

Deckblatt Übersetzung

Daten der Übersetzung:

Court/Gericht:	Bundesgerichtshof
Date of Decision / Datum der Entscheidung:	2018-01-09
Docket Number / Aktenzeichen:	X ZR 14/16
Name of Decision / Name der Entscheidung:	Wärmeenergieverwaltung





FEDERAL COURT OF JUSTICE
IN THE NAME OF THE PEOPLE
JUDGMENT

X ZR 14/16

Pronounced on:
9 January 2018
Anderer
Judicial Secretary as
Clerk of the court
registry

in the patent nullity proceedings

Wärmeenergieverwaltung/
Heat energy management

EPC Art. 56; Patent Act Sec. 4

The definition of the skilled person serves to define a fictitious person from whose point of view the patent and the state of the art are to be assessed. Therefore, it cannot be based on considerations concerning the interpretation of the patent or the inventive step.

Federal Court of Justice, judgment of 9 January 2018 - X ZR 14/16 –
Federal Patent Court

The X. Civil Senate of the Federal Court of Justice, following the oral hearing on 9 January 2018, attended by the presiding judge Prof. Dr. Meier-Beck, the judges Dr. Bacher, Hoffmann and Dr. Deichfuß as well as the judge Dr. Marx

ruled that:

On appeal the judgment of the 1. Senate (Nullity Senate) of the Federal Patent Court of 15 October 2015 is amended.

The action is dismissed.

The plaintiffs shall bear the costs of the dispute.

By operation of law

Facts of the case:

1 The defendant is the owner of European patent 1 890 956, which was granted with effect for the Federal Republic of Germany, was filed on May 24, 2006, claiming a priority of June 13, 2005, and relates to a method and a system for managing thermal energy in a building with a duct for elevator installations. Claims 1 and 8, to which thirteen further claims are referred back, read in the process language:

1. Procédé de gestion d'énergie thermique dans un bâtiment (10) comprenant une installation de levage (13) avec une cabine (16) mobile dans une gaine (14) et un passage de ventilation (22) entre ladite gaine (14) et l'atmosphère, ledit procédé comprenant les étapes suivantes:

la surveillance d'au moins un paramètre d'état de ladite installation de levage (13), la surveillance d'au moins un paramètre d'état comprenant la surveillance de la présence d'une personne dans ladite installation de levage (13) e/ou la surveillance d'un mouvement de ladite cabine (16) dans ladite gaine (14);

l'évaluation dans une unité de gestion (32) de la nécessité de ventilation de ladite gaine (14) sur base de ces paramètres, ladite unité de gestion (32) concluant la nécessité de ventilation de ladite gaine (14) lorsque la présence d'une personne est détecté e/ou lorsque le mouvement de ladite cabine (16) est détecté;

le basculement d'un élément obturateur (30) associé audit passage de ventilation (22) d'une position d'ouverture, dans laquelle le passage de ventilation (22) est essentiellement ouvert, dans une position de fermeture, dans laquelle le passage de ventilation (22) est au moins partiellement obturé, uniquement lorsque ladite évaluation indique qu'une ventilation de ladite gaine (14) n'est pas requise, ledit élément obturateur (30) étant précontraint dans sa

position d'ouverture.

8. Système de gestion d'énergie thermique dans un bâtiment comprenant une installation de levage (13) avec une cabine (16) mobile dans une gaine (14) et un passage de ventilation (22) entre ladite gaine (14) et l'atmosphère, ledit système comprenant en outre:

un élément obturateur (30) associé audit passage de ventilation (22), ledit élément obturateur (30) étant mobile entre une position d'ouverture, dans laquelle le passage de ventilation (22) est essentiellement ouvert, et une position de fermeture, dans laquelle le passage de ventilation (22) est au moins partiellement obturé;

un moyen de précontrainte afin de maintenir, dans un état passif, ledit élément obturateur (30) dans sa position d'ouverture; et

