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**Datasheet for the decision
of 9 December 2025**

Case Number: T 1113/24 - 3.2.07

Application Number: 16184788.4

Publication Number: 3120940

IPC: B08B9/027, B67C3/00, B67C7/00

Language of the proceedings: EN

Title of invention:
BEVERAGE FILLING METHOD

Patent Proprietor:
Dai Nippon Printing Co., Ltd.

Opponent:
Krones AG

Headword:

Relevant legal provisions:
EPC Art. 113(1), 117(1)
EPC R. 103(1) (a)
RPBA 2020 Art. 11, 12(8)

Keyword:

Remittal to the department of first instance

Remittal - fundamental deficiency in first instance proceedings (yes)

Reimbursement of appeal fee - equitable by reason of a substantial procedural violation

Oral proceedings - withdrawal of request for oral proceedings

Decisions cited:

T 0269/00

Catchword:



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Case Number: T 1113/24 - 3.2.07

D E C I S I O N
of Technical Board of Appeal 3.2.07
of 9 December 2025

Appellant: Kronos AG
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Respondent: Dai Nippon Printing Co., Ltd.
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 28 June 2024
rejecting the opposition filed against European
patent No. 3120940 pursuant to Article 101(2)
EPC.**

Composition of the Board:

Chairman G. Patton
Members: V. Bevilacqua
Y. Podbielski

Summary of Facts and Submissions

I. The appellant (opponent) appealed against the decision of the opposition division rejecting the opposition filed against European patent No. 3 120 940.

II. The following documents, mentioned in the appealed decision, will be referred to in the present communication (see consolidated list annexed to the decision under appeal, point I.3):

- D21: Contract AH01a
- D22: Invoice AH01b
- D23: Plan AH02 of the publicly prior-used system
- D24: Delivery confirmation AH03
- D25: E-mail correspondence AH04a
- D26: System diagram AH04b
- D27: System diagram AH05
- D28: Materials list AH06
- D29: Commissioning documentation AH07
- D30: Order confirmation AH08
- D31: System diagram AH09
- D32: System diagram AH10
- D33: Sketch AH11a
- D34: Sketch AH11b
- D35: Sketch AH11c
- D36: Expert report AH12
- D37: Screenshot AH13
- D38: Operating manual, pp. 1-9 (Anlage 1)
- D39: e-mail correspondence (Anlage 2).

- III. With the statement setting out the grounds of appeal the appellant requested
- that the decision under appeal be set aside and
 - that the patent be revoked.

As an alternative to the previous requests the appellant requested

- that the case be remitted to the opposition division for further prosecution, and
- that the appeal fee be reimbursed.

The appellant then also requested oral proceedings as a further auxiliary measure.

- IV. The respondent (patent proprietor) requested in its reply to the statement setting out the grounds of appeal
- that the appeal be dismissed, and therefore
 - that the patent be maintained as granted (main request).

The respondent requested that oral proceedings be held in case that the main request is not allowed, and as a further auxiliary measure, when setting the appealed decision aside,

- that the patent be maintained in amended form according to one of the following auxiliary requests, in the following order (see pages 35 and 36 of the reply dated 25 February 2025 for their correspondence with previous requests):

auxiliary request A0,
auxiliary requests 1 to 3,
auxiliary request 3a, 3b, 3c,
auxiliary request 4,

auxiliary requests 5, 5a, 5b, 5c,
auxiliary requests 6, 6a,
auxiliary requests 7, 8,
auxiliary requests 9, 9a, 9b, 9c,
auxiliary request 10,
auxiliary requests 11, 11a, 11b, 11c.

V. With their subsequent letters (letter of the appellant of 24 June 2025 and letter of the respondent of 8 September 2025) the parties did not change their original requests, given above.

VI. In preparation for oral proceedings the board gave its preliminary assessment of the case by means of a communication pursuant to Article 15(1) RPBA dated 1 October 2025.

In this communication the board set out its preliminary opinion according to which the appellant convincingly demonstrated that a substantial procedural violation took place in the opposition proceedings.

For this reason, the board was of the preliminary opinion that

- the appealed decision had to be set aside,
- the case had to be remitted to the opposition division for further prosecution and
- the appeal fee had to be reimbursed.

