would go to the direction of top supported boilers*". However, it does not give any reasons supporting those assertions.

In the respondent's view, it was disclosed in lines 3 and 4 of column 4 of D1 that the boiler was "*secured at the base with laterally supporting steel work*", and that no vertical support of the boiler was disclosed in the document. The respondent concluded from this that the disclosed support corresponded to the typical arrangement at the base of top-supported boilers preventing oscillations of the device in a horizontal direction, for example due to wind loads.

The Board is not persuaded by this line of reasoning since, as was acknowledged by the respondent itself, bottom-supported boilers can also comprise such "laterally supporting steel work" (see e.g. struts (40) in figure 1 of D3). D1 discloses the presence of

"laterally supporting steel work". This supporting construction is not further defined in D1, and D1 is in particular silent about any detail regarding the type of support of the boiler on the ground. Therefore, the (not further defined) supporting construction in D1 does not imply that the boiler **must** be a top-supported boiler.

In support of its arguments, the respondent also referred to figure 2B of D1 (reproduced below), which allegedly shows that expansion of the boiler had to take place downwards in a vertical direction, since this was the direction in which there was clearance for the distributors (5) and the contiguous rectangular element to expand as they heated up.



The Board cannot agree with the respondent's conclusions, since figures 1A, 1B, 2A and 2B only show

a boiler without its supporting structure (in line with the rest of the disclosure of D1), and therefore the space around the **whole** boiler (not only below its bottom; see also figures 1A and 2A) is apparently "empty". If the boiler in D1 were supported at the bottom, its thermal expansion in the vertical direction would take place upwards unimpeded.

For the sake of completeness, and in reply to the contested decision, D1 is a suitable starting point for assessing inventive step or, to put it in other words, is suitable "closest prior art" - an expression which does **not** imply that only this one document can be used as a starting point - since it discloses a boiler of the type relating to the defined subject-matter even though D1 differs from it essentially in the type of support (i.e. by not disclosing any specific support for the boiler).

1.3.2 Technical effect and objective technical problem

As explained in point 1.2 above, the distinguishing features over D1 are features 1.1 (bottom-supported boiler), 1.8 (four vertical columns vertically supported to the ground) and 1.13 (vertical loads of the boiler pressure body are transferred to the ground by the four vertical columns).

These distinguishing features have the technical effect of providing vertical support for the boiler.

According to the appellant, the objective technical problem can be formulated as how to apply "a support construction with implementable structural details".

The respondent agreed with this objective technical problem.

The Board considers the technical problem reasonable in view of the technical effect.

1.3.3 The selection of a particular kind of support

The respondent argued that there was no motivation for the skilled person to specifically select a bottom support for the boiler of D1 instead of a top support, and that this would be a purposive selection which could be envisaged only with hindsight.

This is not persuasive since the skilled person, starting from D1 and addressing the problem posed, would have to decide which type of support to implement for the boiler disclosed therein. In doing so, **any** type of support suitable for the boiler of D1 would be considered by the skilled person in a routine manner, and no particular reasons would be necessary to justify why one known solution would be selected and not the other, since in fact all available **compatible** standard solutions would be obvious to them.

The respondent argued that figure 2B of D1 showed that the lower part of the boiler lacked so many features necessary to support a boiler from the bottom that the device could not be considered suited to be bottom-supported.

The respondent cannot succeed with this argument since D1 does not disclose any features at all directly related to **any** specific kind of support. It is true that figure 2B does not disclose elements belonging to a bottom support structure. However, it equally does

not disclose any feature which would be technically incompatible with supplementing the boiler with such a bottom support structure.

Concerning the suitability of the boiler of D1 for being bottom-supported, this boiler already has a construction in which the walls together with the downcomers and the "backstays" are strong enough to support the vertical compression load of the boiler pressure body (see column 4, lines 3 to 7: "*Once in the upright position the unit is secured at the base*"), a prerequisite for the bottom support of large boilers also defined in the patent (see paragraph [0002]).

In view of the above, no technical considerations have been explained that would motivate the skilled person to exclude or prioritise a particular alternative for supporting the boiler of D1.

1.3.4 Combination with D9, D12 or D14

(a) Motivation to consult D9, D12 or D14

The skilled person looking for a solution to the posed problem would consider documents disclosing bottom support concepts for boilers of the type of D1, i.e. of corresponding dimensions and purpose. This is the case for documents D9, D12 and D14.

