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**Datasheet for the decision
of 25 September 2024**

Case Number: T 2103/22 - 3.3.03

Application Number: 10761651.8

Publication Number: 2418078

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B65D65/40, C08L67/02,
C09D167/02

Language of the proceedings: EN

Title of invention:
RESIN-COATED METAL SHEET AND SEAMLESS CAN FORMED THEREFROM

Patent Proprietor:
Toyo Seikan Group Holdings, Ltd.

Opponent:
STRAWMAN LIMITED

Relevant legal provisions:
EPC Art. 111(1), 123(2)
RPBA 2020 Art. 11

Keyword:
Amendments - allowable (yes)
Remittal - (yes)

Decisions cited:

G 0003/89, G 0011/91, G 0002/10



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Case Number: T 2103/22 - 3.3.03

D E C I S I O N
of Technical Board of Appeal 3.3.03
of 25 September 2024

Appellant: Toyo Seikan Group Holdings, Ltd.
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 14 July 2022
revoking European patent No. 2418078 pursuant to
Article 101(3) (b) EPC.**

Composition of the Board:

Chairman D. Marquis
Members: O. Dury
L. Basterreix

Summary of Facts and Submissions

I. The appeal by the patent proprietor lies from the decision of the opposition division revoking European patent No. 2 418 078.

II. Claims 1, 3 and 4 of the application as filed read as follows:

"1. A resin-coated metal sheet including a metal sheet and a layer of a polyester resin which chiefly comprises an ethylene terephthalate unit formed on at least one surface of the metal sheet, wherein said polyester resin is a blend of a lowly crystalline polyester resin and a highly crystalline polyester resin."

"3. The resin-coated metal sheet according to claim 1, wherein said highly crystalline polyester resin is a homopolyethylene terephthalate or a polyethylene terephthalate that contains the isophthalic acid in an amount of not larger than 3 mol%."

"4. The resin-coated metal sheet according to claim 1, wherein said lowly crystalline polyester resin is a polyethylene terephthalate that contains the isophthalic acid in an amount of 12 to 18 mol%."

III. The decision under appeal was based on a main request filed with letter of 22 April 2021 as well as sixteen auxiliary requests. As far as relevant to the present case, the following conclusion was reached in that decision:

The subject-matter of claim 1 of the main request did not meet the requirements of Article 123(2) EPC.

Further considering that none of the patent proprietor's auxiliary requests were allowable, the patent was revoked.

- IV. With their statement setting out the grounds of appeal the patent proprietor (appellant) filed a set of claims as main request and twenty sets of claims as auxiliary requests 1 to 14, 14a and 15-19.
- V. The opponent (respondent) replied to the statement of grounds of appeal.
- VI. The parties were summoned to oral proceedings and a communication pursuant to Article 15(1) RPBA was then issued by the Board.
- VII. Oral proceedings were held on 25 September 2024.
- VIII. **The final requests of the parties were as follows:**

The appellant requested that the decision under appeal be set aside and that the case be remitted to the opposition division on the basis of the main request filed with their statement of grounds of appeal for consideration of sufficiency of disclosure, novelty and inventive step. Alternatively, the appellant requested that the case be remitted to the opposition division for consideration of sufficiency of disclosure, novelty and inventive step on the basis of any of auxiliary requests 1 to 14, 14a or 15 to 19 filed with their statement of grounds of appeal.

The respondent requested that the appeal be dismissed. The respondent further requested that, should the appellant's appeal be successful, the case be remitted to the opposition division for consideration of sufficiency of disclosure, novelty and inventive step.

IX. Claim 1 of the **main request** read as follows (additions as compared to claim 1 of the application as filed in **bold**, deletions in ~~strikethrough~~):

"1. A resin-coated metal sheet including a metal sheet and a layer of a polyester resin which ~~chiefly~~ comprises an ethylene terephthalate unit formed on at least one surface of the metal sheet, ~~wherein~~ **characterised in that** said polyester resin is **a blended polyester resin which is** a blend of a lowly crystalline polyester resin and a highly crystalline polyester resin **at a weight ratio of 90:10 to 10:90;**

wherein said highly crystalline polyester resin is a homopolyethylene terephthalate or a polyethylene terephthalate that contains the isophthalic acid in an amount of not larger than 3 mol% and

said lowly crystalline polyester resin is a polyethylene terephthalate that contains the isophthalic acid in an amount of 12 to 18 mol%."

