

Denmark

On a journey towards a specialised patent court

Over the past few years, patent enforcement in Denmark at court level has become more centralised, which has gradually led to the development of a court with a higher level of experience in patent cases. This is likely to improve legal certainty greatly for both patentees and accused infringers.

There are three levels in the Danish court system: district courts, the two high courts and the Supreme Court. Traditionally, patent disputes regarding infringement and invalidity were heard at high court level. Due to the low number of patent disputes and the high turnover of judges at the high courts, each high court judge would normally hear only a few patent cases during his or her career. Thus, there was a huge lack of experience among judges in the highly specialised patent field. Patent expertise, as well as technical expertise, has traditionally been brought into patent cases through court-appointed independent patent and technical experts. The case law shows that expert reports and testimonies were given much weight in the past, probably due to the high court judges' own limited patent experience. Unfortunately, this lack of experience resulted in some unexpected rulings, giving rise to legal uncertainty in the patent field.

In 2006 there was a general court reformation in Denmark. This led to various changes in court procedures and also changed the possible choice of courts for patent cases. As of January 2007, patent disputes, such as infringement and invalidity cases, can be heard in first instance by only one specialised court: the Copenhagen Maritime and Commercial Court.

In addition to being a specialised court for maritime and commercial business matters, the Maritime and Commercial Court has been a specialised IP court for trademarks and designs (in particular European ones) for many years.

Technical judges

Unlike all the other courts in Denmark, due to its status as a specialised court, for a long time the Maritime and

Commercial Court has had a combination of legal and technical judges (ie, technical judges with a maritime or commercial background). This tradition has now also been transferred to the patent cases it hears, and since the beginning of 2007, 15 technical judges with patent experience have been appointed. Generally, the patent technical 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. Thus, the patent knowledge displayed in court hearings has increased significantly and will hopefully lead to more predictable results.

Patent cases normally have one legal judge and two technical judges. The technical judges include one patent technical judge and either a patent technical judge or a commercial judge (the latter, in particular, being relevant when the case includes a request for damages).

Second instance proceedings

Under the previous legal system, the Supreme Court acted as the court of second instance in all patent cases, hearing appeals from high court decisions. It has been decided that it will continue this practice, since Maritime and Commercial Court decisions will usually be appealed to it. The Supreme Court has no technical judges with patent experience, but it can appoint patent experts and usually does so.

In recent years, the Supreme Court has heard several patent cases. It has lately confirmed that it will adopt the same problem-solution approach for evaluating inventive step in Danish patents, as well as in Danish parts of European patents, as that implemented by the Boards of Appeal of the European Patent Office (EPO). This will help to ensure a similar application of patent law in Denmark as in other EU member states.

The Supreme Court has also decided several cases involving equivalent infringement. Thus, it is well established in Denmark that a product or method may infringe a patent even if it does not fall within the literal

scope of the claims. In order to be found to infringe a patent equivalently, the infringing product or method must take advantage of the core of the patent. In one of its latest decisions, the Supreme Court emphasised that in order to infringe a patent with an equivalent product, that product must apply the teaching of the patent to solve a similar technical problem.

Apart from being the patent issuing authority, the Danish Patent and Trademark Office (DPTO) also offers various consultancy products. Recently, a high court deemed a company liable for patent infringement even though the company had previously obtained advice from the DPTO that it would not be infringing the patent in dispute. In this case, the Supreme Court placed much weight on the expert reports and ultimately ordered the company to pay €125,000 in damages and to destroy all the illegally prepared materials and tools used.

In another recent case, the Supreme Court decided in favour of the accused infringer who had applied for a marketing authorisation for marketing a medicament in Denmark – no medicaments had been sold or marketed. The Supreme Court decided that the act of merely applying for and obtaining a marketing authorisation could not be considered an infringing act. This ruling contrasts with several earlier district court decisions and it may end up changing a common practice in Denmark, which is to file a lawsuit at the same time as a marketing authorisation is given to a competitor.

Outcome of court reformation

Three-and-a-half years since the court reformation, it may be time to look back and evaluate the changes.

In most patent cases, court-appointed experts are still used; however, it appears that technical judges have started using their expertise to form their own independent opinions.

In a recent Maritime and Commercial Court decision, in particular, the judges 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 as being where the skilled person has narrower knowledge of the technical field than the 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; as a consequence, 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 now 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-lived, 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.

It is too early to evaluate how predictable the Maritime and Commercial Court decisions in patent cases will be, but an improvement is expected.

Appealing decisions from DPTO Board of Appeal

Appeals arising from decisions of either the examination of patent applications or the opposition to patents may be further appealed. The high courts were previously the courts of choice for invalidity and infringement cases, but this has changed. The Maritime and Commercial Court is now the first instance for such cases, and as a result it will gain even more expertise in the patent field – most likely to the benefit of both patentees and the other parties involved in patent cases.

The number of decisions of the DPTO Board of Appeal appealed to the Maritime and Commercial Court varies from year to year, ranging from a few percentage points up to about 20% of the decisions. In about 10% to 15% of the cases appealed further, the decisions were reversed.

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 – accordingly, 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. Several disadvantageous situations have arisen from this arrangement. First, due to the low number of cases per district court, district court judges often hear only one or two (at most) patent cases during their career. This has biased the system towards supporting the patentee’s rights. District court judges are generally reluctant to find a patent invalid.

This is because an issued patent has already been examined by patent experts, at either the DPTO or the EPO. Further, if a patent is assumed infringed by different parties domiciled or doing business in different jurisdictions (as is often the case in pharmaceutical infringement cases), several different district courts may be involved. 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. This leads to increasing legal uncertainty, where the result of a preliminary injunction can largely depend on a particular district court. For many years there has been a consensus that preliminary injunction cases should be more predictable, for both patentees and accused infringers.

Denmark seems to have come closer to a solution now that the Maritime and Commercial Court has been appointed as a specialised court for hearing preliminary injunction patent cases. Naturally, a subsequent regular lawsuit on the matter cannot be heard by the same court and will instead be heard at high court level. However, it

still seems advantageous that court cases relating to preliminary injunctions can now be heard by a court with patent experience.

Future outlook

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 once the system of technical judges has raised the court's level of patent experience. The costs of patent cases may be reduced if no experts are appointed; further, quite 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 be able to evaluate most of the questions arising (including technical questions) in relation to inventions.



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