

Do Swedish patent licence agreements last for the life of a patent unless otherwise specified?

09 November 2020 | Contributed by [Westerberg & Partners Advokatbyrå Ab](#)

Facts

Decision

Comment

In an interesting judgment, the Patent and Market Court of Appeal provided guidance on the term of patent licences in cases where the licence agreement is silent on that point.⁽¹⁾

Facts

Lundberg VVS-produkter AB (Lundberg) is a company in the heating, ventilation and sanitation field. A person by the name of SL was the director of Lundberg until 2014. The company held a Swedish patent for an articulated air admission device, which the company applied for in 1999 based on an invention by SL and commercialised through a number of products.

In 2005 another company (the Sales Company) was incorporated with one of SL's children as its director. Lundberg and the Sales Company agreed verbally that the latter would handle the sales of Lundberg's products. A document labelled 'Power of Attorney/Certificate' was subsequently made out by Lundberg to the Sales Company wherein it was certified that the Sales Company had the right to manufacture all products in a named product line. It was added that the Sales Company initially would buy finished products from Lundberg but would have the exclusive right to manufacture and sell the products in question if and when SL so decided or after his death. The relevant product line included products that used the invention. In 2013 Lundberg issued a document labelled 'Revocation of power of attorney'. However, the authenticity of that document was contentious.

SL passed away in 2014 and another one of his children became the company director of Lundberg. A dispute about the Sales Company's right to manufacture and sell the products in question arose.

A third company, NGL Vatten och Energiteknik AB (NGL), had a long commercial relationship with Lundberg, having bought products from that company for some 30 years. It marketed, resold and used the products it purchased from Lundberg. From 2005 NGL bought Lundberg products from the Sales Company. In 2016 Lundberg demanded that NGL buy the products directly from Lundberg, which NGL did for a time only to resume its purchases from the Sales Company. Until 2017, the products which NGL purchased from the Sales Company originated from Lundberg. Subsequently the products acquired by NGL were manufactured on behalf of the Sales Company without Lundberg's involvement. The latter company considered those products infringing.

Lundberg initiated infringement proceedings against NGL. The main issue before the courts was exhaustion, which turned on whether the Sales Company had a valid licence from Lundberg at the time of NGL's purchase.

Decision

The Patent and Market Court of Appeal began its judgment by noting that it agreed with the lower court's analysis of the law on licence agreements. The lower court had held that insofar as licence agreements are concerned, contract formation is not subject to any requirement as to the form of the agreement. There must, according to the court, be agreement on the object of the contract, meaning that it must be possible to at least indirectly identify the patent. The court proceeded to explain that agreements are to be construed in accordance with the shared intention of the parties, of which the language of a contract is a central piece of evidence.

Turning to the Power of Attorney/Certificate, the courts found that it was a licence that gave the Sales Company the right to manufacture and sell products that were covered by Lundberg's patent. Both of the courts

AUTHOR

**Björn
Rundblom
Andersson**



appear to have understood the document in the context of the initial verbal agreement and SL's thoughts at the time of scaling back and passing the business on to the next generation.

Since Lundberg argued that the licence agreement had been terminated in 2013 by the revocation of the power of attorney, the question remained of whether that licence was in force at the time of NGL's purchase of patented products from the Sales Company in 2017. The document contained no express provision on the term.

The Patent and Market Court of Appeal cited authorities which opined that it could be presumed that the intended duration of a licence is the life of the licensed patent or patents. The court then held that it had not been demonstrated that the intention was anything other than that the licence should endure for the life of the now relevant patent. It pointed to the fact that the language of the document labelled Power of Attorney/Certificate suggested that the licence was intended to be long term and was to become exclusive after the passing of SL. The court found that the licence was for the life of the patent – that is, a definite term. It found that it followed that the agreement could not be terminated without cause before the expiry date. As no relevant cause for termination had been put forward by Lundberg, its argument that the licence had been terminated did not prevail.

The Patent and Market Court of Appeal concluded that the products which NGL had purchased had been put on the market with the consent of the proprietor of the patent and the patent right was accordingly exhausted in those products.

Appeal to the Supreme Court was not permitted.

Comment

A short description of Swedish contract law might be helpful to properly understand the significance of the Patent and Market Court of Appeal's judgment. Sweden has no comprehensive civil code providing general principles of contract law. Instead, there is legislation governing the formation of contracts and some specific types of contract (eg, the sale of goods and various forms of agency). Provisions governing specific aspects of licence agreements can be found in Swedish IP legislation but there is no comprehensive instrument governing the aspects of the contractual relationship not contemplated by the parties in their agreement.

To the extent that a dispute involves questions not answered by the terms of a contract, recourse must be had to general principles of law. Such principles are commonly derived from the legislation that exists in the field of contract law. One general principle is that if no term is agreed by the parties, a contract will be for an indefinite term. A contract for an indefinite term may, with some exceptions, be terminated without cause but subject to a reasonable termination period. The opposite is generally true for agreements for definite terms.

The Patent and Market Court of Appeal's judgment appears to lay down a rule that differs from the general principle just mentioned. Rather than finding the absence of a provision on the term of the licence to mean that the term was indefinite, it held that it had not been proven that the parties had intended anything other than that the licence should endure so long as the patent remained in force. The court did not outright state that the rule is that absent agreement to the contrary, a licence will last for the time that the licensed patent is in force. Instead, it appears to view the rule as a rebuttable hypothetical (assumed) intention shared by the parties. However, as contracts must be construed in accordance with the shared intention of the parties, the effect is the same as the rule stated above.

To support its conclusion, the court cited authorities that emphasise that a licensee will normally not accept to invest in the manufacture and marketing of licensed products if the operations may have to be subsequently discontinued. This might be true, but the issue is rather which of the parties should bear the risk of leaving the issue of term and termination open in an agreement.

Lastly, it should be noted that the court did not reason about the special nature of the licence agreement in that case. From what can be gleaned from the judgment, it does not seem motivated by purely commercial reasons. It was concluded between family members in a family enterprise. Further, no licence fee seems to have been agreed. It can be discussed whether the bar for terminating a licence that does not rest on purely commercial considerations should be lower than for a strictly commercial licence. Lundberg had not argued that it had cause to terminate the licence and that question was thus not before the court.

The judgment in question demonstrates that patent proprietors that wish to have the opportunity to terminate a licence agreement governed by Swedish law without cause, or to have a shorter term than for the life of the patent, must be careful to include language to that effect in the contract.

For further information on this topic please contact [Björn Rundblom Andersson](mailto:bjorn.rundblom.andersson@westerberg.com) at [Westerberg & Partners Advokatbyrå AB](http://Westerberg.com) by telephone (+46 8 5784 03 00) or email (bjorn.rundblom.andersson@westerberg.com).

The Westerberg & Partners Advokatbyrå Ab website can be accessed at www.westerberg.com.

Endnotes

(1) Patent and Market Court of Appeal judgment of 12 October 2020 in Case PMT 3243-19.

The materials contained on this website are for general information purposes only and are subject to the [disclaimer](#).