une unité de gestion (32) contrôlant la position dudit élément obturateur (30), ladite unité de gestion (32) comprenant des moyens pour surveiller au moins un paramètre d'état de ladite installation de levage (13), et pour évaluer la nécessité de ventilation de ladite gaine (14), ladite unité de gestion (32) ne permettant le basculement dudit élément obturateur (30) en position de fermeture uniquement lorsque l'évaluation de la nécessité de ventilation de ladite gaine (14) indique qu'une ventilation de ladite gaine (14) n'est pas requise, lesdits moyens pour surveiller au moins un paramètre d'état de ladite installation de levage (13) comprenant au moins un moyen pour détecter la présence d'une personne dans ladite installation de levage (13) e/ou au moins un moyen pour détecter le mouvement de ladite cabine (16) dans ladite gaine (14), ladite unité de gestion (32) concluant la nécessité de ventilation de ladite gaine (14) lorsque la présence d'une personne est détectée e/ou lorsque le mouvement de ladite

cabine (16) est détecté.

2 The first plaintiff sought a declaration of nullity of the patent in suit to the extent of claims 1 and 8, insofar as they provide that the presence of a person in the elevator system is detected, and of claims 2 and 4 to 7 and 9 and 11 to 15 relating thereto, claiming that the subject matter attacked was not patentable and that the invention was not disclosed in such a way that a skilled person could carry it out. The second plaintiff challenged the patent in suit in its entirety for lack of patentability.

3 The defendant defended the patent in suit primarily as granted and with five auxiliary requests in amended versions.

4 The Patent Court declared the patent in suit null for lack of patentability. This is contested by the defendant's appeal, which continues to pursue its first-instance claims. The plaintiffs oppose the appeal to the extent of their first-instance claims.

Grounds of the decision:

5 The admissible appeal leads to the dismissal of the action.

6 I. The patent in suit concerns a method and a system for managing thermal energy in a building with a duct for elevator installations.

7 1. According to the statements in the patent in suit, it was common in the state of the art and legally required in many countries to provide an elevator shaft with ventilation for safety reasons. However, ventilation resulted in significant heat losses, which could lead to the installation of an elevator not being possible, especially in low-energy or passive buildings. It is often undesirable or impossible to locate the shaft outside the thermal envelope, and the construction of a sealing sluice entails high costs. The systems proposed in some patents for forced ventilation in the event of fire or smoke used the elevator shaft as a smoke evacuation route for other rooms in the building. This is in contradiction with No. 5.2.3 of the EN 81-1 and EN 81-2 standards. In addition, the ventilation duct is kept closed in these systems outside hazardous

situations, which is contrary to the legal provisions of some countries.

8 2. Against this background, the patent in suit concerns the technical problem of providing a solution that complies with the usual safety regulations, in particular EN 81-1 and EN 81-2, and results in the lowest possible energy losses.

9 3. In order to solve this problem, the patent in suit proposes in claims 1 and 8 a method and a system, the features of which can be subdivided as follows (the subdivision of the Patent Court, which partly deviates in the case of claim 8, is shown in square brackets):

Patent Claim 1	Patent Claim 8
1. The method is for managing thermal energy in a building (10) comprising an elevator system (13) with a car (16) movable in a shaft (14) and a ventilation duct (22) between the shaft (14) and the atmosphere, and comprises the following steps:	1. The system is for managing thermal energy in a building (10) comprising an elevator system (13) with a car (16) movable in a shaft (14) and a ventilation duct (22) between the shaft (14) and the atmosphere, and comprises the following components:
2. at least one of the following two status parameters of the elevator system (13) is monitored	2. a management unit (32) which controls the position of a closure element (30) [4] and has means for monitoring at least one of the following two state parameters of the elevator system (13) [5]:
2.1 the presence of a person in the elevator system (13);	2.1 the presence of a person in the elevator system (13) [5.1];
2.2 the movement of the car (16) in the shaft (14).	2.2 the movement of the car (16) in the shaft (14) [5.2];
3. based on these parameters, a management unit (32) evaluates whether ventilation of the shaft (14) is necessary.	3. means of the management unit (32) to evaluate whether ventilation of the shaft (14) is necessary [5];
4. the management unit (32) considers ventilation of the shaft (14) to be necessary if at least one of the following conditions is detected:	4. the management unit (32) considers ventilation of the shaft (14) to be necessary if at least one of the following conditions is detected [6]:

4.1 the presence of a person;	4.1 the presence of a person [6];
4.2 the movement of the booth (16).	4.2 the movement of the car (16) [6];
5. only when the evaluation indicates that ventilation of the shaft (14) is not required, a closing element (30) associated with the ventilation duct (22) is tilted from an open position, in which the ventilation duct (22) is substantially open, to a closed position, in which the ventilation duct (22) is at least partially closed.	5. the closure element (30) is associated with the ventilation duct (22) and is movable between an open position, in which the ventilation duct (22) is substantially open, and a closed position, in which the ventilation duct (22) is at least partially closed [2], the management unit (32) permitting the closure element (30) to be tilted into the closed position only if the evaluation indicates that ventilation of the shaft (14) is not required [5];
6. The closing element (30) is preloaded in its open position.	6. a means for biasing to hold the closure element (30) in its open position in a passive state [3].

10 4. Of decisive importance for the solution thus claimed is a control of the closing element (30) oriented to safety aspects.

11 a) Like some of the systems mentioned in the patent in suit and known from the state of the art, the solution claimed by the patent in suit provides for a closing element (30) which, in the closed state, counteracts the escape of thermal energy. In order to nevertheless comply with the safety requirements indicated in the description, a management unit (32) ensures that the closing element assumes its closed position only if an evaluation of the monitored operating parameters shows that it is not necessary to keep it open.

12 b) The Patent Court assumed that, in order to monitor the operating parameter "presence of a person in the elevator system" according to features 2 and 2.1, it is sufficient to evaluate the actuation of a switch or button which serves the sole purpose of opening the locking element.

13 This is incorrect.

14 According to common usage, checking whether a switch or pushbutton has been operated manually may indeed be described as monitoring. However,

it follows from the objective pursued by the patent in suit, which is reflected in particular in features 4 and 5, and from the embodiments described in the description that this is not sufficient for surveillance in the sense of features 2 and 2.1. Accordingly, it is necessary to use an indicator which can be used to assess with sufficient certainty for typical usage situations whether a person is in the elevator system. For this purpose, it is neither necessary nor sufficient that a detection device be present whose response under certain, rather unusual circumstances indicates the presence of a person. Nor is it sufficient for a device to permit conclusions to be drawn as to the presence of a person only if this is prompted by an operating operation directed solely to this end.

15 aa) According to the description of the patent in suit, the presence of a person in the elevator system indicates that the system is being used and that, therefore, ventilation of the elevator shaft is required according to the relevant legal provisions (para. 12 lines 36-38).

16 According to the objective of the patent in suit, the aspect of safety addressed by this would not be sufficiently satisfied if the presence of a person could only be detected in special, rather unusual operating situations or if this required an operating operation specifically designed for this purpose.

17 In this context, it would be harmless if a person who activated the ventilation upon entering the system did not deactivate it upon leaving. Accordingly, feature 5 - contrary to the view of the defendant - precisely does not provide that the ventilation duct may only be opened if the presence of a person or a comparable operating condition is detected. Rather, for safety reasons, closing of the ventilation duct is only permitted if it is determined on the basis of the evaluation according to feature 4 that such an operating condition does not exist.

18 In order to achieve the desired level of safety, however, it must be ensured that a person cannot use the elevator without activating the ventilation. This requirement is not met if two different switches must be operated to operate the elevator and to activate the ventilation, allowing the elevator to be used without first activating the ventilation. Even if the switch for activating the ventilation is designed in such a way that it is clearly perceptible and easy to

operate, and if its significance is additionally indicated in an easily recognizable form, it cannot be ruled out that individual users will refrain from activating it out of carelessness, convenience or habit. Such a rudimentary protection did not satisfy the objective of the patent in suit as expressed in features 4 and 5.

19 bb) This is not contradicted by the fact that the presence of a person in the elevator installation can, according to the description (par. 12 lines 40-44), either be detected by an independent system (détectée par un système indépendant) or signaled by an operating procedure on the elevator installation itself (bien fournit par la manoeuvre de l'installation de levage elle-même). In fact, even with the second variant, unlike the use of a separately operated switch for typical operating situations, it is guaranteed that the elevator can only be used when the ventilation is activated.