X. The appellant's arguments, in so far as they are pertinent for the present decision, may be derived from the reasons for the decision below. They are essentially as follows:

Claim 1 of the main request met the requirements of Article 123(2) EPC.

XI. The respondent's arguments, in so far as they are pertinent for the present decision, may be derived from the reasons for the decision below. They are essentially as follows:

Claim 1 of the main request did not meet the requirements of Article 123(2) EPC.

Reasons for the Decision

Main request

1. It was undisputed that the operative main request is identical to the main request dealt with in the decision under appeal.
2. Article 123(2) EPC
 - 2.1 The appellant contested the conclusion reached by the opposition division that the subject-matter of claim 1 of the main request did not meet the requirements of Article 123(2) EPC.
 - 2.2 For the assessment of Article 123(2) EPC, the question to be answered is whether or not the subject-matter of an amended claim extends beyond the content of the application as filed, i.e. whether after the amendments made the skilled person is presented with new technical information (see G 2/10, OJ EPO 2012, 376, point 4.5.1 of the Reasons and Case Law of the Boards of Appeal of the EPO, 10th edition, 2022, II.E.1.1). To be allowable the amendments can only be made within the limits of what a skilled person would derive directly and unambiguously, using common general knowledge, and seen

objectively and relative to the date of filing, from the whole of the documents as filed (G 3/89, OJ 1993, 117; G 11/91, OJ 1993, 125).

- 2.3 As indicated by the respondent (rejoinder: page 6, last paragraph), the question to be answered in order to assess if the requirements of Article 123(2) EPC are satisfied is if the subject-matter defined in claim 1 of the main request finds a valid support in the application as filed. To do so and in view of the arguments put forward by the parties, it is necessary first to determine the subject-matter effectively defined by claim 1 of the main request (which was in dispute between the parties) and then to assess if a valid support for that subject-matter can be found in the application as filed.

Reading of claim 1 of the main request

- 2.4 The respondent adhered to the conclusion of the opposition division regarding Article 123(2) EPC which was in particular reached considering that:
- The wording "is" in the sentence "characterised in that said polyester resin is a blended polyester resin which is a blend of a lowly crystalline polyester resin and a highly crystalline polyester resin at a weight ratio of 90:10 to 10:90" was to be read, in the context of claim 1 of the main request, as "comprises", which meant that any other component different from the ones specifically mentioned in said claim 1 could be present in the blended polyester resin;
 - Adopting that reading, the scope of claim 1 of the main request was neither restricted to a layer of a

polyester resin wherein the polyester resin was a blended polyester resin consisting of the two ethylene terephthalate polymers explicitly defined therein, nor was it restricted to a layer of a polyester resin, wherein the polyester resin was a blended polyester resin containing the two ethylene terephthalate polymers in majority. Also, the wording of claim 1 of the main request encompassed a layer of a polyester resin wherein the polyester resin was a blended polyester resin comprising the two specific ethylene terephthalate resins and in addition further compounds in an undefined amount, including, for example, a majority of polyesters not containing ethylene terephthalate units or embodiments according to which the polyester resin did not comprise an ethylene terephthalate unit in majority.

- 2.5 Considering these arguments, the meaning of the terms "said polyester resin is a blended polyester resin which is a blend of ..." and "a layer of a polyester resin which comprises an ethylene terephthalate unit formed on at least one surface of the metal sheet" present in claim 1 of the main request has to be determined, as well as the meaning of their combination.

Reading of the term "said polyester resin is a blended polyester resin which is a blend of ..."

