EPO: kolossens lerfødder smuldrer

Af George Brock-Nannestad 10. feb 10:46

IDAs formand Frida Frost konkluderede om den kommende patentdomstol i Ingeniøren den 12. maj 2014, før folkeafstemningen:

"..... Og de små virksomheder skal selvfølgelig sikre deres opfindelser med et patent. Der er ingen grund til at sidde passivt og vente for at se, hvad praksis bliver i det nye samarbejde. Det giver derimod fuldt ud mening at gå med i enhedspatentet som en ligeværdig spiller og være med til at påvirke samarbejdet mest muligt, så det bliver bedst muligt. Ikke mindst for de små virksomheders skyld."

Som landet ligger, kommer især de små virksomheder til at lide voldsomt på lidt længere sigt, fordi fundamentet for enhedspatent og patentdomstol er ved at rådne op.

Der sker i øjeblikket en meget kedelig udvikling hos den eneste underleverandør af enhedspatenterne, nemlig det europæiske patentdirektorat EPO. Det er en udvikling, som hidtil kun har optaget specialister, nemlig patentjurister og dommere. Og dertil de sagsbehandlere, som er højt uddannede patentspecialister, som er ansat hos EPO. Disse har de seneste måneder været så frustrerede over de konsekvente forringelser af deres muligheder for at yde et godt arbejde, at de er gået i demonstration i München, hovedkvarteret for EPO. Og de seneste demonstrationer er endt ved det danske konsulat i München, fordi formanden for EPOs bestyrelse (Administrative Council), den øverste ansvarlige tilsynsmyndighed, er en dansker.

Jeg kan ikke her bringe et patentkursus med henblik på en dybtgående forklaring af, hvor problemerne ligger, men jeg kan omtale nogle principper. Der eksisterer et par blogs på nettet, hvor diskussionerne foregår, og den mest seriøse er http://ipkitten.blogspot.dk. Prøv at google <"administrative council" ipkitten>.

Som sagt er der to uafhængige problemer, som vil samvirke til forringelsen af retssikkerheden.

Det ene problem ligger i selve grundlaget fra 1973 og 2000, den europæiske patentkonvention, kaldet EPC. I alle lande har man en appelmyndighed tilknyttet patentvæsenet – i Danmark er det Ankenævnet for Patenter og Varemærker. Hvis man er utilfreds, kan man gå til domstolene i to instanser. Men hvis EPO afslår en europæisk patentansøgning, har man kun én uafhængig instans, nemlig Appelinstansen, Boards of Appeal. Dette er "asymmetri-fejlen" ved EPC.

Der er i EPC lagt vægt på, at Boards of Appeal skal være som en domstol, uafhængig af administrationen, netop fordi den skal afgøre, om der har været fejl i administrationen. Og, hvis nogen er utilfreds med, at Boards of Appeal har opretholdt godkendelsen af den europæiske patentansøgning, så kan man i ethvert land, hvor der valideres, føre en udslettelsessag imod det nu nationale patent. Når patentdomstolen kommer op at køre, kan man føre sagen ved den, og derved ramme alle medlemslandene på én gang. Det vil sige, at en fejl ved Boards of

Appeal ikke er det sidste ord, når det drejer sig om godkendte patentansøgninger.

I over et år har bestyrelsen for EPO, med initiativer taget af direktøren (hvilket han egentlig ikke er berettiget til), lagt planer for at lægge Boards of Appeal direkte ind under direktionen hos EPO. Reglerne for arbejde i EPO, den såkaldte Service Regulation, kommer i fremtiden til at gælde også for Boards of Appeal. Service Regulation sætter meget faste rammer for hvordan medarbejderne skal opføre sig, og forlængelsen af udnævnelsen af Boards of Appeals medlemmer og eventuelle forfremmelser bliver nu afhængig af deres ydelser. Dette har medført meget store protester fra dommere ved domstole og patentdomstole i hele Europa. Man er rent ud sagt bestyrtet over, at der kan gennemtvinges en ophævelse af uafhængigheden for Boards of Appeal.

