



# FEDERAL SUPREME COURT

## IN THE NAME OF THE PEOPLE

### JUDGMENT

X ZR 18/20

Pronounced on:  
March 15, 2022  
Anderer  
Judicial Employee as  
Clerk of the Court  
Registry

in the patent nullity case

Reference book:           yes  
BGHZ:                       no  
BGHR:                       yes

Driverless transport device

Sec. 83 (1), Sec. 116 (2), Sec. 117 of the Patent Act (PatG); Sec. 296 (1), Sec. 529, 530 of the Code of Civil Procedure (ZPO)

- a) As a rule, the defendant in patent nullity proceedings has no reason to file auxiliary requests for delimitation from the prior art if the Patent Court expresses the preliminary view in the reference issued under Sec. 83 (1) Patent Act that the subject matter of the patent in suit is patentable.
- b) If, after such a reference, the plaintiff submits a large number of new objections, the defendant must check whether the supplementary submissions could lead to a different assessment and, if necessary, also submit suitable auxiliary requests. However, if a large number of technical aspects prove to be potentially relevant in this context, it cannot be regarded as negligent without further ado if the defendant has not taken account of a single aspect by its auxiliary requests at first instance.
- c) Auxiliary requests which are intended to take account of an interpretation of the patent in suit which is apparent from the judgment at first instance shall, in principle, be filed within the time limit for filing the statement of grounds of appeal. Subsequent requests shall be taken into account if their admission does not delay the settlement of the legal dispute.

BGH, Judgment of March 15, 2022 - X ZR 18/20 - Federal Patent Court

ECLI:DE:BGH:2022:150322UXZR18.20.0

At the oral proceedings on March 15, 2022 the X. Civil Senate of the Federal Supreme Court by the Presiding Judge Dr. Bacher, Judges Hoffmann and Dr. Deichfuß, Judge Dr. Marx and Judge Dr. Crummenerl

has ruled:

On appeal by the defendant, the judgment of the 7th Senate (Nullity Senate) of the Federal Patent Court of November 26, 2019, is amended, dismissing the further appeal and the cross-appeal of the plaintiff.

European patent 2 336 075 is declared partially invalid with effect for the Federal Republic of Germany in that claim 1 is supplemented at the end as follows and the further claims refer back to this version:

"..., wherein a vertically movable lifting fork (15) is disposed on the U-shaped frame chassis (17) and wherein the lifting fork (15) does not extend between the limbs"

In all other respects, the action is dismissed.

The costs of both instances of the legal dispute are set off against each other.

By law

Facts of the Case:

1           The defendant is the owner of European Patent 2 336 075 (patent in suit), granted with effect for the Federal Republic of Germany, which was filed on December 2010 claiming an Austrian priority of December 2009 and concerns a driverless transport device. Claim 1, to which ten further claims are referred back, reads in the language of the proceedings:

Driverless transport device (1) for automatically conveying, receiving and delivering palettes (2), comprising a frame chassis (17) which is substantially U-shaped in its layout and comprises two limbs, with at least one steerable wheel unit (11) being arranged on each limb of the frame chassis (17), characterized in that at least one steerable wheel unit (11, 11') can be driven individually via at least one respective drive unit (7), with the steerable wheel unit (11, 11'), preferably each steerable wheel unit (11, 11'), having two running wheels (7', 7'').

2           The plaintiff claimed that the subject matter of the patent in suit was not patentable. The defendant has defended the patent as granted and with two auxiliary requests. The plaintiff has not challenged the subject matter defended by the second auxiliary request.

3           The Patent Court declared the patent in suit null and void insofar as its subject matter extends beyond the version defended by auxiliary request 2, and set aside the costs of the legal dispute against each other.

4           In its appeal, the defendant continues to pursue its request to dismiss the action in its entirety. Alternatively, it defends the patent in suit with six new auxiliary requests (B1 to B6). The plaintiff opposes the appeal and challenges the first instance costs decision by way of cross-appeal.

Reasons for Decision:

5 Both appeals are admissible. The appeal is successful with regard to auxiliary  
claim B6. The further appeals are unfounded.

6 I. The patent in suit concerns a driverless transport device.

7 1. According to the description, it has proved problematic with the driverless  
transport systems known in the prior art that the transport device and the palettes  
must be precisely aligned with each other in order to avoid collisions and resulting  
damage. This requires a precisely operating positioning system and sophisticated  
control and logistics (para. 10).

