

Enforcing patents in Sweden

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1. What options are open to a European patent holder, whose rights cover your jurisdiction, when seeking to enforce its rights in your jurisdiction?

Sweden has been a member of the European Patent Convention since 1978, which means that a significant proportion of the patents that are granted in the country today are European patents. Designating Sweden through a European patent application results in a patent with the same legal status and scope of protection as a national Swedish patent. Enforcing a European patent in Sweden is, from a litigation perspective, therefore, very similar to enforcing a national patent. There are three ways of enforcing a patent in Sweden: through litigation, arbitration or a settlement between the parties.

2. Does your jurisdiction have specialist patent courts? If not, what level of expertise can a patent owner expect from the courts?

The District Court of Stockholm (first instance), The Svea Court of Appeal (second instance) and the Supreme Court (final instance) are exclusive venues for patent proceedings. The courts have technical experts within the different technical fields and these sit as judges in patent cases. A high level of expertise can thus be expected from the courts. In some very specialised fields of technology, for example, advanced biotech, the courts' level of expertise might be limited. In such cases, litigation is likely to be rather time consuming and will demand a significant amount of work and expertise from the parties and the attorneys.

3. Is it possible to cross-examine witnesses at trial? How far are proceedings based on

written evidence? Are there restrictions on the use of evidence from experts?

At the main hearing it is possible to cross-examine witnesses. It is also possible for the judge to ask the witnesses questions. Written evidence is allowed and is used to a great extent, but written statements of witnesses are in principle not allowed. There are no restrictions on the use of written formal reports from experts and it is common for the experts also to be examined at the trial.

4. Are infringement and invalidity dealt with simultaneously? What level of proof is necessary to demonstrate one or the other?

In some cases, one of the parties may wish to declare a patent invalid during the course of, for example, a trial for infringement. In this respect, it should be noted that invalidity cannot be used as a counterclaim in an infringement trial. If the defendant in an infringement trial wishes to claim invalidity of the patent, a separate writ of summons with a claim for cancellation of the patent has to be filed. The two cases are thereafter in principle handled and decided jointly by the court.

The level of proof to demonstrate that a patent should be declared null is rather high in Sweden and the court demands that the plaintiff be able to prove beyond doubt, through written evidence, that the invention does not meet the conditions of patentability (such as lack of novelty and/or lack of inventive step). Usually this written evidence - such as dictionaries, books and quotations of prior art - is combined with witnesses and formal reports from experts.

5. To what extent is pre-trial discovery permitted? If it is permitted, how is discovery conducted?

The holder of a patent may request that an infringement investigation be conducted in order to collect evidence of the infringement and the extent of the infringement. A claim

for an investigation is filed at the competent court and is carried out by the enforcement agency. The plaintiff can be present at the investigation but is not allowed to take an active role – it can only respond to questions from the enforcement officers. The plaintiff has to provide security for the possible damages that might be caused to the alleged infringer due to the investigation.

6. To what extent does any doctrine of equivalents apply in an infringement action?

Swedish courts may apply the doctrine of equivalents in patent cases. To what extent and, in particular, how generously this doctrine is used by the courts is difficult to say. There are very few patent cases in Sweden each year and practice is not easy to foresee. In general terms, however, the application of the doctrine of equivalents has in recent years become stricter.

7. To what extent are courts willing to consider, or bound by, the opinions and decisions of other courts that have dealt with similar cases?

For international litigators, it may be worthwhile knowing that Swedish courts are not bound by decisions of other Swedish courts, except with regard to the Supreme Court. This court sets precedents that all lower courts in Sweden are bound to follow.

8. To what extent are courts willing to consider the reasoning given by foreign courts that have handed down decisions in similar cases?

The only circumstances under which a Swedish court will be bound by a decision of a non-Swedish court are when a case has been referred from Sweden to the European Court of Justice. However, judges in patent cases may be prepared to look at the decisions of foreign courts that have tried similar matters and will also look at decisions from the EPO.