20 Presence sensors (36, 38) (capteur de présence) in the car or at the bottom of the elevator shaft are cited in the description as examples of an independent system (par. 27 lines 15 f.). Corresponding explanations are given for determining whether the car is in motion (par. 13 lines 51-54; par. 27 lines 12-15). Other operating parameters that may be monitored include, for example, the internal temperature of the building or elevator shaft, the presence of a person on a stairway landing, the outside temperature, wind speed and solar radiation (par. 17 lines 45-50). Appropriate sensors are listed as examples of suitable devices for monitoring (para. 31 lines 12-27). These types of detection have in common that they do not depend on the targeted behavior of a person.

21 Nothing else applies to detection on the basis of an operating process. It is true that an operation usually requires a purposeful operation on the part of the user. However, if the ventilation is already activated by such an operating operation - such as pressing a button to request the elevator, to close the door, or to go to a specific floor - it is ensured in typical operating situations, without any further action on the part of the user, that the elevator cannot be used without the ventilation being activated. Thus, a level of safety is achieved which is qualitatively comparable to that achieved when sensors are used and which is clearly distinguished from that achieved when a separately actuated switch or a detection device is used which responds to the presence of a person only in certain, rather unusual situations.

22 II. The Patent Court gave the following main reasons for its decision:

23 The invention was sufficiently disclosed. The indications "movement sensor" and "presence sensor" conveyed sufficient information to the skilled person, a technician of heating, ventilation and air conditioning technology with technical school education and several years of experience in the implementation of the building and elevator guidelines in the project planning of an elevator or its retrofitting, which sensors and evaluation logic could be used in principle.

24 However, the subject matter of claims 1 and 8 as granted was suggested to the skilled person by a publication of the Conference of Cantonal Energy Offices (Aufzugsanlagen - Wärmeverluste mindern, A4) and a brochure of Brandschutz-Technik und Rauchabzug GmbH (Spezialartikel für den vorbeugenden Brandschutz, A3). In both publications, the ventilation is admittedly only activated in the event of a fire or when a special switch is actuated. However, the latter was sufficient to disclose features 2 and 2.1. In A4, moreover, the specific circuit was not disclosed. An obvious solution in this respect was disclosed in A3, where, among other things, a central device for monitoring and controlling the other components was disclosed.

25 The subject matter of the version defended by auxiliary request 1 was suggested by the Japanese published application Hei 6-10640 (A9) in combination with A3 and A4. A9 disclosed an elevator system with a permanently open ventilation opening and a passenger presence sensor in the car. The recommendations in A4, published about nine years later, would have suggested to the skilled person to retrofit such a system for the purpose of energy saving and to provide it with a control unit as in A3. A connection of the control unit provided therein with an occupancy detection system, which serves to record the presence of persons, was obviously advantageous. Contrary to the view of the defendant, it is to be assumed that there is an exchange of air between the car and the elevator shaft, so that opening the ventilation flaps in the shaft also has the effect of improving the air in the car.

26 III. This assessment does not stand up to scrutiny in the appeal proceedings in one decisive point.

27 1. The Patent Court correctly assumed that a skilled person engaged in the development of elevators and entrusted with the problem of the patent in suit possessed the knowledge and skills of a technician in heating, ventilation and air conditioning technology at the time of priority.

28 a) In this respect, the Patent Court stated that it was apparent from A4 that a skilled person entrusted with the planning of elevators had already dealt in 2004 with the requirement of a fundamentally airtight building envelope for reasons of energy saving. It can be concluded from this that he also dealt with the requirements for shaft ventilation.

29 b) This assessment is in any case correct in the result.

30 aa) The questions discussed in detail by the appeal as to how individual features of the patent in suit are to be interpreted and whether the subject matter so understood was suggested by the state of the art are not relevant in this context.

31 The definition of the skilled person serves precisely to establish a fictitious person from whose point of view the patent and the state of the art are to be assessed. Therefore, it cannot be based on considerations concerning the interpretation of the patent or the inventive step.

