

Publication in the Official Journal Yes / No

File Number: T 193/87 - 3.2.1
Application No.: 81 850 063.9
Publication No.: 0 039 319
Title of invention: Double seat valve

Classification: F16K 1/44

D E C I S I O N
of 13 June 1991

Proprietor of the patent: ALFA-LAVAL AB
Opponent (01): Otto Tuchenhagen GmbH & Co KG
Opponent (02): Appendagefabriek "Hoogeveen" BV

Headword: Belated translation/Appendagefabriek

EPC Article 14(4), (5); Rule 6(2), 56(1), (2)

Keyword: Translation of notice of opposition not filed in due time -
Opposition non-existent - No examination for admissibility -
Opposition fee refunded

Headnote

If a notice of opposition is filed in a language of a Contracting State other than an official language of the EPO and the translation prescribed in Article 14(4) EPC is not filed in due time, this notice shall be deemed not to have been received, and the opposition fee is to be refunded (following T 323/87, OJ EPO 1989, 343). Since the opposition is not in existence, examination for its admissibility under Rule 56(1) EPC does not come into question.

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Case Number : T 193/87 - 3.2.1

D E C I S I O N
of the Technical Board of Appeal - 3.2.1
of 13 June 1991

Appellant : Otto Tuchenhagen GmbH & Co KG
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Representative : Glaeser, Joachim, Dipl.-Ing
Patentanwalt
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W - 2000 Hamburg 50 (DE)

Appellant : Appendagefabriek "Hoogeveen" BB
(Opponent 02) Prof Zrenikestraat 8
NL - 8606 JV Sneek (NL)

Representative : 't Jong, Bastiaan Jacobus
OCTROOIBUREAU ARNOLD & SIEDSMA
PO BOX 18558
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Respondent : ALFA-LAVAL AB
(Proprietor of the patent) BOX 500
S - 147 00 Tumba (SE)

Representative : Vonnemann, Gerhard Dr.-Ing
Meyer, Stach, Vonnemann
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Decision under appeal : Decision of Opposition Division of the European
Patent Office dated 11.03.87 rejecting the
opposition filed against European patent
No. 0 039 319 pursuant to Rule 56(1) EPC.

Composition of the Board :

Chairman : P. Delbeque
Members : F. Benussi
F.A. Gumbel

Summary of Facts and Submissions

- I. The mention of the grant of European patent No. 0 039 319, based on European patent application No. 81 850 063.9 filed on 9 April 1981, was published on 4 September 1985. The opposition period accordingly expired on 4 June 1986.
- II. The Appellant (Opponent II) filed a notice of opposition in the Dutch language on 29 May 1986 and paid the respective fee at the same time.
- III. Since the prescribed translation of the notice of opposition in accordance with Art. 14(4) and Rule 1(1) EPC was not submitted before the expiry of the opposition period and within the one month period after filing of the notice of opposition (Rule 6(2) EPC), the Formalities Officer of the Opposition Division, on 5 August 1986, issued a communication under Rule 56(1) EPC (Form 2305.2) informing the Appellant that in view of that deficiency, rejection of the notice of opposition as inadmissible had to be expected.
- IV. On 26 September 1986 the Appellant filed a translation in English of the notice of opposition and at the same time submitted his observations to the communication of the Formalities Officer of 5 August 1986, which can be resumed as follows:
 - the filing of the translation in one of the official languages of the EPO is required by Rule 1(1) EPC, second sentence, and to this extent Rule 56(1) EPC applies;
 - the time limit for filing this translation is fixed by Rule 6(2) EPC and failure to observe this time limit would be a case where Rule 56(2) should be applied;

- the legal effect announced in the communication could not ensue because a communication under Rule 56(2) EPC, inviting the Opponent to remedy the deficiency within a further time limit to be set should have been sent by the Formalities Officer of the Opposition Division instead of the communication pursuant to Rule 56(1) EPC;
- as subsidiary request, the Appellant requested that Rule 88 EPC should be applied.

V. By its decision of 11 March 1987 the Formalities Section acting on behalf of the Opposition Division rejected the opposition as inadmissible under Rule 56(1) EPC.

The reasons given in this decision were essentially the following:

1. The translation into English of the notice of opposition was not filed within the period prescribed by Rule 6(2), second sentence, EPC; therefore the notice of opposition had to be deemed not to have been received (Art. 14(5) EPC);
2. Consequently Art. 99(1) EPC had not been complied with resulting in the legal consequence prescribed by Rule 56(1) EPC, i.e. rejection of the opposition as inadmissible.
3. Rule 88 EPC would not be applicable, because the incorporation of quotations from the patent specification in the language of the proceedings into the Dutch language notice of opposition does not mean that the notice contains linguistic or other errors,

neither in the English nor in the Dutch parts of the text.