9. What options are open to a defendant seeking to delay a case? How can a plaintiff counter delaying tactics?

Parties in litigation may often, for strategic or economic reasons, seek to delay the trial proceeding. There are a number of ways to do this in Sweden; for example, requests for extension of time to respond, late filing of evidence, filing of extensive evidence and arguments and unclear statements tend to delay cases. These are all informal ways of delaying the proceedings. As in many jurisdictions, there are no formal ways of achieving a delay and consequently it

is difficult for a plaintiff to counter delaying tactics.

10. How available are preliminary injunctions and how do you get them?

Preliminary injunctions are a relevant option for many parties, not just for legal purposes but also as an efficient way to persuade a hesitant counterparty to negotiate. In short, the procedure for requesting a preliminary injunction in Sweden can be described as follows. Requests for preliminary injunction can be filed at the time of filing the writ of summons, as well as before the writ of summons or later on in the litigation. If the plaintiff shows that it is probable that an infringement is occurring and that one may reasonably fear that the defendant will, by continuing the infringement, reduce the value of the exclusive right to the patent, the court may impose a prohibition under penalty of fine for the period until the case has been finally decided or another decision has been made. Together with the request for a preliminary injunction, the plaintiff has to file security at the court for the damages that may be caused to the defendant due to the injunction if the court later judges that no infringement has occurred. Before a prohibition is imposed, the defendant has the opportunity to comment on the request for the injunction, unless a delay would involve a risk for further damages to the plaintiff.

11. How long does it take to get a decision at first instance? Is it possible to expedite this process?

Patent proceedings in Sweden are a relatively long process. It takes about one to three years to get a decision in the first instance. In principle, it is not possible to expedite the process (except through a preliminary injunction).

12. What avenues for appeal are open to the defeated party in a first instance case? What criteria are there for granting an appeal? How long does the appeal process take?

The decision from the district court may be appealed to the Court of Appeal. The decision from the Court of Appeal can be appealed to the Supreme Court only if a leave to appeal is granted. Such a leave to appeal is granted only if the case is considered to set precedent or if it is evident that the lower court has made a judicial mistake. The appeal process to the Court of Appeal usually takes between 12 and 24 months. If a leave to appeal is granted the process will at least take another 12 to 24 months.

13. To take a case through to a first instance decision, what level of cost should a party to litigation expect to incur?

Cost-wise, litigation in Sweden is rather low by international comparison. The costs differ from case to case but one should be prepared for costs of between SEK 1 million and SEK 3 million depending on the case, evidence adduced, witnesses, experts etc. Furthermore, in general, the losing party must pay the winning party's legal costs.

14. Who can represent parties in court? Is specialist representation required?

Compared to many other countries, specialist representation is not required in Swedish courts, although it is still recommended. Attorneys specialising in intellectual property and patent law usually handle court proceedings.

15. What remedies are available for infringement and how are these typically applied? Are punitive damages available and in what circumstances?

The remedies available are imprisonment or a fine (in criminal cases), injunction under penalty of fine and damages. Punitive damages are not available, only damages for use of the invention and further damages, for instance market damages or loss of profit. Damages are often quite low in Sweden. The damage for use is calculated as an estimated licence fee. The court may also order infringing goods to be destroyed.

16. Are there any realistic alternatives to litigation in cases relating to patent disputes?

Mediation is an alternative to litigation. Usually, the parties meet and reach a settlement agreement shortly after litigation has been initiated. This causes no procedural problems, as court proceedings may be cancelled at any time if all involved parties concur. Indeed, the courts often encourage parties to reach a settlement out of court, even after litigation has been initiated. In cases where the parties for some reason do not want the publicity that court litigation might provoke, arbitration is an alternative. There are a number of individuals and organisations that specialise in arbitration; most significant is the Stockholm Chamber of Commerce.

17. Has your jurisdiction signed up to either the London Protocol or the European Patent Litigation Agreement? If not, how likely is it that it will do so?

On 18th May 2006, the Swedish Parliament approved the London Agreement and

amended the Swedish Patents Act in order to implement the London Agreement (compulsory translation of the claims into Swedish, description must be available in English). The date of deposit of the instrument of ratification, and thus of the entry into force of the amendments to the Patents Act, will be decided by the Government.