(b) Alleged selection of features with hindsight

The respondent argued that the devices disclosed in D9, D12 and D14 did not comprise vertical columns attached to the respective corner sections of the casing (features 1.11 and 1.12), and that the skilled person would need to select specific features from D1 and from

the respective secondary teaching represented by any of D9, D12 or D14 in order to arrive at the defined subject-matter.

Even if the respondent's technical statement were completely correct - and this is not the case at least for D12; see paragraph [0024]: "*Dieser Rohrkäfig* [...] *trägt sich selbst und wird durch die Fallrohre an den jeweiligen Ecken nach unten abgestützt* [This tubular cage [...] is self-supporting and is downwardly supported by the downcomers at the respective corners]" - this is irrelevant since features 1.11 and 1.12 are disclosed in starting document D1.

What is relevant in assessing inventive step is whether the solutions disclosed in the secondary teaching are compatible with features 1.11 and 1.12 disclosed in the starting document, in other words, whether the skilled person would have understood that adopting the solutions disclosed in D9, D12 or D14 was only possible by dispensing with the attachment between vertical columns and corners disclosed in D1.

The respondent has not explained why these features should not be compatible, and the Board does not see any reason which could explain this presumed incompatibility either. All the solutions disclosed in D9, D12 and D14 are compatible with the attachment between vertical columns (4) and the corners of casing (1) of D1 since they are all based on contact between the corresponding vertical columns in each document and a supporting structure - be it a mere prolongation of the vertical columns as in D12 or D14, or a lower supplementary structure in extension of the vertical columns as in D9. This is independent of how the vertical loads are transferred to the vertical columns

above this supporting structure, i.e. how the vertical load of the boiler casing has been transferred to the point of contact which lies between the bottom of the downcomer and the corresponding support below it, such that this vertical load is finally supported on the ground.

Finally, the skilled person would have no motivation to dispense with the connection between vertical columns (4) and the corners of casing (1) of D1 when implementing the solutions disclosed in D9, D12 or D14. This would be in conflict with the general aim pursued in D1, namely to increase the rigidity of the boiler ensemble in order to conform "*to loading requirements enabling the unit to be transported assembled from factory to site*" (see column 1, lines 6 to 9, and also column 3, lines 21 to 24).

(c) Combination with D9

D9 relates to the provision of a support construction for a boiler similar to that of D1 (see lines 63 to 65 of D9') and discloses a solution based on the provision of a bottom support (14) constituting a support construction together with self-supporting columns (2) (see figure 1, reproduced below). The vertical columns (down tubes (3)) are supported on the ground by way of the support construction.

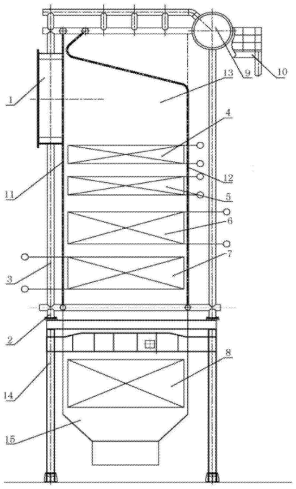


图1

D1 discloses downcomers (4) comparable to the down tubes (3) of D9, thus confirming the compatibility of the solution disclosed in D9 with the boiler of the starting prior art. Providing a supporting structure under the downcomers (4) as taught by D9 (see D9', lines 63 to 65 and 89 to 93; see also figure 1 of D9) would result in an embodiment as defined in contested claim 1, namely corresponding to the example disclosed in figure 1 of the contested patent.

(d) Combination with D12

Document D12 discloses the use of downcomers ("*Fallrohre*" 660, 661) to form the supporting framework (620) of a boiler comprising a boiler pressure body comprising planar water tube walls (670) (see paragraphs [0060] and [0081]).

The skilled person would consult D12, as it concerns a boiler of similar construction and purpose to that of D1, and would learn that the proposed framework provides a stable support (see paragraph [0081] and figure 2, reproduced below) in which the downcomers are

extended in a downwards direction to provide a vertical support.

