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Supreme Court holds that experts from the Administration cannot be a judge in their own cause

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On 17 February 2022, the Administrative Chamber of the Spanish Supreme Court handed down a very interesting judgment setting out legal doctrine on the legal value of expert opinions from the Administration in two different scenarios: on the one hand, when they are issued in judicial proceedings between third parties and, on the other, when they are issued in judicial proceedings where the Administration is a party. Although the judgment came out in a case alien to the realm of patents, it may well have an impact on patent cases for the reasons that will be briefly discussed below.

The case stemmed from an appeal filed by a private party against a decision from the Spanish Ministry of Culture denying an authorisation to export a painting. In a nutshell, the Ministry denied the authorisation relying on expert opinions issued by experts from the Spanish Administration who advised against the exportation of the painting. The party interested in the exportation had filed expert opinions issued by private experts contradicting the expert opinions from the Administration but the Ministry of Culture gave more weight to those issued by the experts from the Administration.

The decision was appealed to the High Court of Justice of Madrid (Administrative Chamber) which, in a judgment of 12 June 2019, dismissed the appeal. In short, the Court found that the expert opinions produced by the experts from the Administration had a higher guarantee of objectivity and impartiality than opinions produced by private persons.

The losing party filed an appeal “in cassation” to the Supreme Court in which, among other things, it asked the Supreme Court (Administrative Chamber) to lay down legal doctrine on the legal value of expert opinions produced by the Administration. The Supreme Court, after noting that the Spanish law on administrative procedure does not explicitly deal with the point under discussion, reviewed the relevant norms on expert opinions in the Civil Procedure Act (“CPA”), which apply by default to administrative proceedings. It should be noted, in passing, that article 348 of the CPA requires Judges to assess all expert opinions according to the rule of what is termed “healthy criticism.”

After analysing the facts of the case in light of the relevant provisions of the CPA, the Supreme Court came to the conclusion that such provisions had been infringed by the judgment under appeal. The thoughts of the Court are best encapsulated in the following paragraph:

> *"Once it is established that the experts at the service of the Administration can act as experts and that their opinions -as well as any other expert opinion- must be valued in a free and reasoned manner, it is necessary to make three additional considerations in order to give a complete response to the question of objective national interest. In the first place, as the appellant points out, using a report or opinion issued by the Administration as evidence in a dispute between third parties is not the same as using one in a dispute in which that same Administration is a party. In this latter case, it makes no sense to say that the report or opinion enjoys impartiality and, therefore, deserves enhanced credibility: whoever is a party is not impartial. In addition, when this occurs, the point is relevant, since it requires that we not elude the purely administrative origin of the report or opinion, and examine to what extent this may have influenced the expert conclusions."*

As mentioned above, these observations may have far-reaching consequences in future patent cases where, for example, whether or not a supplementary protection certificate ("SPC") should be granted is discussed before the Spanish Patents and Trademark Office ("SPTO"). In the past, the High Court of Justice of Madrid has tended to give more weight to the technical reports produced by the SPTO than to the expert opinions produced by private persons. Clearly, after the judgment discussed in this blog, it will have to change tack because, as highlighted by the Supreme Court, one cannot be a judge in one's own cause.

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