32 bb) Appropriately in approach, the appeal asserts that the definition of the skilled person may depend on the technical problem which the invention serves to solve and that the technical problem results from what the invention actually achieves (Federal Court of Justice, judgment of 4 February 2010 Xa ZR 36/08, GRUR 2010, 602 marginal no. 27 - joint arrangement; judgment of 14 June 2016 - X ZR 29/15, BGHZ 211, 1 = GRUR 2016, 921 marginal no. 14 - pemetrexed). However, the contested decision is not objectionable under this aspect either.

33 According to the appeal, A4 and A3 as the closest state of the art reflect the knowledge of a skilled person of elevator at the priority date. This is supported by the fact that both citations originate from the early days of elevator shaft smoke extraction, when stairwell smoke extraction systems were transferred to elevator systems in an essentially identical manner.

34 This does not call into question the considerations of the Patent Court, but confirms them.

35 In this context, the - in any case irrelevant (see only Federal Court of Justice, judgment of 31 January 2017 - X ZR 119/14, GRUR 2017, 498 marginal no. 28 - Gestricktes Schuhoberteil) - question as to which citation is to be regarded as the "closest" state of the art can be left aside, as can the questions as to which group of persons the cited citations are addressed to and by whom they were written. The very fact that they deal with the removal of smoke from a part of a building and propose solutions for this purpose which were known for the removal of smoke from stairwells gave a specialist entrusted with the further development of such systems cause to consult a technician in the field of heating, ventilation and air-conditioning technology if he did not have sufficient knowledge of his own in these fields.

36 cc) Contrary to the opinion of the appeal, it cannot be concluded from the fact that on the priority date no solution was disclosed which met both the requirements of the Energy Saving Ordinance and the requirements of standards EN 81-1 and EN 81-2 that there was no specialist capable of mastering this task.

37 If, on the priority date, there was indeed no system that met all the requirements and the patent in suit provided a corresponding solution for the first time, this may be a weighty indication for the affirmation of patentability. Whether the skilled person had reason to arrive at this solution is, however, to be decided according to the criteria relevant for the assessment of the inventive step, but not by the definition of the skilled person.

38 2. The Patent Court wrongly considered the subject matter of the patent in suit as granted as not patentable.

39 a) Contrary to the opinion of the Patent Court, the subject matter of claims 1 and 8 is not suggested by citations A4 and A3.

40 aa) The citation A4 published by the Conference of Cantonal Energy Agencies in Switzerland contains recommendations for architects and building owners on how to avoid heat loss in elevators.

41 A4 states that an elevator shaft must contain openings to allow smoke to escape in the event of a fire and, if necessary, to conduct waste heat from the elevator motors to the outside. During regular operation, there would be no reason not to close these openings. Therefore, it is proposed to install ventilation flaps whose position is controlled by thermostats in the shaft head or in the machine room as well as by manually operated switches. Below a temperature limit which depends on the particular plant and is generally between 35 and 40 °C, the flaps are to be closed; at higher temperatures, on the other hand, they are to be opened when a corresponding switch is actuated, which could also be designed as a fire department key switch, and in the de-energized state.

42 bb) Features 1, 2, 5 and 6 are thus disclosed.

43 With the configuration disclosed in A4, the escape of thermal energy from a building with an elevator is counteracted by monitoring two state parameters - temperature and actuation of a switch. From the requirement that the dampers be open when de-energized, it follows that they are closed only when evaluation of the monitored parameters indicates that keeping them open is not necessary. This requires biasing the dampers into the open position.

44 cc) The Patent Court rightly came to the conclusion that the additional design with features 3 and 4 is suggested by A3.

45 The statements contained in A4, according to which the flaps are to be controlled in dependence on thermostats and switches, at least give the skilled person reason to look for suitable control means. Even if this indication were not sufficient to resort to a management unit with features 3 and 4, the skilled person, as the Patent Court correctly pointed out in detail, was not only given corresponding suggestions in A3, but even shown suitable devices.