VII. The appellant replied to the above mentioned communication with letter of 16 October 2025.

In this letter the appellant did not comment on the preliminary opinion of the board and withdrew its request for oral proceedings under the condition that the case be remitted to the opposition division for further prosecution.

VIII. By letter of 13 November 2025 the respondent also withdrew its request for oral proceedings under the condition that the case be remitted to the opposition division for further prosecution without commenting on the preliminary opinion of the board.

IX. The arguments of the parties are dealt with in detail in the reasons for the decision.

X. Claim 1 of the main request reads as follows (the features are identified in accordance with section I.13 of the appealed decision):

M1.1 "A drink filling method in which
M1.2 a drink supply pipe line (7) for supplying the drink
from a heat-sterilizing unit (18) into a filling
machine (2) is sterilized,
M1.3 then filling a container (4) that has been sterilized
with the drink supplied from the drink supply pipe line
(7), and thereafter,
M1.4 the container (4) is sealed, wherein
M1.5 an upstream side circulation path is formed
M1.5.1 by forming an upstream side return path (6a) to an
upstream side pipe line section (7a)
M1.5.2 passing through the sterilizing unit (18) of the drink
supply pipe line (7),

- M1.6 a downstream side circulation path is formed
- M1.6.1 by forming a downstream side return path (6b) to a downstream side pipe line section (7b) of the drink supply pipe line (7)
- M1.6.2 extending from a downstream side portion of the upstream side pipe line section (7a) to the filling machine (2),
- M1.7 an alkaline cleaning liquid is circulated within the upstream side circulation path and the downstream side circulation path to thereby clean and sterilize an interior of the drink supply pipe line (7), and
- M1.8 a drink filling process is started after performing a rinsing treatment with water."

The wording of the claims of the other requests is irrelevant to the present decision.

Reasons for the Decision

- 1. Decision in writing, Article 12(8) RPBA
- 1.1 The present decision is taken without holding oral proceedings.
- 1.2 The parties have been informed of the board's preliminary assessment on the appellant's allegation of a substantial procedural violation and on its request for reimbursement of the appeal fee, with a communication under Article 15(1) RPBA taking their submissions fully into account.
- 1.3 Both parties withdrew, in reaction to the above mentioned board's communication, their respective requests for oral proceedings under the condition that the case be remitted to the opposition division for

further prosecution, without reacting in substance to the reasons given by the board.

- 1.4 As there is no request on file to hold oral proceedings to discuss the issues of remittal of the case to the opposition division for further prosecution and reimbursement of the appeal fee, holding oral proceedings is deemed not necessary and the present case is ready for decision on the basis of the above mentioned written submissions.

The principle of the right to be heard (Article 113(1) EPC) is respected since the grounds and evidence upon which the present decision is based are known to the parties and both parties decided not to react to them.

In view of the above the board, while cancelling the oral proceedings scheduled for 10 February 2026, issues the present decision in written proceedings in accordance with Article 12(8) RPBA.

2. Section II.16.2 of the decision under appeal

In this section of the decision under appeal the opposition division justified its decision not to hear the witnesses offered by the appellant (Mr Markus Riedl and Mr Stefan Hoeller) in support of an allegation of public prior use with the following arguments.

- 2.1 The witnesses had been offered to confirm that the filling and cleaning installation according to the prior use "Adelholzener" anticipates all the features of claim 1 of the contested patent.

However the documentary evidence supporting the alleged prior use D21 to D39 was of such a low quality that a

skilled person would not be able to read any technical information from the diagrams of documents D23, D24, D26, D27, D32, D34 or D35 containing all the technical information, and thus would not be able to identify whether some of the claimed features (features M1.5, M1.5.1, M1.5.2, M1.6, M1.6.1, M1.6.2 and M1.7) were disclosed in these documents or not.

2.2 Hearing these witnesses was not necessary according to the decision under appeal, as their testimony would not have been sufficient to remedy the deficiencies in the documentary evidence and therefore would not have been able to influence the outcome of the proceedings, namely that the alleged prior use was not adequately proven by the available documentation.