VI. On 8 May 1987 the Appellant lodged an appeal against that decision, paying the appeal fee at the same time.

On 9 July 1987 he filed a Statement of Grounds of Appeal in which he submitted that:

- (a) as the requirements mentioned in Rule 56(1) EPC are complied with, the rejection of the notice of opposition filed on 29 May 1986 was not properly founded;
- (b) the Opposition Division should have decided that the failure to file the translation of the notice of opposition in due time forms a deficiency as categorised under Rule 56(2) EPC and that, therefore, this deficiency should have been communicated to the Appellant who should have been invited to remedy this deficiency within a further specified period.

VII. In a communication of the Board dated 11 September 1990, it was stated that according to the Board's provisional opinion the failure to provide a due translation of the notice of opposition within the time limit provided under Rule 6(2) EPC cannot be seen as a deficiency which could be remedied under the provisions of Rule 56(2) EPC. Further, it was pointed out that in the present case the provision of Art. 14(5) EPC is to be applied, i.e. the notice of opposition should be deemed not to have been received.

VIII. In his observations dated 12 November 1990 in reply to this communication and during the oral proceedings held on 13 June 1991, the above opinion was contested by the

Appellant. In particular he submitted that the right according to Art. 14(2) and (4) EPC to file documents in a different language than the language of the proceedings was intended to set up a system of some compensation for the disadvantageous position of persons who are forced to have proceedings in a foreign language as compared to those who have an official language, i.e. English, French or German as their native language. In any case, this disadvantageous position was not fully compensated because, in fact, the persons referred to in Art. 14(2) EPC are confronted with two time limits for filing the document and for filing the translation, with the risk that this additional time limit goes by unnoticed, as occurred in the present case. In this context, the Appellant submitted that the necessity to remedy the discrimination existing for instance for the Dutch language should be a reason for extending the time limit for filing the translation of the notice of the opposition.

With reference to Rule 6(2) EPC, the Appellant contested that this provision is implicitly included in Rule 56(1) EPC. There was a close logical and legal connection between Rule 6(2) and Art. 14(4) EPC on the one hand and between Rule 1(1) and Art. 14(4) EPC on the other hand, but there was no close logical and legal "cross-connection" between Rule 6(2) and Rule 1(1) EPC. Therefore the reference to Rule 1(1) in Rule 56(1) EPC, cannot entail an implicit reference to Rule 6(2) EPC.

The fact that Rule 1(1) and not Art. 14(5) is referred to in Rule 56(1) EPC clearly showed that the legal consequences of Art. 14(5) were not envisaged by the legislator. Anyway, in view of the different wording used, "in due time" mentioned in Art. 14(5) EPC was not equivalent to "within the time limit" mentioned in

paragraph 4 of this Article. The term "in due time" would rather correspond to the "good time" of Rule 56(2) EPC.

IX. During the oral proceedings the following requests were presented:

The Appellant (Opponent II) requested that the decision under appeal be set aside and that his opposition may be considered as admissible.

The Respondent (Patentee) requested that the appeal be dismissed and that the costs for the oral proceedings be apportioned to the Appellant.

Reasons for the Decision

1. The appeal complies with Arts. 106 to 108 and Rules 1(1) and 64 EPC and is therefore admissible.
2. The appeal raises the question as to whether the Appellant, as a person referred to in Art. 14(2) EPC, filing a notice of opposition in the official language of a Contracting State having a language other than English, French or German as an official language, when the Formalities Officer of the Opposition Division had noticed that the translation of the notice of opposition in one of the official languages of the EPO was not filed in due time, should have been informed and invited to remedy this deficiency within a further specified period according to Rule 56(2) EPC even after expiry of the time limits under Rule 6(2) EPC.
3. The answer to this question requires some general observations concerning the regulations of the language problem adopted by the EPC.

3.1 The adopted regulations, as in many other international agreements, were based on a compromise, which takes account of the interests of applicants, competitors and the Contracting States, but without prejudicing workable proceedings before the EPO.

The general principles of this compromise are:

- (a) the official languages of EPO are to be limited to three languages, namely English, French and German: therefore for the filing and prosecution of their European patent applications, the applicants may choose between one of these three languages.
- (b) the European patent applications are to be prosecuted and published and the European patents are to be granted in one single language, namely, in one of the three official languages of the EPO chosen by the applicants, which is mentioned in the EPC as the language of proceedings.

All the documents referring to European patent applications received by the EPO or emanating from the EPO may only be in the language of the proceedings.