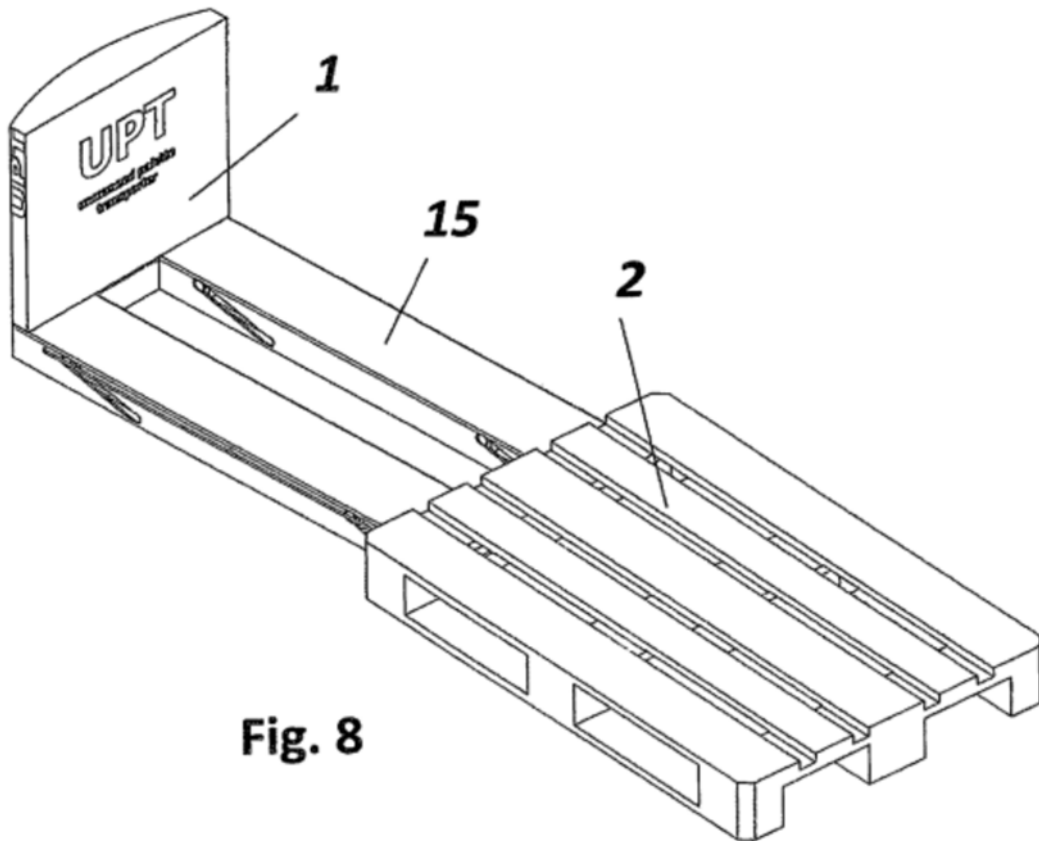
8 2. Against this background, the patent in suit concerns the technical  
problem of providing a driverless transport device that offers good protection  
against collisions.

9 3. For the solution the patent in suit proposes in claim 1 a transport device,  
the features of which can be divided as follows:

- 1.1 Driverless transport device (1)
- 1.2 for automatically conveying, receiving and delivering of palettes  
(2)
- 1.3 comprising a frame chassis (17) which is substantially U-shaped  
in its layout.
  - 1.3.1 The frame chassis comprises two limbs.
  - 1.3.2 At least one steerable wheel unit (11) being arranged on each limb  
of the frame chassis (17).
- 1.4 At least one steerable wheel unit (11, 11') can be driven  
individually via at least one respective drive unit (7).
- 1.5 The steerable wheel unit (11, 11'), preferably each steerable  
wheel unit (11, 11'), having two running wheels (7', 7").

10 4. Contrary to the opinion of the appeal, it cannot be inferred from feature  
group 1.3 that the limbs of the frame chassis must be arranged in the same position  
as the limbs of the lifting fork so that these can be moved together with the latter  
under the plate to be transported.

11 a) It is true that the embodiment described in the description comprises  
such a configuration as shown, for example, in Figure 8 reproduced below.



**Fig. 8**

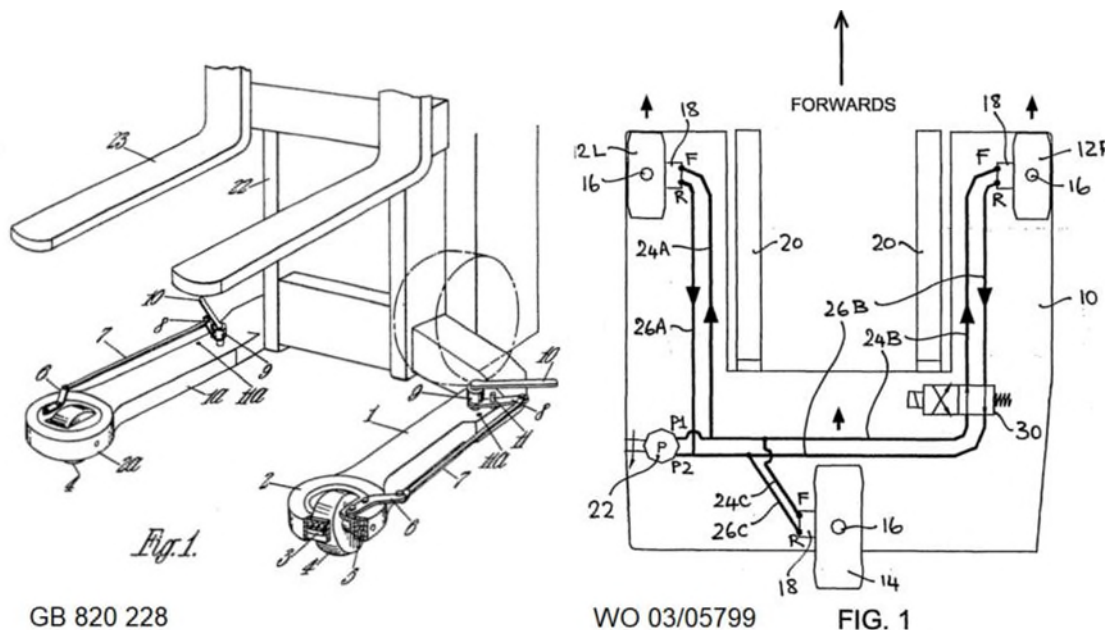
12 However, this requirement was not reflected in claim 1.