46 Also disclosed in A3 is a system in which the ventilation opening in the elevator shaft is closed during regular operation and is opened only in the event of fire, for the detection of which a smoke aspiration system is used, and optionally upon manual actuation of a button. This essentially corresponds to the functionality described in A4. The skilled person therefore had reason to refer back to A3 for a more detailed design of the solution proposed in A4. This

is not opposed by the fact that the blind provided in A3 for closing the opening is normally closed and must be opened with the aid of a motor. The resulting need for adaptation does not pose any discernible problems.

47 dd) Contrary to the opinion of the Patent Court, neither in A4 nor in A3 are features 2.1 and 4.1 disclosed.

48 As already explained above, monitoring the state of a switch to be operated manually is not sufficient to monitor the operating state "presence of a person in the elevator system" within the meaning of feature 2.1. Thus, at the same time, feature 4.1 is not disclosed because, in the absence of sufficient monitoring, it is not ensured that this operating state is detected and taken into account in the control of the closing element.

49 ee) Contrary to the opinion of the first plaintiff, the temperature monitoring disclosed in A4 is also not sufficient to disclose features 2.1 and 4.1.

50 In the solution disclosed in A4, the thermostats serve to detect a fire or excessive heating of the elevator motors. Depending on the place of installation and the system configuration, the thermostats may be triggered in individual cases even if the elevator is only in operation for a short time or if there are persons in the shaft head or in the machine room - which form part of the elevator system within the meaning of the patent in suit. However, this does not ensure monitoring of the status parameters "presence of a person in the elevator system" or "movement of the car in the shaft" that satisfies the requirements of feature groups 2 and 4, because the aforementioned operating states can at best be detected in special, rather unusual circumstances, but not in the typical operating situations in which this is required under the patent in suit. Indications for configuring the system in such a way that a detection is also possible in typical operating situations do not result from either A4 or A3.

51 b) The assessment of the Patent Court is not supported by its comments on auxiliary request 1. The subject matter of the patent in suit is also not suggested on the basis of citation A9.

52 aa) In A9 a device for controlling the ventilation in an elevator car is disclosed.

53 The description of A9 states that ventilation devices are known in the state of the art which are automatically switched on and off depending on the presence or absence of passengers. The amount of air circulated by the fan during operation is normally constant. During low occupancy or low temperature, this could result in the airflow being perceived as too strong; energy would also be wasted. At high occupancy or high temperature, the airflow may be perceived as insufficient.

54 To improve this condition, A9 proposes a device in which the amount of air is measured as a function of the number of passengers, the internal temperature of the cabin, or a combination of these two parameters. In this case, the number of passengers is determined by the weight of the cabin, and the internal temperature is determined by a temperature sensor. In the embodiment example described, the ventilation is only switched on for the purpose of energy saving when the elevator is requested via an outside call or when a car command is issued (par. 18).

55 bb) Thus, feature group 2 is disclosed. With the switching on of the ventilation in dependence on the actuation of a button for fetching or operating the elevator, a monitoring of the operating states "presence of a person in the elevator system" and "movement of the car in the shaft" is disclosed, as also provided by the patent in suit as an embodiment example for features 2.1 and 2.2.

56 cc) Not disclosed, as the Patent Court did not fail to recognize, are in any case feature group 4 as well as features 5 and 6.

57 A9 deals only with the ventilation of the elevator car, not with the ventilation of the elevator shaft. The evaluation of the monitored operating parameters does correspond to the logic provided in feature group 4. However, it is only used to control the car ventilation. How the shaft is ventilated and whether it is separated from the atmosphere by a closing device controlled in accordance with features 5 and 6 is not clear from the citation.

58 dd) Contrary to the opinion of the Patent Court, the suggestion to provide the control disclosed in A9 for ventilating the shaft by opening and

closing a closing element did not result for the skilled person from A4 and A3.

59 (1) However, the Patent Court correctly assumed that the skilled person had reason to consider whether and how the device disclosed in A9 can be adapted to the requirements of the standards EN 81-1 and EN 81-2 and the Energy Saving Ordinance.

