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What test should be applied to judge equivalence?

Miquel Montaña (Clifford Chance) · Monday, August 30th, 2010

One of the topics that have kept our Courts busy over the last few years relates to which test should be applied to judge “equivalence”. Whereas the U.S.’s “same function-same way-same result” test has been accepted in cases involving mechanical patents, it has been discarded in cases dealing with chemical patents. In its judgment of 17 January 2008, the Barcelona Court of Appeal confirmed that in the case of chemical patents, the “three Catnic questions” test which the English Courts used to apply is a better test. The question is whether or not the Spanish Courts will stick to that test, since it was abandoned by the House of Lords in 2004. All this uncertainty could have been avoided if Article 2 of the Protocol of Interpretation of Article 69 of the EPC had introduced a definition of “equivalence”. However, the negotiators of the EPC 2000 failed to agree on a definition, thus leaving our national Courts in the dark.

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