13 b) Contrary to the view of the appeal, the requirement from feature 3,  
according to which the frame chassis must be substantially U-shaped, does not  
necessarily imply the mentioned configuration.

14 A U-shape may require that the distance between the two limbs is smaller than their length. However, it does not follow that it must be smaller than the width of a palette.

15 c) This understanding is confirmed by the prior art statements contained in the description.

16 As examples of vehicles with U-shaped frame chassis, the description cites British patent 820 228 (para. 2) and international application 03/059799 (para. 7, D20). D20 discloses a system in which the lift fork (20) is located between the two limbs of the frame chassis (10). The illustration in the British citation also suggests such an embodiment, but in any case does not clearly indicate that the frame chassis can be pushed under the palette.



17 d) No further requirements arise in this respect from the function assigned to the frame chassis according to the invention.

18 As the appeal rightly asserts in its approach, the patent in suit aims in particular at a high degree of mobility. According to the description, the all-wheel steering and the all-wheel drive serve to achieve this goal (paras. 15 to 18). The arrangement of the two limbs of the frame chassis below the lifting fork is not mentioned in this context. Moreover, claim 1 also does not mandatorily provide for all-wheel steering and all-wheel drive. According to features 1.3.2 and 1.4, one steerable and drivable wheel unit per limb is sufficient as a minimum requirement.

19 II. The Patent Court gave the following main reasons for its decision, insofar as they are relevant to the appeal proceedings:

20 The subject-matter of the granted version of claim 1 was not based on inventive step based on European patent application 2 105 816 (D19). D19 discloses a transport device which has all features with the exception of feature 1.5. The person skilled in the art was familiar with designing wheel units with two running wheels in order to improve the surface mobility.

21 The subject-matter defended by the first-instance auxiliary request 1 was suggested by US patent specification 4 529 052 (D15) on the basis of D19.

22 III. This assessment withstands appellate review as to the version issued.

23 1. The Patent Court rightly decided that European patent application 2 105 816 (D19) discloses features 1.1 to 1.4.

24 a) D19 discloses a driverless transport system with a lifting unit for picking up palettes.

25 b) An example of an embodiment is shown in Figure 1 reproduced below.





28           d) Contrary to the opinion of the appeal, feature group 1.3 is also  
anticipated.

29           As already explained above, feature group 1.3 does not require that the limbs  
of the frame chassis are arranged in such a way that these can be pushed under  
a palette together with the lifting fork. Therefore, the Patent Court correctly held  
that the limbs disclosed in D19 laterally surrounding the lifting fork disclose feature  
group 1.3.

30           2. The Patent Court rightly assumed that equipping at least one steerable  
wheel unit with two running wheels within the meaning of feature 1.5 was  
suggested by the prior art.

31           As the Patent Court correctly pointed out and not challenged in this respect,  
it was part of the general know-how that it can be advantageous to distribute a load  
to be transported over several wheels in order to reduce the load on the individual  
wheels and to facilitate steering. Such a configuration also lent itself to the transport  
system disclosed in D19. No particular difficulties in implementation are indicated or  
otherwise apparent.

32           IV. There is no deviating assessment with regard to the auxiliary requests  
B1 to B5.

33           1. The subject matter of claim 1 as amended by auxiliary claim B1 is also  
obvious from D19.

34           a) Auxiliary request B1 provides an additional feature 2.6, according to  
which a vertically movable lifting fork (15) is arranged on the U-shaped chassis  
(17).

35           Contrary to the view of the appeal, it also does not follow from this that the  
lifting fork is arranged above the two limbs of the frame chassis. Rather, it is  
sufficient if it is attached to the frame chassis.

36           As the appellate defence rightly argues, it does not necessarily follow from  
the preposition "on" that the lifting fork must be arranged above the frame chassis.  
Accordingly, the preposition is also found in feature 1.3.2, although the wheel unit  
provided there is not arranged above the limb of the frame chassis, but on its  
underside.

