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PATENTS IN EUROPE 2015/16 THE NETHERLANDS

by Harm van der Heijden and Hans Hutter



This article is published in the seventh edition of *'Patents in Europe: helping business to compete in the global economy'*. Produced in partnership with the European Patent Office, this publication offers a guide for all those who use or have an interest in the European patent system. *'Patents in Europe'* features detailed information on litigating in many of the continent's most important jurisdictions in a series of country-based contributions in which correspondents answer a number of set questions on how patents are enforced. The following article covers the Netherlands, and is written by NLO European Patent attorneys Harm van der Heijden and Hans Hutter.

1. What options are open to a patent owner seeking to enforce its rights in your jurisdiction?

Several options are available to rights holders to enforce their patents in the Netherlands. Rights holders can start proceedings on the merits by summoning the alleged infringer before The Hague District Court. A popular alternative to this is the procedure under the accelerated regime, which was devised by the Hague District Court specifically for patent infringement cases. This is a trimmed-down procedure in which there are fewer exchanges of written arguments before the trial date. Exchanges and the trial date are also set in advance by the court on a strictly managed schedule. Besides the standard and accelerated procedures, summary proceedings can be initiated for preliminary relief. However, these must still be followed by proceedings on the merits. Finally, it is possible for a rights holder to request permission from a court to seize evidence from an alleged infringer in order to preserve it. Such permission can be obtained in an **ex parte** procedure, which does not require the presence of the alleged infringer. While such seizures are intended to be used to support proceedings on the merits, in fact they are also frequently used by rights holders to force an alleged infringer to the negotiating table.

2. Are parties obliged to undertake mediation/arbitration prior to bringing a case before the courts? Is this a realistic alternative to litigation?

There is no obligation for parties to undertake any type of mediation or arbitration before bringing a case before the courts. However, in case of standards-essential patents (e.g., for fair, reasonable and non-discriminatory (FRAND) licences) the courts have been reluctant to order the seizure of infringing goods or an injunction until negotiations between the two parties have been attempted seriously.

3. Are there specialist patent or IP courts in your jurisdiction? If not, what level of expertise can litigants expect from the courts?

By law (Article 80 of the Patents Act 1995) only The Hague District Court is competent to hear patent infringement and validity actions. For appeal cases, only The Hague Appeals Court is competent. Finally, the Supreme Court may decide on procedural aspects of court decisions. The courts in The Hague deal with a fair number of patent cases every year and their decisions have been recognised by other courts in Europe. For instance, the Federal Court of Justice in Germany recently held that a German court should take decisions of parallel proceedings in other member states of the European Patent Convention (EPC) – which includes the Netherlands – into account where the questions are essentially the same. In 2010 the UK Court of Appeal decided that UK courts should also take decisions of parallel proceedings into account, especially from Germany, the Netherlands and France.

4. Are validity and infringement dealt with together, or does your country have a bifurcated system?

In principle, as in most systems, infringement and validity are separate procedures. However, when an alleged infringer files a counterclaim of invalidity, the two cases typically remain joined and are heard by the same court on the same day. There is one minor exception: when claiming the invalidity of a Dutch patent granted under the Patents Act 1995 (rather than a European patent validated in the Netherlands), the claimant must obtain an opinion of validity from the Dutch Patent Office

and submit this to the court. This is because Dutch national patents – as opposed to European patents – are only searched, but not examined during the granting procedure.

5. Who may represent parties engaged in a dispute?

Parties in a dispute may be represented by any attorney at law who is qualified to represent parties before the Dutch courts. By law, a registered Dutch patent attorney is allowed to speak on behalf of the parties in a patent case (Article 82 of the Patents Act 1995). However, a patent attorney is not allowed to represent parties or to plead in court.

6. To what extent is pre-trial discovery permitted in cases?

The Dutch system has no pre-trial discovery. The procedure mentioned earlier for requesting permission to seize evidence for preservation cannot be used as a means of discovery.

7. Is cross-examination of witnesses allowed during court proceedings? If so, what form does this take?

There is no formal cross-examination of witnesses by parties. The court may put questions to witnesses or experts present in the courtroom at the request of one of the parties or at its own discretion.

8. What use of expert witnesses is permitted?

Experts (rather than 'witnesses') may file a declaration with a statement relevant to the case. If the expert is present during the trial, the judges will sometimes put questions to him or her.

9. Is the doctrine of equivalents applied by courts in your jurisdiction? If so, what form does it take?

For European patents, the guiding principle for claim interpretation is Article 69 of the EPC and its protocol. This states that the scope of protection is somewhere between the strict literal claim meaning of its wording and what – from a consideration of the description and drawings by a person skilled in the art – the patent owner

has contemplated. Dutch courts usually apply a form of function/way/result test to establish equivalence. In chemical and pharmaceutical cases, Dutch courts may apply the insignificant/insubstantial difference test. In a recent decision, the bar for equivalence was set quite high: the court found that an unclaimed and undisclosed alternative must have been "completely evident" to a skilled person.

