Denmark

Improving legal certainty in patent cases

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It is not enough to have a strong patent granted; it is also important to be able to enforce the patent in an efficient and predictable manner. During the past few years there has been an improvement in the handling of patent cases by the Danish courts, and it appears that further improvement is under way. Recently, the courts have been quite active in patent disputes and they seem to be more independent of patent experts.

Centralised patent court

In Denmark, for many years patent disputes were generally heard in the first instance in the traditional court system. This resulted in cases heard by judges with little experience in patent cases, leading to some uncertainty. However, as of January 2007, patent disputes (eg, infringement and invalidity cases) have been heard in the first instance by a specialised court: the Copenhagen Maritime and Commercial Court. In addition to being a specialised court for maritime and commercial business matters, this court has been a specialised IP court for trademarks and designs for many years, and was also appointed as the trademark and design court for Community trademarks and designs.

Unlike all the other courts in Denmark, due to its status as a specialised court, the Maritime and Commercial Court has had a long tradition of using a combination of legal and technical judges. In order to increase the court's patent knowledge, this tradition has also been transferred to the patent cases heard by the Maritime and Commercial Court. Since the beginning of 2007, 15 technical judges with patent experience have been appointed. Generally, the technical patent judges have had many years of experience as either patent attorneys or in-house patent agents, and they have been appointed by either the organisation of in-house patent agents or the organisation of patent attorneys. Following these changes, the patent-related experience in the court has increased significantly, which is reflected by the decisions made by the court.

Independent court

Case law shows that reports and testimonies from experts, including patent experts, were given much weight in the past, probably due to the judges' own limited patent experience. This lack of experience resulted in some unexpected rulings, giving rise to legal uncertainty in the patent field. However, since the establishment of a specialised court with technical judges, this has improved significantly.

In most patent cases, court-appointed experts are still employed; however, recent decisions show that the Maritime and Commercial Court is willing to make decisions deviating from recommendations provided by court-appointed experts during proceedings.

Furthermore, the Maritime and Commercial Court has also proven that it is willing to consider the technical nuances of cases based on its own judgement and not necessarily guided by the court-appointed patent experts. In one recent invalidity case, the patent as issued was found to lack inventive step. The patentee provided several different suggested amendments to the claims. For the first time in Danish court history, the judges evaluated the different claims set and allowed amendments to the patent claims

during the proceedings, and finally maintained the patent in a limited form.

In another recent decision, the court found that the patent in dispute lacked inventive step. However, its analysis started from an alternative document as closest prior art than the document considered closest prior art by the court-appointed experts. This case shows that the court now feels confident that it has the expertise to evaluate legal questions pertaining to patents without leaning towards patent experts. However, it is still believed that the court will continue to apply the teachings of technical experts.

The Maritime and Commercial Court has also provided for the first time a standard for the creative step of a utility model. Utility models are also called 'little patents' as they expire after 10 years, whereas other patents can be valid for 20 years. Further, it is well established that the standard for creative step required for utility models in Denmark is set to be lower than that for the inventive step in patents. However, it has been unclear how much lower the standard actually is. The Maritime and Commercial Court has now defined the standard for creative step: for assessment of creative step the skilled person must have knowledge of a narrower technical field than a skilled person in a patent case. Thus, in relation to a utility model, the skilled person could not have been expected to know of remote prior art; consequently, the utility model was deemed valid in view of the discussed prior art. The court's decision has provided a useful tool to patent applicants.

It is possible to branch off a Danish utility model from a European patent application. If the examination of a European patent application is progressing slowly due to discussions of inventive step, it may be worth considering branching off a Danish utility model if infringement takes place in Denmark. Since the standard for creative step is lower than the standard for inventive step, this would thus give rise to a strong – albeit shorter-lasting – right. In contrast to the situation in Germany, in Denmark a patentee is allowed to obtain both a utility model and a patent for an invention.

European Patent Office case law is followed

It is an acknowledged challenge to the legal certainty of both patentees and third parties in Europe that national courts choose to interpret patent law differently between different member states and, in particular, that national courts interpret patent law differently to the interpretation provided by the European Patent Office (EPO) Board of Appeal.

In several instances the Danish courts have decided to follow the practice established by the EPO, and thereby harmonise their decisions with EPO practice on several important issues.

An example was a recent case where inventive step was an issue. The Maritime and Commercial Court and the Supreme Court have specifically stated that they will employ the EPO's 'problem-solution approach' to determine whether an invention is inventive, thereby officially establishing a standard for evaluation of inventive step under invalidity cases heard by the courts.

Danish patent case law is limited and it is thus gratifying that the courts have decided to follow the well-developed case law of the EPO, providing increased legal certainty in patent cases.

Preliminary injunctions

A preliminary injunction is a provisional court decision whereby a patentee may obtain, through a faster procedure, an injunction which would otherwise be jeopardised by the long duration of a regular lawsuit – and it is a well-known fact that preliminary injunctions can be a powerful tool.

At present, a preliminary injunction in Denmark is requested at district court level and heard by only one legally appointed judge, who generally has no experience in patent disputes. This has biased the system towards supporting the patentee's rights. As an issued patent has already been examined by patent experts at either the Danish Patent and Trademark Office or the EPO, there is a strong assumption of validity.

In fact, even in a recent case where a patent was found invalid by the opposition division at the EPO, the Danish High Court stated that although the decision from the EPO weakened the assumption of validity, it did not eliminate it all together. However, after a detailed analysis of the patent, the High Court agreed with the EPO on the merits and found it likely that the patent was not valid.

Since cases for preliminary injunctions have been heard decentrally on a district court level, and according to the law the venue is either the place of business of the assumed infringer or the place of the infringing act, infringement cases relating to the same patent but infringed by different parties (as is often the case in pharmaceutical infringement cases) may be heard by several different district courts. Over recent years, it has been shown that even if the subject of the cases is the same, various judges can still reach different decisions, leading to increased legal uncertainty.

In order to overcome the problems of hearing cases relating to similar or identical subjects in several different district courts, it has been evaluated whether it is possible to appoint a central court for hearing preliminary injunction cases. In this regard, Denmark has come closer to a solution, in that the Maritime and Commercial Court will probably be appointed to hear preliminary injunction patent cases in the future. The government introduced a bill in Parliament in November 2012. The new bill will allow preliminary injunction cases to be heard by the Maritime and Commercial Court; the court will be composed of both legal and technical judges. Given the expertise of the Maritime and Commercial Court in patent cases, this will greatly increase legal certainty for cases regarding preliminary injunctions. In addition, the bill will expand the competence of the court, so that the court will be able not only to impose a prohibition to undertake certain acts, but also to order parties to undertake specific acts. Such an order could, for example, compel the infringer to withdraw infringing goods which have already been placed on the market.

At present, court-appointed experts are used in most patent cases, except for cases with limited commercial potential. However, it is probable that the use of court-appointed experts will gradually decrease — at least at the Maritime and Commercial Court if the court continues to rely mainly on the expertise of its own judges. The costs of patent cases may be reduced if no experts are appointed. Further, often the time involved in appointing experts and drafting expert reports may result in slower progress than desired by the parties. It may still be relevant to appoint experts (particularly non-patent technical experts in technically complex cases). However, it seems that the judges now have the necessary expertise to evaluate most of the questions arising (including technical questions) in relation to inventions. *iam*

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