- 2.6 In the Board's view, although it is correct that the normal rule of claim construction is that the terms used in a claim should be given their broadest technically sensible meaning, the literal reading of the passage of claim 1 of the main request "said polyester resin is a blended polyester resin which is a

blend of a lowly crystalline polyester resin and a highly crystalline polyester resin at a weight ratio of 90:10 to 10:90" defines that "said polyester resin" consists of the lowly crystalline and highly crystalline polyester resins further defined in claim 1 of the main request, in the given weight ratio. In that regard, according to established case law (Case Law of the Boards of Appeal of the EPO, 10th edition, 2022, II.A.6.2), the term "consists of" means that the definition of "said polyester resin" is given in a "closed" manner, i.e. it excludes the presence of any other components other than the ones specifically defined (in the present case the lowly and highly crystalline polyester resins).

2.6.1 At the oral proceedings before the Board, the respondent argued that, according to accepted practice, a blend of two components A (e.g. the highly crystalline polyester resin as defined in claim 1 of the main request) and B (e.g. the lowly crystalline polyester resin as defined in claim 1 of the main request) did not exclude the presence of a third component C, whereby the latter component could be present in any amount, even as a main component as compared to A and B. For that reason, they considered that the reading of claim 1 indicated in above section 2.6 was not correct.

a) However, claim 1 of the main request does not merely defines that "said polyester resin" is a blend of "a lowly crystalline polyester resin" and "a highly crystalline polyester resin" but specifies that "said polyester resin is a blended polyester resin which is a blend of a lowly crystalline polyester resin and a highly crystalline polyester resin ...". In the Board's view, said wording imposes that "said polyester resin"

is obtained by blending the lowly and highly crystalline resins as otherwise defined in the claim, and only these resins. In particular, the term "said polyester resin" defines that the resin so defined must be a polyester, which excludes e.g. that other resins may be present as a main component in the blend. In addition, the combination of the term "is a blended polyester resin" directly followed by the term "which is a blend of ... and ... " constitutes a product-by-process formulation that defines that "said polyester resin" should be obtainable by a blending operation and as the result of blending the lowly crystalline resin and the highly crystalline resin, and only these two resins. Indeed, in the Board's view, the use of the word "is" in this context ("is a blended polyester resin which is a blend of ...") leaves no room for the presence of any other components different from the lowly and highly crystalline resins making up "said polyester resin" according to claim 1 of the main request.

b) It is noted that the above conclusion is reached on the basis of the wording of claim 1 only but that conclusion is also congruent with the description of the patent in suit which does not disclose the presence of any other resin(s), in particular polyester resin(s), blended together with the lowly and highly crystalline resins. If the use of optional blending agents is indicated in paragraph 42 of the patent in suit (paragraph 18 of the application as originally filed), this takes place in a further, i.e. subsequent, blending step. Therefore, the above reading of claim 1 of the main request is fully in line with the description of the patent in suit.

d) For these reasons, the reading of the passage of

claim 1 "said polyester resin is a blended polyester resin which is a blend of a lowly crystalline polyester resin and a highly crystalline polyester resin at a weight ratio of 90:10 to 10:90" in an open manner contemplated by the respondent did not convince and was rejected by the Board.

Reading of the term "a layer of a polyester resin which comprises an ethylene terephthalate unit formed on at least one surface of the metal sheet"

2.7 The resin-coated metal sheet according to claim 1 of the main request is further defined in that it includes "a layer of a polyester resin which comprises an ethylene terephthalate unit formed on at least one surface of the metal sheet".

2.7.1 In that regard, the term "a layer of a polyester resin" defines, according to its literal reading, that the polyester therein mentioned, i.e. "which comprises an ethylene terephthalate unit", is the main component of the layer. However, this wording neither imposes that the polyester resin is the sole component of the layer, nor that it is the sole resin possibly present in the layer.

2.7.2 With that reading in mind, the Board therefore agrees with the opposition division that claim 1 of the main request is not restricted to a layer of a polyester resin, wherein the polyester resin is a blended polyester resin consisting of the two ethylene terephthalate polymers defined as lowly and highly crystalline polyester resins in claim 1 (decision under appeal: middle of page 3).

2.7.3 It is noted that the reading of claim 1 indicated in section 2.7.1 above also does not lead to any discrepancy between claim 1 and the disclosure of paragraph 42 of the patent in suit which is directed to the possible further blending of the blended resin with known blending agents for resins. Indeed that wording of claim 1 of the main request allows that such additives can be present in the "layer of a polyester resin" as defined in claim 1 of the main request.

