

Swedish Supreme Court on Jurisdiction and Patent Infringements

Introduction

The Swedish Supreme Court (*Högsta Domstolen*) recently rendered a decision on adjudicatory jurisdiction over a negative declaration pursuant to non-infringement of a patent, and hence non-contractual non-liability. The decision is dated 2006-06-02 and was published in NJA 2006 p. 354 (NJA 2006:39), – case no. Ö 2773-05. Following is a brief note on the decision.

Parties, facts and contentions

The plaintiff, Alligator Bioscience AB, a company domiciled in Sweden, served the defendant, Maxygen Inc., a company domiciled in the USA holding a European patent (EP 0 752 008) valid in Sweden, with a subpoena in a Swedish court (Stockholms tingsrätt). Alligator's object of action was to ask the court to declare that Alligator was in its right to manufacture fragment induced diversity by a method of in vitro mutated polynucleotides (abbreviated FINDTM) without infringing Maxygen's patent. Maxygen asserted the court must reject to hear the case and subsequently dismiss the case from becoming a member of the Swedish adjudicatory law system, based, first, on lack of Swedish adjudicatory authority, and, second, Alligator's lack of interest to have that question determined by the court. This case note will solely venture into the question of adjudicatory authority.

Court instances and conclusions

The decisions of the court of first and second instance as well as the Supreme Court were as follows. The court of first

instance (*Stockholms tingsrätt*) attributed adjudicatory authority to Swedish courts based on analogous application of the Brussels and Lugano Conventions article 5.3 and the Brussels I Regulation article 5.3, admitting that neither were directly applicable. Maxygen appealed that decision to the court of second instance (*Svea Hovrätt*), which concurred with the court of first instance. Maxygen appealed that decision to the Swedish Supreme Court, which attributed adjudicatory authority to Swedish courts on the basis of Swedish national law Chapter 10, §3 in "*rättegångsbalken*" (1942:740).

Ratio decidendi of the Swedish Supreme Court

In the following, the rationale of the Swedish Supreme Court will be described.

First, the Swedish Supreme Court identified the legal basis for conferring, delimiting and thus both attribute and exclude adjudicatory authority to Swedish courts. Since the defendant neither was domiciled in an EU State nor an EFTA State, the legal basis for determining the attribution of jurisdiction to Swedish courts was, in accordance with the Brussels I Regulation article 4.1 and the Brussels and Lugano Conventions article 4, to be determined by Swedish law. Further, the Swedish Supreme Court reasoned that the attribution of jurisdiction to court could in principle be based on analogous application of the Brussels and Lugano Convention article 5.3 and the Brussels I Regulation article 5.3 since, finding support in Swedish legal literature (Bogdan's book titled "*Svensk internationell privat- och processrätt*", 6th edition 2004 p. 113 with references to NJA 1994 p. 81 and 2001 p. 800) those rules express international principles in conflicts of adjudicatory jurisdiction between courts in different States under the condition that their application do not lead to limitation of Swedish adjudicatory authority. However, since the Swedish Supreme Court in case in NJA 2000 p. 273, had established that article 5.3 of the Lugano Convention was inapplicable to negative court declarations of non-contractual

non-liability, and it was uncertain and a controversial issue in legal literature whether the Brussels I Regulation article 5.3 and the Brussels Convention article 5.3 encompassed a negative declaration for non-infringement of a patent, and hence a declaration for non-contractual non-liability. Since that question so far was an open question, the Swedish Supreme Court decided it was not evident in this case to base Swedish adjudicatory authority on an analogous application of the Brussels and Lugano Conventions article 5.3 and the Brussels I Regulation article 5.3.

Second, the Swedish Supreme Court outlined its policy considerations for the possibility to seek a negative declaration of non-infringements of patents on the basis of the possibility to seek negative court declarations on non-infringements of trademarks. Since in the EU it is possible to seek a negative declaration on a non-infringement of a trademark on the condition that such a declaration is permitted to seek in accordance with a Member State's national law (see regulation no 40/94 of 20 December 1993 article 92 b), and such a negative declaration is permitted in the Swedish trademark law § 44, by consequence, the Swedish Supreme Court reasoned, Alligator's lawsuit were to be attributed to Swedish courts if that claim had been a claim on infringements of trademarks. (Swedish trademark law states that the legal dispute is to be attributed to the court where the defendant is domiciled or has its place of business, or, if the defendant is neither domiciled nor has a place of business in a Member State, the legal dispute shall be attributed to the court where the plaintiff is domiciled or has its place of business, see article 93.1, 93.2 and 93.5.) Further, the Swedish Supreme Court reasoned, since the European Patent Convention does not regulate the equivalent question for patents, and there are no objective grounds to determine the attribution of jurisdiction to court different from negative declarations on non-infringement of trademarks, the solution should be the same for patents as it is for

trademarks. Finally, the Swedish Supreme Court noted the Commission proposal on 1 August 2000 to the regulation on European Patents, COM 2000(412), which was a proposal not yet promulgated, which presupposes in articles 30 and 34 that a plaintiff is permitted to seek a negative declaration on non-infringement of a patent against a patent-holder in an EU court for immaterial rights.

Third, upon having determined that the Brussels and Lugano Conventions article 5.3 and the Brussels I Regulation article 5.3 were inapplicable by analogy, and upon establishing that well founded reasons argue in favour to permit a plaintiff to seek a negative declaration on non-infringement of a patent, the Swedish Supreme Court sought the legal basis for determining Swedish adjudicatory authority in Swedish national law Chapter 10, §3 in "*rättegångsbalken*" (1942:740). In accordance with this law, the legal or natural person who does not have a known domicile in Sweden, can in disputes relating to movable property be sued at the place where the movable property is. In a previous Swedish Supreme Court decision, in case NJA 2004 p. 891, it was not necessary for the Swedish Supreme Court to determine whether and to what extent immaterial rights could be located within the sphere of a State territory in the sense the said law required, but expressed it was a controversial issue. Further, since Maxygen's patent was a European patent, was valid in Sweden and had the same legal position as if the patent were registered in Sweden, and since that patent could be exploited as security rights in accordance with Swedish law, the Supreme Court reasoned those rights were possible to locate, where upon Maxygen's patent rights could be located in Sweden as conceived in the spirit of the Swedish national law Chapter 10, §3 in "*rättegångsbalken*" (1942:740).

Fourth, the Swedish Supreme Court ended by commenting on whether and under what conditions a future decision on establishing liability for and enforce permanent

discontinuation of patent infringement would lead to a nullification of a preceding negative declaration on non-liability for non-infringement of a patent. The Swedish Supreme Court noted that a preceding negative declaration on non-liability for non-infringement of a patent could not in any event be nullified so long as the decision to establish liability for and enforce permanent discontinuation of patent infringement did not interfere with the uncertainty the plaintiff wished to achieve certainty for through her seeking of the negative declaration on non-liability for non-infringement of a patent.