2.3 Furthermore, as the appellant had not filed written statements of the witnesses, any possible information provided by the witnesses during the hearing would have introduced new facts into the proceedings.

3. Arguments of the appellant

The appellant argues that the opposition division's refusal to hear witnesses constitutes a violation of its right to be heard according to Article 113(1) EPC for the following reasons.

3.1 The appellant disputes the respondent's claims about document quality, stating that in D23, the circulation paths are described in detail with consecutive numbers and are clearly recognizable.

The submitted files in "pdf"-format have perfect quality, and any quality loss during electronic filing at the EPO cannot be blamed on the opponent.

3.2 The witnesses were not offered to introduce new facts, but merely to confirm facts already alleged in the notice of opposition (specifically referenced on page 24 of the notice) and could very well explain and prove the prior use with or without reference to D23.

3.3 According to the established case law, regardless of all other evidence and their quality or content, naming witnesses for later witness examination is to be considered as providing evidence, as long as it is recognizable for which factual allegations the witness is named.

It is in particular not necessary to state in advance what a witness will say about the alleged facts. A prior affidavit from the witnesses is therefore not a prerequisite for summoning them.

Additional explanations given by a witness to close a potential gap in documentary evidence cannot be considered as new facts *per se*.

4. Position of the respondent

4.1 In the reply to the statements setting out the grounds of appeal the respondent argues, referring to T 269/00, that the decision of the opposition division was reasonable.

Not hearing witnesses did not amount to a substantial procedural violation because the prior use was not adequately substantiated during the opposition period.

In fact, according to the respondent, the documents submitted to prove the alleged prior use (D23, D32-D35)

are too poor in quality and unclear to be complemented by a witness hearing.

The opposition division was therefore correct in deciding that there was no reasonable prospect that oral witness statements would have influenced the opposition division's decision.

4.2 In its letter dated 8 September 2025 the respondent adds the following arguments.

Evidence based only on witness statements cannot be confirmed by anyone other than the witness; witness testimony alone cannot prove an alleged public prior use beyond reasonable doubt.

In this situation, and contrary to appellant's allegations, it can be determined in advance that hearing witnesses would not influence the decision.

5. Position of the Board

5.1 The appellant convincingly demonstrated that a substantial procedural violation took place in the opposition proceedings for the following reasons.

5.1.1 The opposition division incorrectly mixed up the submission of facts, which in the present case was complete, with the proof required to establish the alleged facts, which the witnesses were meant to provide.

The notice of opposition contains the allegation (see pages 18-23) that features M1.5, M1.5.1, M1.5.2, M1.6, M1.6.1, M1.6.2, and M1.7 were disclosed in the schematic diagrams D31-D35 (AH09, AH10, AH11a-c).

D37 (AH13) was also referred to, as additional evidence, for feature 1.7 (page 22, penultimate paragraph).

As clearly stated on page 24 of the notice of opposition, the appellant offered witnesses specifically to corroborate and explain the technical details of the circulation paths that were visible in the diagrams (but required expert interpretation).

This means that the witnesses have not been offered to introduce new facts into the proceedings, but merely to confirm the facts alleged in the notice of opposition.

- 5.1.2 According to the established jurisprudence (Case Law of the Boards of Appeal, 11th Edition 2025, CLB in the following, III.G.3.1.1), if the evidence offered as proof of contested facts essential to the settlement of the dispute is decisive, the body hearing the case must, as a rule, order that it be taken.

This principle directly applies here, as the contested features M1.5-M1.7 were essential to the novelty determination.

- 5.1.3 The opposition division also incorrectly based its decision on the prior use on an assumption about what the witnesses would say, thereby pre-empting the evidence's evaluation.

The opposition division, when justifying its decision not to hear the witnesses, explained that D21-D37 (specifically citing D23, D24, D26, D27, D32, D33, D34 and D35) were of such a low quality that a skilled person would not be able to identify features M1.5,

M1.5.1, M1.5.2, M1.6, M1.6.1, M1.6.2 and M1.7 in these documents.

This approach, determining in advance that witnesses could not fill gaps in documentary evidence without hearing them, amounts to speculation about what the witnesses would say based on the written documents.

The opposition division should instead have evaluated the complete evidence offered by the appellant, before deciding on the prior use.