2.7.4 The respondent put forward that in the passage of claim 1 of the application as filed "A resin-coated metal sheet including a metal sheet and a layer of a polyester resin which chiefly comprises an ethylene terephthalate unit formed on at least one surface of the metal sheet", the term "which" referred to the layer and not to the polyester. According to the respondent, this derived from the fact that it was evidently the layer that was "formed on at least one surface of the metal sheet".

However, should this reading be equally considered for claim 1 of the main request (which contains the same wording, albeit without the term "chiefly"), the Board considers that the reference to "unit" in that passage makes it clear that the term "which" makes reference to the polyester resin and not to the layer. This, in the Board's view, would also be the logical reading of the claim made by the skilled person, considering that the term "which" usually makes reference to the word directly preceding it. In that respect, it makes also no doubt that the skilled person would further read that it is indeed the layer which is "formed" on the surface of the metal sheet (as acknowledged by the respondent: see letter of 25 July 2024, page 1, end of penultimate paragraph). For these reasons, the

respondent's objection did not convince.

Combination of both terms in claim 1 of the main request

- 2.8 Considering that the subject-matter of claim 1 of the main request is defined by the combination of the two terms which meaning was analysed in sections 2.6 and 2.7 above (see wording: "a layer of a polyester resin which comprises an ethylene terephthalate unit formed on at least one surface of the metal sheet, characterised in that said polyester resin is ..."), also the meaning of the combination of these two terms has to be determined.
- 2.8.1 In that respect, the term "characterised in that said polyester resin is" means that the polyester resin specified in the term "a layer of a polyester resin" is identical to the "said polyester resin" further defined in claim 1, i.e. it consists of a blend of only the lowly and highly crystalline polyester resins (for the reasons indicated in section 2.6 above).
- 2.8.2 However, it has to be further taken into account that said lowly and highly crystalline polyester resins are further defined in claim 1 of the main request as follows:
- "said highly crystalline polyester resin is a homopolyethylene terephthalate or a polyethylene terephthalate that contains the isophthalic acid in an amount of not larger than 3 mol%" and
- "said lowly crystalline polyester resin is a polyethylene terephthalate that contains the isophthalic acid in an amount of 12 to 18 mol%".

In view of these definitions, both the highly and lowly crystalline polyester resins of the blend are "a polyester resin that comprises an ethylene terephthalate unit". This further means that also the blend of these two resins can only be "a polyester resin that comprises an ethylene terephthalate unit". Therefore, in view of the conclusions reached in sections 2.6 and 2.7 above, the term "which comprises an ethylene terephthalate unit" of claim 1 of the main request is in fact redundant (i.e. not further limiting).

2.8.3 In that respect, it is noted that in view of the conclusions reached in section 2.6, 2.7 and 2.8.2 above, the wording of claim 1 of the main request does not allow that the layer defined therein comprises a polyester resin that does not comprise an ethylene terephthalate unit in majority, contrary to the opposition division's view, which was adhered to by the respondent e.g. at the oral proceedings before the Board. Indeed, the definition of the highly crystalline polyester resin according to claim 1 imposes that it is either a homopolyethylene terephthalate or a polyethylene terephthalate that contains isophthalic acid in an amount of less than 3 mol%. In the Board's view, although it is correct that other comonomers different from isophthalic acid may be present in the highly crystalline polyester resin according to claim 1 of the main request, its definition however not only imposes that the highly crystalline polyester resin comprises an ethylene terephthalate unit (as indicated in section 2.8.2) but further imposes that said ethylene terephthalate unit must be present in majority since, otherwise, the resin would not be a "polyethylene terephthalate" anymore. In addition, the

same conclusion is, for the same reasons, equally valid for the lowly crystalline polyester resin which is defined in claim 1 of the main request in a very similar manner than the highly crystalline polyester resin, albeit only as a copolymer. For that reason, the respondent's argument did not convince.

