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Is article 138 of EPC 2000 self-executing?

Miquel Montaña (Clifford Chance) · Monday, August 16th, 2010

The entry into force of the EPC 2000 on 13 December 2007 presented, for the first time in Spain, the possibility of amending claims in legal proceedings followed before national Courts where the validity of the patent has been questioned. This has sparked debate as to whether the application of article 138 will require the approval of implementing regulations or, on the contrary, article 138 is clear enough to lend itself to be directly applied by national Courts. Although there are no precedents in point as yet, one would expect Spanish Courts to accept the direct applicability of article 138, since its text is even more clear than provisions included in other international treaties which our Courts have considered to be “self-executing”. However, to guide Courts, patent owners and third parties, it would be desirable for our Government to amend Royal Decree 2424/1986 on the application of the EPC to include guidelines governing the procedural steps leading to the modification of claims.

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