advocaten
avocats
lawyers

Equivalence in Belgium

Young EPLAW Congress – 24 April 2017

A. Rule

- Interpretative Protocol Article 69 EPC:

> *"For the purpose of determining the extent of protection conferred by a European Patent due accounty shall be taken of any element which is equivalent to an element specified in the claims."*

2

B. Test

- Function/way/result test usually applied by case-law:

  The substituted means must essentially perform the same function in the same way and with the same result

- Substantial/insubstantial differences test?

  ⇔ Unimportant or superficial differences :

  do not preclude **literal** infringement, even in case of numerical features (1%)

3

B. Test

- Patent claim must be read and construed from the perspective of the person skilled in the art

  (Liège Court of Appeal, 19/09/2013, *glass fibers*)

4

C. Applications

1. Liège Court of Appeal, 19/09/2013, *glass fibers*
   - B1 version : for use of glass fibers with "*an average diameter of less than 8 µm*" – no carcinogenic potential
   - B2 version : glass fiber "*having a~~n average~~ diameter of less than 8 µm*"
   - Contested glass fiber product with between 11 and 14% of fibers > 8µm

5

C. Applications

1. Liège Court of Appeal, 19/09/2013, *glass fiber*
   - Although same function (no carcinogenic potential), it was held as substantially different as the claim should be read as limited to glass fibers with a diameter of < 8µm (cf. '**file wrapper estoppel**')
   - **No equivalent infringement**

- Confirmed on point-of-law referral (Cass., 12/03/2015)

6

C. Applications

2. Comm. Court Brussels, 11/12/2015, *tibolone* (Docpharma-Mithra/Organon-MSD)

- Patent claims protection for crystalline polymorph of tibolone "*with a purity higher than 90 %*"
- Higher purity leads to better stability – formulation with less than 85 % was known to be unstable
- Contested batches had 88,5 % and 88,6 % purity

7

C. Applications

2. Comm. Court Brussels, 11/12/2015, *tibolone*

- Even if *result* of both features is substantially the same (a longer shelf life at room temperature), result is achieved in a different *way* (a lower purity level).
- Again : a crystalline purity of 85% was already part of the prior art and that the patentee had argued **before the EPO** that it was exactly this difference of 5% which created the technical effect of the invention
- **No equivalent infringement**

8

C. Applications

3. Brussels Court of Appeal, 25/03/2013, *drospirenone*

- Patent claims process for production of drospirenone by (a) eliminating water from a substance by (b) adding **an acid** to that substance
- Infringing product uses a base pyridine/water

9

C. Applications

3. Brussels Court of Appeal, 25/03/2013, *drospirenone*

- infringed by equivalence by substitution of acid by **base pyridine/water** since if performs the same function (eliminating water) in substantially the same way (a catalyst in the reaction) with substantially the same result (drospirenone)

10

/ THANK YOU

Kirian Claeyé
Kirian.Claeye@altius.com

11