- 5.1.4 Additional clarifications provided by a witness to close a potential gap in the documentary evidence on file cannot be considered *per se*, even before hearing the witness, as new facts; hearing a witness would otherwise be futile (CLB, point III.G.2.4.1).

While it is possible that a witness statement contains the allegation of a new fact, this can only be established *a posteriori*, after having heard the witness.

The principle of unfettered consideration of evidence does not apply until after the evidence has been taken and cannot be used to justify not taking evidence offered.

- 5.1.5 The absence of written declarations by the offered witnesses is also not a reason to suspect that their testimony would exclusively introduce new facts, and also does not justify the decision of not hearing them.

This is because, according to the established jurisprudence it is a party's choice to present whatever means of evidence it considers to be suitable,

and it is an opposition division's duty to take its decision on the basis of all the relevant evidence available rather than to expect the presentation of more preferred pieces of documentary evidence, and to speculate on the reasons for and draw conclusions from their absence (CLB, point III.G.3.3.4).

- 5.1.6 In conclusion, while it is correct that oral evidence of a witness should only be taken when required to clarify matters decisive for the decision, the opposition division should have heard the witnesses before deciding what the alleged prior use was, and was not, disclosing, as the witnesses were offered to corroborate decisive facts already alleged in the notice of opposition.

By refusing to hear the proposed witnesses before deciding on the allegation of prior use, the opposition division has in fact proceeded to assess evidence that had not yet been completely established thereby incurring a substantial procedural violation of the appellant's right to be heard under Articles 113(1) and 117(1) EPC.

- 5.1.7 The position of the respondent is that not hearing witnesses did not amount to substantial procedural violation because, as the available written evidence was not sufficient to adequately prove the prior use, it was clear that witness statements would have been superfluous.

In this context the distinction between facts and evidence is crucial because, as established in the case law (CLB, point III.G.3.3.4) no EPC provision requires that facts adduced in support of an alleged prior use

be proven within the opposition period to substantiate the allegation.

- 5.1.8 The reference of the respondent to T 269/00 is also not convincing because, in the present case, as discussed above, the witnesses were offered specifically to confirm facts already alleged in the notice of opposition and therefore also to corroborate the technical details of the circulation paths.

In T 269/00, the circumstances were different as they involved a situation where the prior use was not adequately substantiated during the opposition period (see point 14 of the reasons).

By contrast, in the present case, there is no reason to doubt that the submission of facts was complete.

- 5.2 The Board therefore concludes that the opposition division, by not hearing the witnesses offered by the appellant, violated the right to be heard of the appellant.

This is because the right to be heard is not just a right to submit evidence, but also to have this evidence duly considered and reviewed with respect to its relevance for a decision on the matter (CLB, point III.K.3.4.2).

6. Reimbursement of the appeal fee, remittal to the opposition division
- 6.1 The appellant requested, based on the above discussed substantial procedural violation, that the case be remitted to the opposition division for further prosecution and that the appeal fee be reimbursed.
- 6.2 Taking into account that the proceedings leading to the appealed decision were tainted with a substantial procedural violation, the board decides that both requests are allowed, for the following reasons.
 - 6.2.1 Under Article 11 RPBA the Board shall not remit a case to the department whose decision was appealed for further prosecution, unless special reasons present themselves for doing so, whereby, as a rule, fundamental deficiencies which are apparent in the proceedings before that department constitute such special reasons.

According to the established case law of the boards of appeal (CLB, point V.A.9.4.4.a)), the violation of the right to be heard under Article 113(1) EPC is a fundamental procedural deficiency in the first-instance proceedings that amounts to a special reason within the meaning of Article 11 RPBA and justifies remittal to the department that issued the contested decision.

- 6.2.2 Rule 103(1) (a) EPC stipulates that the appeal fee has to be fully reimbursed when an appeal is allowable and the reimbursement is equitable by reason of a substantial procedural violation. In view of the above, such requirements of Rule 103(1) (a) EPC are fulfilled and, hence, the appeal fee has to be reimbursed.

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.
3. The appeal fee is reimbursed.

The Registrar:

The Chairman:



G. Nachtigall

G. Patton

Decision electronically authenticated