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## Is the “essentiality” test here to stay?

Miquel Montaña (Clifford Chance) · Monday, May 15th, 2017

Most readers will be aware of the so-called “all elements” test, whereby patent infringement is normally discarded unless the allegedly infringing device or process reproduces each and every element of the claim.

The “all elements” test contrasts with the so-called “essentiality” test. According to this test, there can still be infringement if an element of the claim is missing in the allegedly infringing device or process, as long as that precise element is not “essential” to put the invention into practice. For example, the German Supreme Court found in the “Air-Breathing Hose” judgment that the absence of an element would only exclude infringement if the patent owner had described such element as an essential feature of the invention. A decision of 30 December 2016 from Commercial Court number 1 of Barcelona has sparked the debate regarding whether the “essentiality” test is also making inroads in Spain. In this recent case, the Court ordered a preliminary injunction against a Spanish company that was marketing a device to spray liquids. According to the Court, the fact that one of the elements of the claim was missing did not rule out direct patent infringement. In particular, the Court wrote that «In relation to the characteristic (1c) “and a spray nozzle (4) for dispensing fluid from within the liner 13”, the BPS system as such does not include the spray nozzle which, we agree with the applicant, does not exclude a case of direct patent infringement insofar as the BPS system reproduces the essential elements of the independent claim of the same (doctrine of the Vileda case of the Barcelona Court of Appeal).»

If the criterion expressed in this decision is confirmed by the Barcelona Court of Appeal and / or by the Supreme Court in the main proceedings, it could mean that the “essentiality” test is here to stay.

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