60 (2) Moreover, it can be assumed in favor of the plaintiffs that it was obvious to provide the cabin with a ventilation opening in the floor and ceiling for this purpose, as provided for in both technical standards under No. 8.16.1, so that the question discussed in detail by the defendant as to whether A9 discloses an essentially airtight cabin in which the air is merely circulated would not be of decisive importance.

61 (3) It can also be assumed in favor of the plaintiffs that it was obvious to provide the elevator shaft with a flap as proposed in A4 and A3 for the purpose of adaptation to the requirements of the Energy Saving Ordinance. Precisely because A9 deals only with the ventilation of the car and a possible saving of energy in the process, there are indications that the skilled person who wants to install such a car in a ventilated shaft and also avoid unnecessary energy losses in the process will refer to state of the art models in this respect.

62 (4) Contrary to the opinion of the Patent Court, however, the skilled person was in any case not prompted to use the monitoring of the presence of a person and the movement of the car disclosed in A9 as a means for controlling the car ventilation also as a means for controlling the closing device for the elevator shaft.

63 The reference in A3 that the central device could also be controlled via other systems of the building control system may have given the skilled person reason to look for other parameters relevant to the control of the closing device that could be monitored in an automated manner. A3, however, did not give any concrete indication of what these parameters might be.

64 Against this background, the fact cited by the Patent Court that the supply of fresh air into the shaft can be advantageous for the ventilation of a car provided with ventilation openings did not give the skilled person sufficient

reason to provide for an opening of the closing device every time the elevator was used or every time the elevator car was moved. The explanations in A9, according to which the required degree of ventilation depends not only on the degree of occupancy but also on the interior temperature of the car, give more reason to link the opening to additional conditions. This is all the more true since A3 provides for opening only in the event of fire for reasons of energy conservation, and A4 even contains the explicit statement that there is no reason not to close the opening during regular operation.

65 The EN 81-1 and EN 81-2 standards do not make any further suggestions in this respect. As the first plaintiff also asserts in a different context, it cannot be readily inferred from the regulation contained in No. 5.2.3 that the shaft must be adequately ventilated that ventilation must be mandatory every time the elevator is used.

66 The contested decision does not prove to be correct in its result for other reasons.

67 a) Contrary to the opinion of the second plaintiff, the subject matter of the patent in suit is also not suggested by the German published application 198 49 868 (A7).

68 aa) A7 discloses a device for controlling ventilation means in a building.

69 The description of A7 states that for controlling or automating the ventilation in a room, criteria such as room temperature or presence of persons are usually used. However, these said little about air quality. In large systems with closed ventilation circuits, highly accurate CO₂ sensors are used. However, these are correspondingly expensive. For the control of ventilation means in individual rooms, therefore, a device is proposed which records the CO₂ concentration and compares it with an adjustable threshold value.

70 bb) This does not disclose a method or system for managing thermal energy in a building with an elevator system.

71 It is true that the device proposed in A7 may also be used for this purpose.

However, such use is not described in the citation.

72 It can be left open here whether an elevator shaft is to be regarded as a room within the meaning of A7 from the point of view of a skilled person, as the first plaintiff asserted at the oral proceedings. Even if this were to be affirmed, the reference in A7 that the proposed system is particularly suitable for controlling ventilation means of individual rooms would not result in the direct and unambiguous disclosure of its use in an elevator shaft.

73 cc) Furthermore, it is not disclosed in A7 to use the proposed device for monitoring the presence of persons in an elevator installation and to control a closing element in the manner claimed by the patent in suit on the basis of the recorded data.

74 A suggestion in this regard would have resulted from other citations such as A9, A4 or A3 at most if the skilled person had had reason to take the presence of persons in the elevator system as a reason to close the locking element. This was not the case, however, for the reasons already stated in connection with A9.

75 b) Contrary to the opinion of the first plaintiff, the subject matter of the patent in suit is also not suggested by the Japanese published application Hei 4-184075 (A34) and the US patent specification 5 718 627 (A22).

76 aa) In A34, a system for supplying fresh air to a building is proposed.

77 In the system disclosed in A34, a fresh air inlet and a duct connected to the interior of the building are arranged in an elevator shaft on each of several floors. Check valves are used to move the air, and these valves respond to the pressure changes that occur as the elevator car moves. In areas of positive pressure, air flows from the hoistway into the building interior; in areas of negative pressure, fresh air is drawn into the hoistway from outside.