37           Irrespective of this, feature 2.6 specifies only the frame chassis in its entirety  
as the spatial reference point, but not the two limbs.

38           b)    In view of this, the subject matter defended by auxiliary request B1 is  
also obvious on the basis of D19.

39           In the device disclosed in D19, the lifting fork is also arranged on the chassis.

40           c)    Against this background, it can be left open whether auxiliary request  
B1, which was filed for the first time in the appeal instance, must be disregarded  
due to lateness.

41           2.    The subject matter defended by auxiliary request B2 is suggested by a  
combination of D19 with U.S. Patent Specification 4 529 052 (D15).

42           a)    Auxiliary request B2 provides, as additional feature 3.6, that a pivoting  
movement of the wheel unit (11, 11') about a vertical axis is carried out via the drive  
unit (7), so that the transport device (1) can be moved forwards, backwards or  
sideways and along a predetermined trajectory.

43           This essentially corresponds to the first instance auxiliary request 1. The  
deletion of the supplementary requirement there, according to which the wheel unit  
(11, 11') must be coupled, does not lead to preclusion (see BGH, Judgment of  
August 11, 2020 - X ZR 96/18, GRUR 2020, 1284, para. 77 -  
Datenpaketumwandlung).

44           b) The Patent Court correctly decided that the additional feature was  
obvious from D19 through D15.

45           aa) D15 discloses a conveyor truck.

46           D15 describes as a disadvantage of known conveyor trucks that these could  
only be moved in a straight direction or on a curved track. This requires  
complicated procedures to move the truck along spaced parallel lines (col. 1, lines  
23 to 54).

47           As an improvement, D15 proposes to mount the drive wheels on rotating  
elements so that the truck can be moved transversely and diagonally (col. 1, lines  
60 to col. 2, line 5). In this way, a better control possibility for linear and curved  
movements is achieved (col. 3, lines 34 to 66).

48           In addition to the drive wheels, the truck has support wheels at the front and  
rear, which are not rotatably mounted. These support wheels can be omitted if  
more than two sets of rotatably mounted drive wheels are used (col. 5, lines 24 to  
30).

49           bb) As the appeal correctly asserts in its approach, it does not follow from  
D19 that the vehicle can also be moved sideways. Such a movement is precluded  
by the support wheels mounted at the front and rear, which are not disclosed as  
also being rotatably mounted.

50           As the Patent Court rightly decided, however, the suggestion arose on the  
basis of D19 to design all rotatably mounted wheels as disclosed in D15. This  
was already supported by the indication contained in D15 that further rotatably  
mounted drive wheels can be provided instead of the support wheels if required.  
Such a design was all the more appropriate for the device disclosed in D19, since  
all wheels there are rotatably mounted anyway.

51           The obvious embodiment thereafter of mounting all wheels in such a way that  
these can be pivoted about their vertical axis as desired enables all directions of  
52           movement provided for in auxiliary request B2.

52           3.    Nothing to the contrary applies to auxiliary request B3.

53           Auxiliary request B3 provides for a combination of the features added by  
auxiliary requests B1 and B2. These were also obvious in their combination for the  
54           reasons explained above.

54           4.    A different assessment also does not result with regard to auxiliary  
request B4.

55           a)   Auxiliary request B4 is based on auxiliary request B2 and provides as  
additional feature 5.7 that the two running wheels of at least one wheel unit are  
drivable independently of each other, preferably via one electric motor each, which  
is particularly preferably brushless.

56           b)   As rightly argued in the appellate defense, D15 discloses that the drive  
wheels are each driven by a separate motor. Such a design was also obvious in  
the combination with D19.

57           5.    Nothing to the contrary applies to auxiliary request B5.

58           a)   After auxiliary request B5, claim 1 in the version of auxiliary request B1 is  
to be amended by inserting the word "open" before the word "frame chassis" in  
feature 1.3.2.

59           b)   This modification also does not mean that the lifting fork must be  
arranged above the two limbs of the frame chassis. Auxiliary request B5 is  
therefore not to be assessed differently from auxiliary request B1.

60           V.    In    contrast, the subject matter defended by auxiliary request B6 is  
patentable.

61           1.    According to auxiliary request B6, claim 1 as amended by auxiliary  
request B1 is to be supplemented to the effect that the lifting fork does not extend  
between the limbs.

62           The function of this feature is to allow the lift fork and frame chassis to be  
moved together under a palette, as shown in Figure 8.

63           It follows from this that the limbs of the chassis must not overlap the fork tines  
of the lifting fork on the outer sides, or at most only slightly. However, it is not  
impossible for individual parts of the lifting fork to be arranged between the limbs,  
provided that this does not impair the above-mentioned function.

64           For example, the tines of the fork may in turn have a U-shaped profile that  
laterally surrounds the limbs of the chassis in the lower position of the fork,  
provided that the overall width of the tines remains sufficiently small to still allow  
them to be slid under a palette. Similarly, components that connect the two tines  
at the base and are located at positions that will not be pushed under a palette are  
harmless.