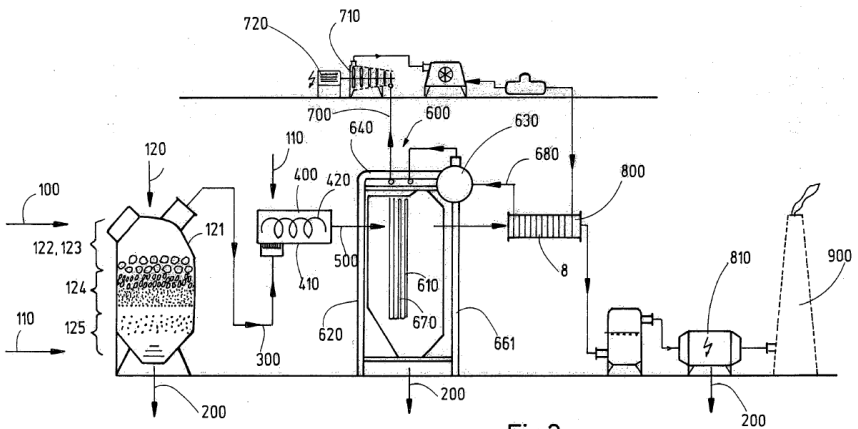


Fig.2

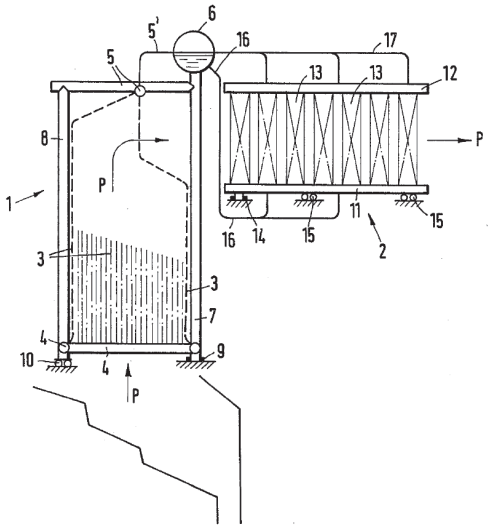
The skilled person would apply this teaching (i.e. the downwards extension of the downcomers) to the boiler of D1 merely by adapting the existing downcomers (4) for the same purpose in terms of length and strength, and thus arrive at the subject-matter of claim 1, since such an arrangement would result in the implementation of features 1.1, 1.8 and 1.13.

(e) Combination with D14

The disclosure of D14 is analogous to that of D12 (see D14, figure 1, reproduced below), in particular in view of vertical water tubes (3) (planar water tube walls), vertical down pipes (7) and return pipes (8) (vertical columns), and engagement elements (9), (9') and (10) providing the bottom support (see column 3, lines 17 to 23).

The reasoning set out in point (d) above would thus apply *mutatis mutandis*.

Fig.1



1.3.5 Conclusion

The subject-matter of claim 1 of the main request is obvious when combining D1 with any of D9, D12 or D14 (Article 56 EPC).

2. Remittal - Article 111(1) EPC and Article 11 RPBA

2.1 Submissions related to auxiliary requests 1 to 6 during the written phase of the proceedings

The following circumstances applied regarding the filing of the auxiliary requests and the parties' (lack of) submissions in this respect.

Auxiliary requests 1 to 6 were filed with the reply to the statement setting out the grounds of appeal.

In its reply, the respondent pointed out the alleged basis for the amended features and a brief justification for the amendments in auxiliary request 1.

The appellant did not make any submissions in writing in reply to the filing of the auxiliary requests before issuance of the preliminary opinion of the Board.

The Board noted in its communication under Article 15(1) RPBA that no arguments had been put forward with respect to the allowability of auxiliary requests 1 to 6 other than the respondent's explanations as to the origin of the amendments, and drew the parties' attention to the fact that in such a situation remittal of the case to the opposition division might be required.

The respondent filed a letter in reply to this communication in which - in connection with the auxiliary requests - it repeated *verbatim* the same arguments which had already been put forward in the reply to the appeal.

The appellant did not make any submission in writing in reply to the Board communication or to the latest submissions by the respondent.

2.2 Amendment of the appellant's case during the oral proceedings

During the oral proceedings before the Board, the appellant requested for the first time that auxiliary requests 1 to 6 should not be admitted according to Article 12(3), (4) and (5) RPBA and identified the following three reasons.

- The auxiliary requests had not been substantiated by the respondent in the appeal phase and, although they appeared to correspond to auxiliary requests 1 to 6 as filed during opposition proceedings, they

had not been substantiated during those proceedings either.

- The auxiliary requests were not convergent.

- The auxiliary requests were *prima facie* not allowable since their subject-matter was obvious and not clear, the latter being a consequence of the addition of the wording "**mainly** upwards" in claim 1.

The appellant acknowledged that these submissions were an amendment of its appeal case within the meaning of Article 13(2) RPBA and justified them on the ground of late assignment of the case to the authorised representative participating in the oral proceedings. The appellant also pointed out that it had several substantive objections to the auxiliary requests but acknowledged that they had not been brought forward in writing.