78 bb) Whether this is to be seen as a process for managing thermal energy within the meaning of feature 1 can be left open. In any case, features 2 to 5 are not disclosed.

79 In the system disclosed in A34, the check valves on the fresh air inlets,

which act as closing elements, are not controlled by a management unit which monitors certain operating parameters, but solely by the air pressure in the elevator shaft.

80 cc) There is no suggestion from A22 that features 2 through 5 be added to the system disclosed in A34.

81 A22 discloses a system for ventilating an elevator shaft in the event of fire, in which fresh air drawn in through special ducts is blown into the shaft from below by means of fans and, in certain operating situations, escapes through a flap attached to the top of the shaft. This flap is controllable to allow the air to escape to the interior of the building when the elevator car is in certain positions.

82 Even if the skilled person should have had cause to combine the solutions disclosed in A34 and A22, this would not have resulted in the suggestion to also monitor, by means of the control provided in A22, the presence of a person in the elevator installation or the movement of the car in the shaft and to open the closing device when at least one of these two conditions has occurred. In A22, the control of the shutter depends on the position at which the elevator car is located. This does not result in the suggestion to open the flap for other reasons.

83 c) No further suggestions can be derived from the Building Inspection Service 3/1997 of the Hamburg Building Authority (A41) submitted in the second instance. Therefore, it can remain undecided whether the submission of the first plaintiff in this regard is timely and whether this document was publicly accessible on the priority date.

84 aa) In A41, it is stated that lift shafts are to be provided with a smoke extraction device in accordance with Sec. 35(5) of the Hamburg Building Code. On this basis, it is stated that smoke extraction devices may also serve as ventilation if they meet certain requirements. In the event that smoke extraction openings were closed by flaps, these would have to open automatically in the presence of smoke or at temperatures of around 70 °C, and it would also have to be possible to operate them manually from a suitable location.

85 bb) It can be seen from this that the installation of a closing device was

already considered permissible in 1997, at least in one German state. However, the constellations for which an opening is mandatory are essentially the same as those mentioned in A4 and A3, as the first plaintiff also points out. A suggestion that the elevator system should also be monitored for the presence of a person does not result from this.

86 d) The reasons for which the Patent Court considered the invention to be sufficiently disclosed for the skilled person to carry it out do not indicate an erroneous assessment.

87 aa) The Patent Court dealt in detail with the first-instance argument of the first plaintiff, to which the first plaintiff refers in its reply to the appeal, and considered it to be unsubstantiated with appropriate reasoning. The response to the appeal does not point to any additional aspects which could lead to a different assessment.

88 bb) Contrary to the opinion of the first plaintiff expressed at the oral proceedings, the fact that the patent in suit leaves it up to the skilled person to decide on the basis of which criteria the presence of a person in the elevator system or the movement of the car in the shaft is detected does not lead to a different assessment.

89 In the description of the patent in suit, the skilled person is shown two feasible ways of detecting the operating conditions mentioned, namely the use of sensors and the evaluation of operating processes on the elevator system itself. The invention is thus sufficiently disclosed. The fact that there may be numerous other possibilities, not described in detail in the patent specification, for detecting the presence of the operating states mentioned is therefore irrelevant.

90 IV. The decision on costs is based on Sec. 121(2) Patent Act and Sec. 91(1) Code of Civil Procedure.

91 Although the two plaintiffs have attacked the patent in suit to different extents, the costs are to be apportioned to them in accordance with Sec. 100(1) Code of Civil Procedure. There is no reason for a different apportionment pursuant to Sec. 100(2) Code of Civil Procedure because the attack of the first

plaintiff, which is limited to individual claims, would not have led to a significant reduction of the amount in dispute in the case of an isolated action.

Meier-Beck

Bacher

Hoffmann

Deichfuß

Marx

Previous instance:

Federal Patent Court, judgment of 15 October 2015 – 1 Ni 1/14 (EP) leading connected with 1 Ni 2/14 (EP) –