65 An arrangement with which these requirements can be met is shown by way of example in Figures 5 and 6 reproduced below.

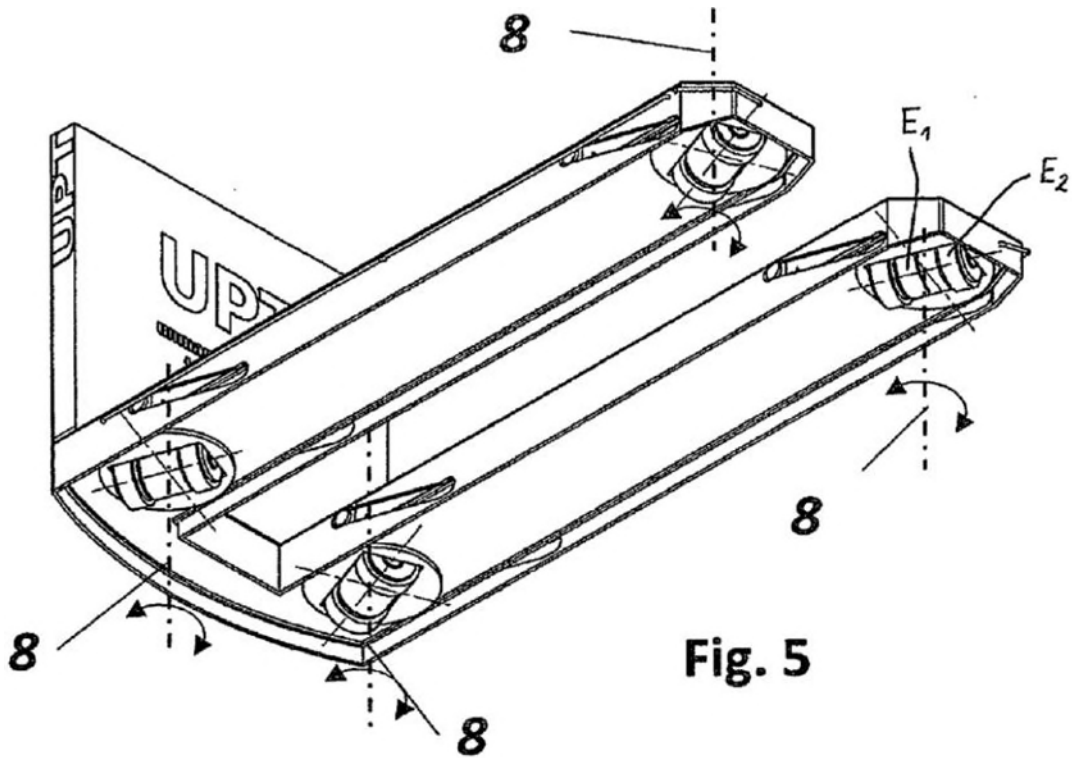


Fig. 5

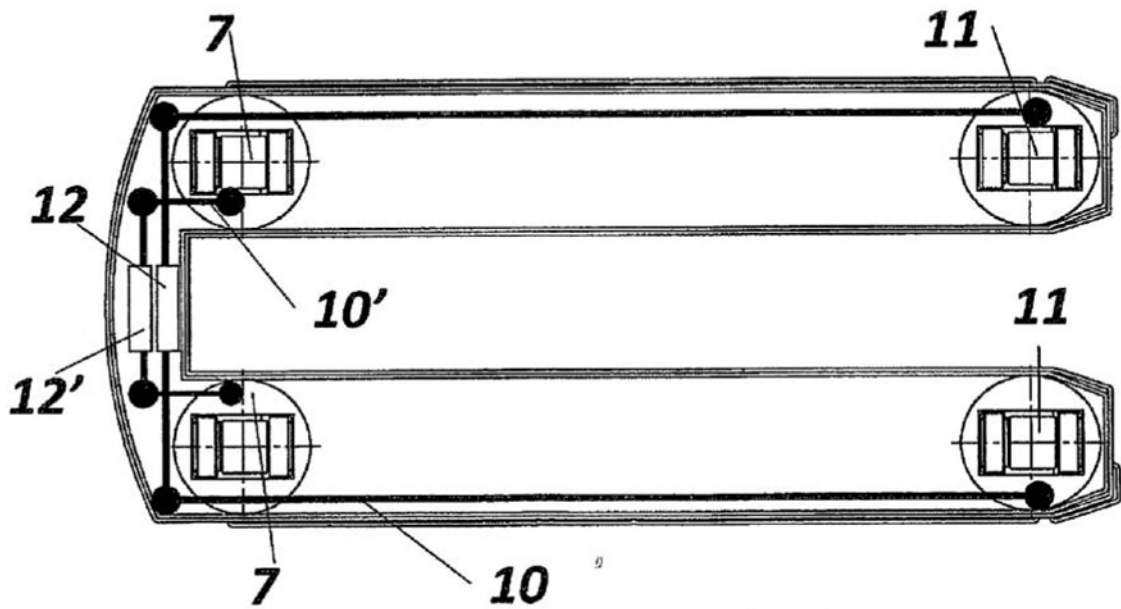


Fig. 6

66           2. Contrary to the opinion of the appellate defence, the defence of the  
patent in suit with this request is admissible under Sec. 116 (2) Patent Act.