For en virksomhed, som ikke får godkendt sin europæiske ansøgning, vil der i fremtiden ikke engang være én uafhængig instans. Dette er et retstab af dimensioner!

Det andet problem er, at sagsbehandlerne gives kortere og kortere tid til sagsbehandling, fordi de skal opfylde rent arbitrære produktionsmål, som skal give besparelser hos EPO. Besparelserne vil ikke medføre lavere afgifter. Man kan sige, at fremtiden er, at sagsbehandlingen bliver temmelig summarisk. Det vil sige, at hverken ansøger eller eventuelle konkurrenter kan vurdere, om der kommer en rettighed, som enten kan bruges, eller som man skal vogte sig for. Dette har sagsbehandlerne, som er specialister på området, protesteret over med alle midler.

Helt seriøst tales der nu i professionelle patentrådgiverkredse om, at man må anbefale sine klienter helt at undgå EPO (og dermed enhedspatentet) og ansøge nationalt, som man gjorde det i gamle dage, før 1978. Det er blevet langt lettere idag, bl.a. fordi mange lande nu accepterer en indlevering på engelsk, som så i visse af landene skal oversættes til det lokale sprog indenfor en yderligere frist. Men det er da en falliterklæring for et system, som der har været investeret så meget i siden 1978.

Hele EPO-systemet drives idag af en gruppe selvsupplerende indspiste embedsmænd, som er langt dygtigere til at manipulere systemet end politikere har forestillet sig. Desværre er formanden for bestyrelsen en dansker, som i sin tid kom ind med store ord om, at man for at nedbringe ansøgningspuklen, skulle lave et tværeuropæisk samarbejde, hvor en del af sagsbehandlingen af europæiske patentansøgninger skulle foregå hos de nationale patentmyndigheder som underleverandører. Man kan virkelig spekulere på, hvorfor han går fra denne åbne politik til en ekstrem lukkethed og medvirken til direktørens manipulation.

Et underudvalg af bestyrelsen, kaldt Board28, skal på onsdag fremlægge forslag til den fremtidige styring af EPO, og bestyrelsen selv skal vedtage den på et egentligt bestyrelsesmøde til marts. Der findes ikke nogen kanaler til at opnå en dialog eller indflydelse på bestyrelsen, undtagen ved at de enkelte landes ansvarlige ministre tager sagen op. Men, desværre, de i EPC foreskrevne 5-årlige ministermøder er aldrig blevet afholdt! Og den planlagte diplomatiske konference, som skulle tilpasse EPC efter erfaringer med dens hidtidige virkemåde, er taget af bordet.

Hvorfor skal brugerne føres bag lyset? Hvorfor skal fremtidens europæiske patentsystem gøres dårligere?

http://ing.dk/debat/epo-kolossens-lerfoedder-smuldrer-174029

English translation

EPO: The Colossus' feet of clay are crumbling

By George Brock-Nannestad 10 Feb 10:46

IDA chairperson Frida Frost came to the following conclusion about the future Patent Court in Ingeniøren on 12 May 2014, before the referendum:

"... And of course small businesses must safeguard their inventions with a patent. There is no reason to stand idly by, waiting to see what will happen in practice under the new collaborative system. Conversely, it makes complete sense to enter into the unitary patent on a level playing field and to be able to influence collaboration as much as possible to optimise this. Not least for the sake of small businesses."

The way things look at the moment, small businesses in particular will suffer hugely in the slightly longer term because the foundations of the unitary patent and the Patent Court are rotting away.

Right now there is a very unfortunate development at the only subcontractor of unitary patents, i.e. the European Patent Office EPO. Up until now, this development has been the concern of specialists: patent attorneys and judges, as well as case handlers – the highly educated patent specialists who work at the EPO. In recent months, they have been so frustrated about the consistent erosion of their ability to do a good job that they have been out demonstrating in Munich, where the EPO has its headquarters. The most recent demonstrations ended at the Danish consulate in Munich, because the president of the EPO's Administrative Council, the highest responsible authority, is a Dane.