2.8.4 Under these circumstances the Board considers that, contrary to the opposition division's and respondent's view, the wording of claim 1 of the main request does not encompass a layer of a polyester resin wherein the polyester resin is a blended polyester resin comprising the lowly and highly crystalline polyester resins and in addition thereto any other compounds in any amount, including, for example, "a majority of polyesters not containing ethylene terephthalate units" or "embodiments according to which the polyester resin does not comprise an ethylene terephthalate unit in majority" (decision: paragraph bridging pages 3 and 4; page 4, third full paragraph, last sentence). Rather, the wording of claim 1 imposes that the layer must remain "a layer of a polyester which comprises an ethylene terephthalate unit", which means that said layer cannot comprise e.g. a majority of polyesters not containing ethylene terephthalate units.

2.8.5 Considering that the above conclusions are reached on the basis of the wording of claim 1 of the main request alone, there is no need to turn to the description to interpret the meaning of that claim. In particular, the Board sees no reason to consider that the reading of claim 1 of the main request which is indicated above would not be a technically sensible reading that would not be considered by the skilled person. Under these circumstances, there is no need to address hereinafter the arguments of the parties relying on the examples of

the application as filed to interpret the wording of claim 1 of the main request.

2.8.6 The respondent argued that during the course of the proceedings at least three different readings of the subject-matter defined by claim 1 of the main request had been proposed, either by the respondent and the opposition division, by the appellant in their statement of grounds of appeal and by the Board in the preliminary opinion, the latter being afterwards accepted by the appellant. Adopting the reading of claim 1 contemplated by the Board in the preliminary opinion would not reflect the original intention of the appellant, so the respondent (letter of 25 July 2024: page 1, third to fifth paragraphs; the argument was further expanded at the oral proceedings before the Board).

However, it is unclear to the Board how that argument, which was not shown to amount to an objection pursuant to Article 123(2) EPC but rather appears to constitute a remark or comment, can be relevant. Indeed, in the present case, it is correct that both parties initially proposed different readings of claim 1 of the main request. In view of that exchange of arguments, the Board provided an analysis of the situation and its preliminary opinion in regard of the issue at stake in its communication, which was sent to the parties well ahead of the oral proceedings (3 June 2024 vs. 25 September 2024). Both parties filed further written submissions in reaction to that communication (letters of 25 July 2024 for the respondent and of 30 August 2024 for the appellant) and were given the opportunity to exchange their argument at the oral proceedings before the Board. That the Board arrived at a different conclusion than the opposition division is

not unusual (it is in fact the aim for a party to file an appeal). Nor is the fact that a party changes its position regarding the reading of a claim in view of the exchange of arguments having taken place during the proceedings. For that reason, the respondent's submission failed to persuade and is, in the Board's view, not relevant for the present decision.

- 2.8.7 The respondent put forward that adopting the reading of claim 1 indicated above, would lead to the consequence that auxiliary request 19, which was filed for the first time with the statement of grounds of appeal and the admittance of which had been contested by the respondent, would have to be admitted. This would be detrimental to the respondent, which should be prevented (respondent's letter of 25 July 2024: page 1, sixth paragraph).

In that respect, the Board shares the appellant's view that the question of the reading of claim 1 of the main request in order to assess if the requirements of Article 123(2) EPC are met has no bearing on the assessment of the admittance of auxiliary request 19, should it (have) be(en) needed at any stage of the appeal proceedings (appellant's letter of 30 August 2024: points 3.1 and 3.2). For that reason, the respondent's argument is rejected.

Support in the application as filed for the subject-matter of claim 1 of the main request

- 2.9 It remains to be assessed if the subject-matter defined in claim 1 of the main request according to the above analysis finds a valid support in the application as filed.