67           a) According to the case law of the Federal Supreme Court, the alternative  
defence of the patent in suit with amended claims in the appeal instance can  
regularly no longer be considered relevant within the meaning of Sec. 116 (2) No.  
1 Patent Act if the defendant already had cause to do so in the first instance. Such  
cause for a limited defence, at least in the alternative, may arise from the fact that  
the Patent Court indicated in its notice issued under Sec. 83 (1) Patent Act that in  
its preliminary view the subject matter of the patent in suit is not likely to be based  
on an inventive step (Federal Supreme Court, Judgment of December 15, 2015 -  
X ZR 111/13, GRUR 2016, 365 - Telekommunikationsverbindung; Judgment of  
April 23, 2020 - X ZR 38/18, GRUR 2020, 974, para. 33 -  
Niederflurschienenfahrzeug).

68           b) In the litigation the notice given by the Patent Court under Sec. 83 (1)  
Patent Act did not give the defendant cause to file auxiliary requests.

69           In the notice the Patent Court expressed the preliminary view that the subject-  
matter of claim 1 as granted was patentable. In this initial situation, there was no  
reason for the defendant to base its defence of the patent in suit on additional  
arguments or further requests.

70           c) Plaintiff's comments on the notice given by the Patent Court did not give  
sufficient reason to specifically address this aspect.

71           In its statement, the plaintiff submitted several new citations, including D15  
and D19. The defendant had to take this as an opportunity to review the  
supplementary submission to determine whether it could lead to a different  
assessment and, if necessary, also to submit appropriate auxiliary requests.

The fact that the defendant did not misjudge this is shown by the fact that it countered the argument and filed the two auxiliary requests at first instance.

72            However, in view of the breadth of the new submissions and the large number of counter-arguments put forward by the defendant, in particular also with regard to D19, it was not readily foreseeable for the defendant that it was precisely the position of the lifting fork in relation to the frame chassis which could prove to be decisive. In view of this, it cannot be considered negligent that it did not take this aspect into account in its submissions at first instance.

73            d)    Sec. 117 Patent Act as well as Sec. 530 and Sec. 296 (1) of the Code of Civil Procedure (ZPO) likewise do not prevent the consideration of the new auxiliary request.

74            aa) The defendant, however, had reason to also make this auxiliary request already in the statement of grounds of appeal.

75            Already in its statement of grounds of appeal, the defendant argued that D19 does not prevent patentability because the patent in suit requires the fork to be arranged above the limbs of the frame chassis. It also correctly recognized that its argumentation could not be successful with regard to the granted version and therefore filed auxiliary request B1.

76            In this initial situation, the defendant should have expected that even the wording chosen in auxiliary request B1 might not be sufficient for the limitation of the protected subject matter it was seeking. Therefore, it had reason to file further auxiliary requests as a precaution if it also wanted to defend the patent in a different wording.

77            bb) However, a rejection of the late request pursuant to Sec. 530 in conjunction with Sec. 296 (1) of the Code of Civil Procedure (ZPO) is ruled out because its consideration does not delay the settlement of the legal dispute.



78           On the basis of the arguments of both parties, the Senate can finally decide  
on the patentability of the subject-matter defended by auxiliary request B6.

79           In its appellate defence, the plaintiff has already explained the reasons why  
it considers it obvious to arrange the lifting fork above the limbs of the frame  
chassis in a device based on the D19. In its response to auxiliary request B6 and  
at the oral proceedings before the Senate, it expanded on this argument but did  
not present any fundamentally new aspects.

80           3.    Contrary to the opinion of the appellate defence, the subject-matter  
defended by auxiliary request B6 is disclosed in the originally filed documents as  
belonging to the invention.

81           a)   As also not disputed by the appellate defence, the application already  
contains the description of the embodiment example also described in the patent  
specification with Figures 1 to 12.

82           From this illustration, and in particular also from Figures 5, 6 and 8, it can be  
seen directly and unambiguously that the lifting fork is arranged above the limbs  
of the frame chassis and therefore the entire device can be moved under a palette  
to be transported.

83           b)   Contrary to the view of the appellant, the fork is not arranged between  
the limbs of the chassis in the arrangement shown in Figures 5 and 6.

84           In this embodiment, the fork does indeed also include a base that connects  
the two tines and therefore also extends between the two limbs of the frame  
chassis. However, as explained above, the requirement that the lifting fork must

not extend between the limbs refers only to those parts of the fork that are pushed under a palette. This does not include the base shown in Figures 5 and 6.

85           c)    Contrary to the view of the appellate defence, it is not an inadmissible generalization that auxiliary request B6 theoretically also covers embodiments in which the limbs of the frame chassis lie wholly or partially between the tines of the lifting forks.