3.2 Some discrimination between those applicants, whose native language is either English, French or German and those for whom this is not the case, has been eliminated by special regulations of the EPC:

- (a) persons having their residence or principal place of business within the territory of a Contracting State having a language other than English, French or German as an official language, and nationals of that State who are resident abroad, may file a European

patent application, and any other documents which have to be filed within a time limit, in an official language of that State (Art. 14, paragraphs 2 and 4 EPC);

- (b) a reduction in the filing fee, examination fee, opposition fee or appeal fee (Rule 6(3) EPC) in favour of the applicants who avail themselves of the options provided in Art. 14(2) and (4) EPC shall be allowed.
- (c) the persons referred to in Art. 14(2) EPC are given the possibility to go back to the original text where the translation was narrower than the original text.

4. As previously mentioned, Art. 14(4) EPC permits the persons referred to in Art. 14(2) EPC to file documents which have to be filed within a time limit in an official language of their State provided they file a translation in the language of the proceedings within the time limit prescribed in the Implementing Regulations. Furthermore, according to the language regime for opponents and third parties intervening in opposition proceedings laid down in Rule 1(1) EPC (version in force until 31 May 1991), there is provided in favour of these parties a rather liberal linguistic regulation: the opponent being a person who acts not only in his own interest, but also in the public interest is not restricted to the language of the proceedings, but may file documents or the required translation in any of the official languages of the EPO. The time limit for filing a translation referred to in Art. 14(4) EPC is one month after filing of the document in the foreign language and shall be extended where appropriate to the end of the opposition period or appeal period where the document is a notice of opposition or an appeal (Rule 6(2) EPC).

The consequence of the belated presentation of a translation of a document, other than those making up the European patent application, that is e.g. the notice of opposition, is clearly laid down in Art. 14(5) EPC, which provides that "if any document, other than those making up the European patent application, is not filed in the language prescribed by this Convention, or if any translation required by virtue of this Convention is not filed in due time, the document shall be deemed not to have been received".

In other words, the above-mentioned liberal approach with regard to the language in which the documents may be filed cannot lead to the time limit pursuant to Rule 6(2) EPC within which the translation of a document has to be filed being exceeded, for instance, by application of the procedure under Rule 56(2) EPC suggested by the Appellant.

In the present case, the notice of opposition to the European patent as granted was presented in the Dutch language on 29 May 1986 and the English translation was filed on 26 September 1986, i.e. after the one-month period laid down in Rule 6(2) EPC and also after the nine-month period laid down in Art. 99(1) EPC had expired, with the legal consequence pursuant to Art. 14(5) EPC that the notice of opposition has to be deemed not to have been received (see in this context the decision T 323/87 OJ 1989, 343 in an analogous case).

5. Contrary to the opinion set out in the appealed decision finding the notice of opposition to be inadmissible, and also in contrast to the instructions under chapter IV point 1.2.2.1b, of the Guidelines for Examination which require that a case such as the present one be handled under Rule 56(1) EPC under the terms of inadmissibility,

the Board takes the view that this Rule cannot be applied if - as in the present case - the notice of opposition shall be deemed not to have been received with the consequence that no opposition came into effect the admissibility of which could have been examined in accordance with Rule 56 EPC.

6. Since, as follows from the considerations above, neither Rule 56(1) nor Rule 56(2) could be applied in the present case the respective arguments presented by the Appellant (see points IV, VI and VIII of this decision) fall on sterile ground and need not be dealt with in detail.
7. From the fact that the notice of opposition is deemed not to have been received and consequently an opposition has not been filed, it follows that the opposition fee has been paid without reason and must therefore be reimbursed.
8. Finally, the Respondent's request for the apportionment to the Appellant of the costs for the oral proceedings is rejected.

Having regard to the Art. 104(1) EPC, the Board cannot see in the present case reasons of equity which could justify such an apportionment of the costs, nor has the Respondent brought forward any evidence in this respect. No abuse can be seen of the right to oral proceedings given to any party by Art. 116(1) EPC.

Order

For these reasons, it is decided that:

1. The decision under appeal is set aside.

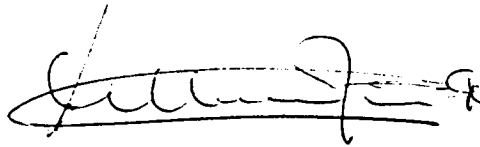
2. The Appellant's opposition is deemed not to have been filed.
3. The opposition fee paid by the Appellant is to be refunded.
4. The request for apportionment of costs is rejected.
5. The case is remitted to the first instance for further prosecution.

The Registrar:



S. Fabiani

The Chairman:



P. Delbecque