I cannot at this juncture provide a course on patents with a view to explaining in depth where the problems lie, but I can cite some principles. There are a few blogs online where discussions are ongoing, and the most professional one is http://ipkitten.blogspot.dk. Try a Google search of <"administrative council" ipkitten>.

As stated, there are two independent problems which will have the combined effect of degrading legal certainty.

One problem is inherent in the actual basis from 1973 and 2000, the European Patent Convention (EPC). All countries have a Board of Appeal associated with the patent system – in Denmark, it is Ankenævnet for Patenter og Varemærker (the Patents and Trade Marks Appeal Board). Anyone who is dissatisfied has two court instances to approach. However, if the EPO rejects a European patent application, that leaves only one independent instance, i.e. the Board of Appeal. That is the "asymmetry flaw" when it comes to the EPC.

The EPC emphasises that the Board of Appeal should be like a court, independent of the administration, precisely because it has to determine whether the administration is in error. And, if anyone is unhappy about the Board of Appeal having upheld the approval of the European patent application, then in each country where it has been validated, it is possible to conduct nullity proceedings against the now national patent. Once the Patent Court is up

and running, it will be possible to conduct nullity proceedings there, and thus impact all Member States in one go. In other words, an error at the Board of Appeal is not the last word when it comes to approved patent applications.

For more than a year, the Administrative Council of the EPO, at the instigation of the president (actually outside his remit), has been making plans to subjugate the Board of Appeal directly to the management of the EPO. Going forward, the EPO Service Regulation will also be applicable to the Board of Appeal. The Service Regulation places fixed constraints on staff conduct, and the extension of appointment of Board of Appeal members and any promotions will now become contingent on performance. This has led to strong protests from judges at courts and patent courts throughout Europe. They are frankly appalled that it is possible to force through suspension of the independence of the Board of Appeal.

There will no longer be even one independent instance for a company that fails to get its European application approved. That amounts to serious prejudicing of rights!

The other problem is that the case handlers are being given less and less time to process cases because they are required to meet purely arbitrary production targets to make savings for the EPO. Those savings will not result in lower charges. It could be said that, going forward, case processing will become rather perfunctory. In other words, neither the applicant nor any competitors will be able to assess whether any right granted will be fit for purpose or something to be wary of. The case processors, who are specialists in their field, have used every means at their disposal to protest about this.

It is now being suggested quite seriously in professional patent advisory circles that clients should be advised to avoid the EPO (and thus the unitary patent) entirely and apply nationally, the way things were done long ago, before 1978. Things have become much easier today, partly because many countries now accept submissions in English, which in some countries then have to be translated into the local language by a later deadline. But that is tantamount to declaring the bankruptcy of a system that has had so much invested in it since 1978.

The entire EPO system is now run by a group of self-perpetuating, cronyistic officials who are far more adept at manipulating the system than politicians imagined. Unfortunately, the president of the Administrative Council is a Dane who, back in the day, arrived with great words about setting up pan-European collaboration in order to reduce the bulge of applications, whereby some of the case processing for European patent applications would be done by the national patent authorities as external suppliers. It really makes you wonder why he has moved from this open policy to an extremely closed one, complicit in the president’s manipulation.

A subcommittee of the Administrative Council, known as Board28, will be presenting a proposal on Wednesday regarding the future administration of the EPO, and the Administrative Council itself will adopt this at an actual Administrative Council meeting in March. There are no channels for arriving at a dialogue or for influencing the Administrative Council, except if the ministers with responsibility in the individual Member States take the matter up. Unfortunately, however, the five-yearly ministerial meetings prescribed by the EPC have never taken place! And the planned diplomatic conference, designed to modify the EPC in line with lessons learnt from how it has been working up until now, has been taken off the table.

Why should users have the wool pulled over their eyes? Why should the European patent system of the future be degraded?