86           In this context, it is not necessary to make a final decision on the extent to which such designs are technically possible and sensible. A sufficient restriction results in any case from the functional requirement already indicated that the limbs of the frame chassis must be arranged in such a way that they can be pushed under a palette together with the fork. This aspect is sufficiently clearly described by the wording chosen in auxiliary request B6 without resorting to further forms of design.

87           4.    For the same reasons, the defence under auxiliary request B6 also does not lead to an expansion of the scope of protection.

88           5.    The subject matter defended by auxiliary request B6 is not obvious on the basis of D19.

89           a)    As already explained above, in the device disclosed in D19 the lifting fork is arranged between the two limbs of the frame chassis.

90           b)    A suggestion to arrange the limbs below the lifting fork instead did not result from D19.

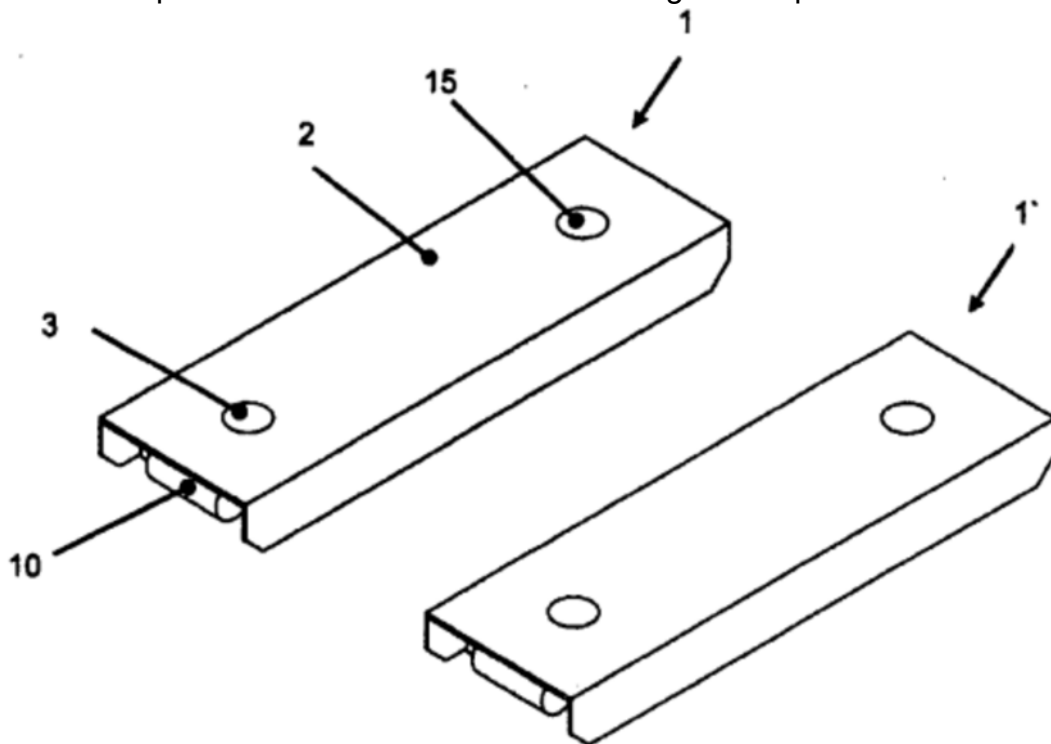
91           In the case of the device disclosed in D19, such an arrangement is already precluded by the fact that the two limbs of the frame chassis are of considerable

height. The arrangement of the lifting fork above them would mean that a palette could not be picked up from the ground or deposited there.

92           6.    Contrary to the opinion of the plaintiff, a design according to auxiliary request B6 was also not suggested by the German disclosure 10 2007 046 868 (D1).

93           aa) D1 discloses a transport device for load carriers and a method for controlling the same.

94           An example of an embodiment is shown in Figure 1 reproduced below.



**Figur 1**

95 The transport devices (1, 1') can be used individually for load units without palletizing or in pairs for palettes (para. 5). Each device (1, 1') has a carrier (2), each with two wheels driven separately by an electric drive unit (paras. 6, 16).

96 The devices communicate wirelessly with a control center that centrally controls one or more individual units or units grouped in pairs (para. 16, sentence 3).

97 bb) All features except for feature 1.3 are thus disclosed.

98 The frame chassis is not U-shaped but I-shaped.

99 cc) Based on D1, there was no reason to combine two of the devices disclosed there into a U-shaped unit by a common base.

100 The division into separate devices that can be coupled in pairs for transporting palettes is highlighted as a particular advantage in D1. On the one hand, it enables the device to be used for other loads as well and also offers the advantage when transporting palettes that the coupling can be cancelled when maneuvering without a load.

101 Against this background, the design with a U-shaped frame chassis would involve a complete departure from the central basic concept of D1. This was not suggested by D1.

102 dd) On the basis of D19, D1 also did not give rise to any suggestions in the direction of the subject matter defended by auxiliary request B6.