- 2.9.1 It was common ground that the main support in the application as filed relied upon by the appellant in respect of claim 1 of the main request is claim 1 of the application as filed, whereby the term "chiefly" was deleted. Also, the respondent's objection was solely that the absence of the term "chiefly" in claim 1 of the main request led to added-matter.
- 2.9.2 However, in view of the amendments made as compared to claim 1 of the application as filed identified in section IX above, it is noted that, in order to arrive at the subject-matter of claim 1 of the main request, claim 1 of the application as filed has to be further combined with other passages of the application as filed. In that regard, both parties explicitly acknowledged at the oral proceedings before the Board that the amendments related to the definition and weight ratio of the lowly/highly crystalline polyester resins as defined in claim 1 of the application as filed found a valid support in claims 3 and 4 and/or in the passages at page 8, lines 17-20, page 9, lines 12-14 and page 9, lines 16-20 of the application as filed. This view, which had been mentioned in the Board's communication (point 6.11.1.b), remained undisputed, both in the subsequent written submissions made by the parties and at the oral proceedings before the Board. Under these circumstances, it remains to be assessed if the deletion of the term "chiefly" from claim 1 of the application as filed leads to added-matter.
- 2.9.3 In that regard, there is no reason to give to the term "chiefly" present in claim 1 of the application as filed a meaning that would deviate from its literal sense, which is that the polyester resin of the layer so defined should principally comprise an ethylene

terephthalate unit, i.e. said polyester should contain an ethylene terephthalate unit not as the sole component but as the most important component. This was also the respondent's view (rejoinder: page 6, last sentence; oral proceedings before the Board) and this was undisputed.

2.9.4 However, adopting for the passages of the application as filed that provide a valid support for claim 1 of the main request the same reading as the one outlined above for the corresponding passages of claim 1 of the main request, the term "which chiefly comprises an ethylene terephthalate unit" can only be held, for the same reasons as the ones indicated above, to be redundant (i.e. not further limiting) in view of the other features defining the valid support in the application as filed for the subject-matter being claimed (see the conclusion reached for the corresponding passage of claim 1 of the main request which does not contain the term "chiefly" in point 2.8.2 above). Therefore, the presence or not in claim 1 of the main request of the term "which chiefly comprises an ethylene terephthalate unit" - which is not limiting in that context - or of the term "chiefly" contained therein, does not lead to added-matter pursuant to Article 123(2) EPC.

2.9.5 At the oral proceedings before the Board, the respondent argued that claim 1 of the main request did not meet the requirements of Article 123(2) EPC because the application as filed did not provide a valid support for a layer consisting of only the highly and lowly crystalline polyester resins.

However, as explained in sections 2.6 to 2.8 above, the Board does not agree with such a reading of claim 1 of

the main request. In particular, the wording of claim 1 of the main request does not impose that the layer therein defined consists of only the highly and lowly crystalline polyester resins. In addition, various passages of the application as filed describe that "said polyester resin" as defined in claim 1 of the main request is obtained by blending the lowly and highly crystalline polyester resins as otherwise defined in said claim 1 (see e.g. page 9, lines 16-17 and 32-33; page 10, lines 5-6; examples: resins (1)-(3) and (5)-(7) of paragraph 26 and page 18, lines 7-15). This, in the Board's view, further shows that the subject-matter of claim 1 of the main request finds a valid support in the application as filed. For these reasons, the respondent's argument did not convince.

2.9.6 To conclude, considering that it was undisputed that the application as filed provides a direct and unambiguous disclosure for the definition and amounts of the lowly/highly crystalline polyester resins defined in claim 1 of the main request, the fact that the term "chiefly" is not present in claim 1 of the main request whereas it was present in claim 1 of the application as filed was not shown to lead to subject-matter that extends beyond the content of the application as filed (Article 123(2) EPC).

2.10 In view of the above, the arguments put forward by the respondent or retained by the opposition division to argue that claim 1 of the main request did not meet the requirements of Article 123(2) EPC did not convince. Therefore, the corresponding objections are rejected.

3. Remittal

The decision under appeal did not address the grounds of opposition regarding sufficiency of disclosure, novelty and inventive step, which were put forward by the opponent in their notice of opposition. Considering that these circumstances amount to special reasons in the sense of Article 11 RPBA 2020 and in view of the primary object of appeal proceedings to review the decision under appeal in a judicial manner (Article 12(2) RPBA), the case is remitted to the opposition division for further prosecution.

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 on the basis of the main request filed with the statement of grounds of appeal.

The Registrar:

The Chairman:



D. Hampe

D. Marquis

Decision electronically authenticated