2.3 Reasons for the remittal

2.3.1 The Board considers that the case should be remitted to the opposition division in view of the situation created by the behaviour of **both** parties.

Firstly, the respondent submitted auxiliary requests 1 to 6 accompanied by rather limited arguments, merely stating the basis for the amendments and the alleged reasons for the specific amendments in auxiliary request 1. The respondent replied to the communication of the Board under Article 15(1) RPBA - in which the Board had noted the limited arguments in point 14.1 - and the respondent repeated these same submissions in its letter dated 5 February 2025.

Secondly, the appellant never responded in writing to the filing of the auxiliary requests, neither as to their allowability nor as to their admissibility. The appellant did not even respond to the Board's communication in which the Board pointed out the lack of arguments from either party in relation to the auxiliary requests.

This means that almost any argument or fact put forward by the parties during the oral proceedings in relation to the admissibility or allowability of auxiliary requests 1 to 6 - either in their favour or against them - would have been an amendment to the appeal case which the Board would have to consider under Article 13(2) RPBA.

This situation, in which there was an almost complete lack of written arguments from **both parties**, does not allow for proper handling of the case. It would oblige the Board to take a decision on the auxiliary requests (as to their admittance and/or their allowability) during the oral proceedings on the basis of an *ad hoc* examination of new facts and arguments. All of these new submissions would constitute an amendment of each party's appeal case under Article 13(2) RPBA, the admittance of which would need to be discussed as well.

For the sake of completeness, the mere fact, brought forward by the respondent, that the interpretation of D1 by the Board was surprising played no role in the Board's decision to remit the case.

2.3.2 The appellant argued at the oral proceedings that the case should not be remitted to the opposition division

since auxiliary requests 1 to 6 were not to be admitted (see point 2.2 above).

This argument does not sway the Board.

As explained in the preceding point, the reason for the remittal is that (in the case of the appellant) no written submissions at all were made with respect to the auxiliary requests, whether regarding their admittance or their allowability. Therefore, the Board considered the issue of remitting the case before even examining admittance of the auxiliary requests.

The Board considers that, although it may be good practice for a case to be remitted only if some parts of a party's case are determined to be in the proceedings, which would mean in the case of the patent proprietor that (at least) one of the filed auxiliary requests is indeed admitted into the proceedings, a remittal can be decided at any time, i.e. even before a decision on the admittance of auxiliary requests is taken. The law does not limit the Board's power in this respect (Article 111(1), second sentence, EPC).

Ultimately, as already explained above, it was the lack of arguments from any party that led to the remittal.

2.3.3 For the sake of completeness, the Board also specifically addresses the issue of remittal in the light of the appellant's arguments relating to admittance, brought forward during the oral proceedings, see point 2.2 above. The Board considers that, in order to be able to exercise its (possible) discretion under Article 12(4) or (5) RPBA, it would in the present case necessarily be faced with new facts and arguments submitted at the latest possible moment

in the proceedings. Such new submissions would have to address the fact that these auxiliary requests constitute "carry-over requests" which had been filed in due time before the opposition division (namely on the final date fixed by the opposition division pursuant to Rule 116(1), second sentence EPC). They would also have to address the question of whether they constitute an "amendment" within the meaning of Article 12(4), first sentence, RPBA, and thus whether the admittance of this amendment is at all within the Board's discretion under Article 12(4), second sentence, RPBA. As to admittance under Article 12(5) RPBA, the new submissions would have to address the requirements of Article 12(3) RPBA. In the event that these requirements were indeed not met, the new submissions would have further to address whether the Board might exercise this discretion by nevertheless admitting the auxiliary requests because, for example, they were "carry-over requests" and/or considered self-explanatory.

All these new submissions (for or) against admittance of the auxiliary requests would constitute an amendment to the parties' appeal case, the admittance of which would have to be considered by the Board under Article 13(2) RPBA. The Board cannot see any valid justification for the parties' submissions on admittance being made only at the oral proceedings. In particular, the fact that the appellant's representative was entrusted with the case only late in the course of the proceedings does not constitute a valid justification for submissions made only at oral proceedings.

2.4 The Board thus considers that the above constitutes "special reasons" within the meaning of Article 11,

first sentence, RPBA, and is exercising its discretion under Article 111(1), second sentence, EPC to the effect that it is remitting the case to the opposition division.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.

2. The case is remitted to the opposition division for further prosecution.

The Registrar: The Chairman:

C. Spira F. Bostedt

Decision electronically authenticated