103 In D1, the focus is also on the aspect of a design that is as compact as possible. However, with the division into two separate limbs, which are coupled by a common control system if required, D1 proposes a concept that differs

fundamentally from the U-shaped frame chassis familiar from many other counter-measures.

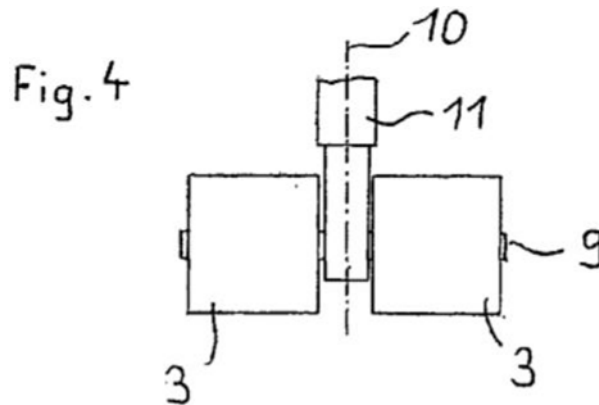
104            Even if there had been other reasons for a complete departure from the concept proposed in D1, such as the difficulty of controlling two individual carrying devices together with the necessary precision, this would not have resulted in the suggestion to return to a U-shaped frame chassis but to arrange it below the lifting fork in deviation from D19. Such an arrangement was indeed known for conventional lift trucks, such as those disclosed in German disclosure 44 30 060 (D2). For self-propelled devices, however, D19 provided for a different structure. In this initial situation, there was no reason to combine individual design elements from such different citations as D19, D1 and D2 in the manner proposed by the patent in suit.

105            7.    Also D2 does not suggest the subject matter of claim 1 according to auxiliary request 6.

106            a)    The citation discloses a lift truck with load rolls.

107            D2 describes as prior art lift trucks with load rolls attached to their arms for additional support of the load. These rolls are attached with pivoted forks so that the distance of the load or support arms from the ground can be changed. With small turning radii, the load rolls could not roll; instead, they would drag on the ground.

108            As an improvement, D2 proposes to arrange two independently rotatable load rolls on one axis, as shown in Figure 4 reproduced below.



109           b)    This anticipates features 1.3, 1.3.1 and 5.

110           c)    Contrary to the view of the defendant, feature 1.3.2 is also disclosed.

111           In the explanations to Figure 4 it is stated that the bar (11) can rotate around the vertical axis (10) (col. 2, lines 35 to 38).

112           d)    Based on D2, there was no reason to design the device disclosed there as driverless and at the same time to provide it with a steerable wheel unit within the meaning of feature 1.4.

113           aa)   It can be assumed in favor of the appellate defence that there may also have been reason to consider designing smaller devices for driverless operation.

114           The brochure of the Berufsgenossenschaft Handel und Warendistribution (Einsatz von Flurförderzeugen, 2. Aufl., July 2009, D7), which is part of the state of the art, could speak in favor of this, describing, among other things, laser scanners as a means of personal protection for driverless industrial trucks and showing, as an example, a photo of a driverless industrial truck that also includes a tiller for manual operation.

115           bb) Even on this premise, however, there was no reason to provide at least  
one of the wheel units arranged on the limb with a drive unit.

116           According to the defendants' submission, which in this respect remains  
uncontradicted, the rear wheel unit mounted in the area of the base is driven on  
the lift truck disclosed in D2. There was no suggestion to deviate from this.

117           It is true that such drive elements are disclosed in D15. As already pointed  
out in connection with D1, a combination of individual features from citations such  
as D15 or D19, which show significantly larger transport devices, with smaller  
devices such as those disclosed in D2 was not readily suggested.

118           VI. The cross-appeal is unfounded.

119           1. Although a connection limited solely to the point of costs is not  
necessary because the Senate must review the first-instance decision on costs of  
its own motion anyway pursuant to Sec. 308 (2) of the Code of Civil Procedure  
(ZPO) (most recently BGH, Judgment of June 15, 2021 - X ZR 61/19, GRUR 2021,  
1280, para. 64 - Laufradschnellspanner), it is nevertheless permissible (BGH,  
Judgment of January 24, 2017 - XI ZR 183/15, ZIP 2017, 761, para. 35).

120           However, the allocation of costs made by the Patent Court is not  
objectionable in any case because the patent in suit proves to be legally valid to a  
further extent in the instance of appeal.

121           VII. The decision on costs is based on Sec. 121 (2) Patent Law and Sec.  
92 (1) and Sec. 97 (1) of the Code of Civil Procedure (ZPO).

122 Even if the subject matter of the appeal proceedings differs from the subject matter of the proceedings at first instance and the defendant ultimately prevails to a greater extent than the Patent Court assumed, the Senate considers a reversal of costs for both instances to be appropriate.

Bacher

Hoffmann

Deichfuß

Marx

Crummenerl

Lower court:

Federal Patent Court, Decision of November 26, 2019 - 7 Ni 52/19 (EP) -