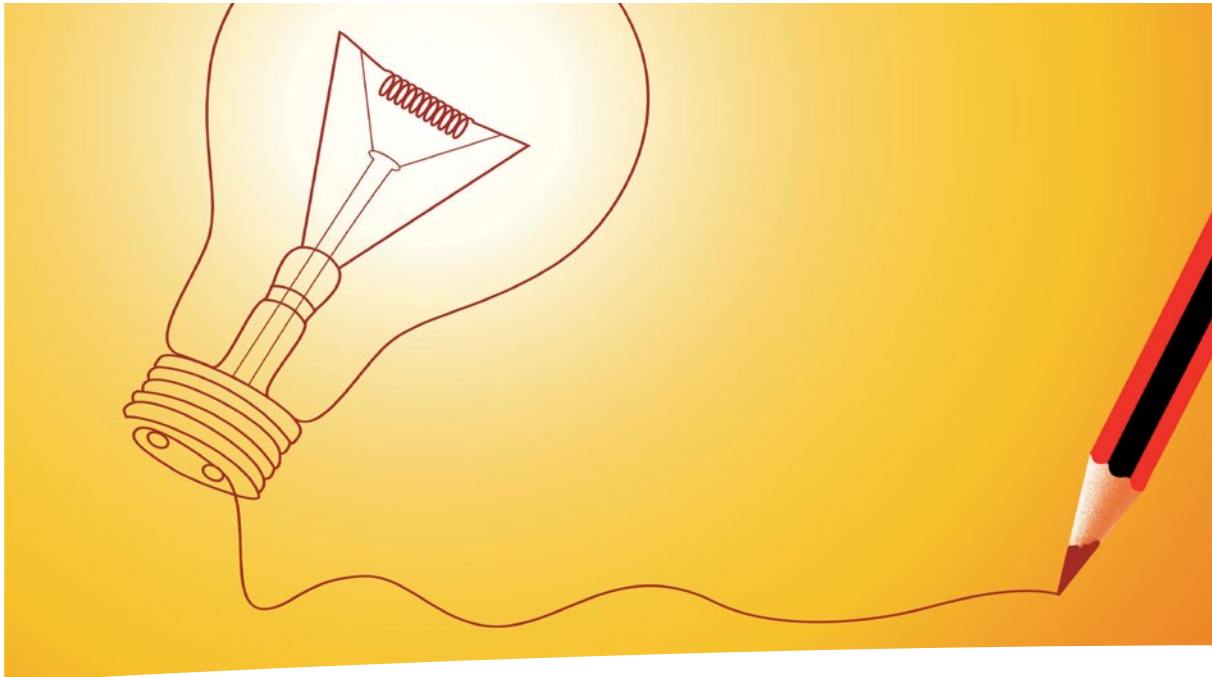
10. Are there problems in enforcing certain types of patent relating to, for example, biotechnology, business methods and software?

In general, there are no issues with enforcing patents in specific fields (i.e., Dutch law and courts are well harmonised with European (case) law). In other words, all of the exceptions to patentability mentioned in the EPC are set out in Dutch patent law too. Under certain conditions, studies, tests and experiments relating to medicinal products are not considered infringing when they relate to the preparation of a generic medicine to be marketed after the patent has expired (known in the United States as the 'Bolar' exception). There is also a scientific research exception, allowing researchers to work on patented subject matter without infringing the patent.

One noteworthy point is the enforceability of standards-essential patents – the courts have recently required that rights holders sincerely try to negotiate a licence deal (e.g., under FRAND terms) before the court will consider issuing an injunction.

11. To what extent are courts obliged to consider previous cases that have covered issues similar to those pertaining to a dispute?

The Hague District Court and Appeal Court will follow relevant decisions issued by the Supreme Court.



12. To what extent are courts willing to consider the way in which the same or similar cases have been dealt with in other jurisdictions? Are decisions from some jurisdictions more persuasive than those from others?

There is no law or court decisions obliging Dutch courts to consider court decisions in parallel proceedings in other EPC member states. However, in practice, parties will file such decisions themselves as exhibits and the courts will take them into account, even though the extent to which this happens may not be always be clear. Dutch courts are bound by decisions of the European Court of Justice.

13. What realistic options are available to defendants seeking to delay a case? How might a plaintiff counter these?

The first-instance courts usually operate on a fairly strict and reliable schedule. Using the accelerated regime, a decision is typically issued within 12 months of a summons. The standard, unaccelerated procedure takes between six and 12 months longer. There are few options for a defendant to delay a case; in particular the accelerated proceedings are strictly managed. Since counterclaims of invalidity are heard by the same court,

such a counterclaim cannot be used to obtain a stay in infringement proceedings. If an opposition (appeal) is still in progress before the EPO, a judge may stay a patent procedure if there is fair chance that the opposition outcome will influence the Dutch case (Article 83 of the Patents Act 1995).

Filing an excessive number of documents or offering complex forms of evidence may cause a court to consider that a case is unsuitable for the accelerated proceedings and may, theoretically, cause it to be sent back to the slower standard proceedings. However, this never actually happens.

At second instance (appeal), the pace is typically slower than at first instance. There are no accelerated procedures at second instance.

Obviously, in summary proceedings for a preliminary injunction a defendant also has few options for delaying proceedings. Once the court has accepted that a case is urgent, which it readily accepts in patent infringement cases, there is virtually no way for a defendant to derail the court's timetable.

14. Under what circumstances, if any, will a court consider granting a preliminary injunction? How often does this happen?

It is quite common to ask for a preliminary injunction.

The court will grant this only if it is provided with:

- **prima facie** evidence of the applicant's rights; and
- evidence of serious and irreparable damage to the applicant as a result of the infringement.

15. How much should a litigant budget for in order to take a case through to a decision at first instance?

For a relatively simple case (e.g., in the field of mechanics), a claimant should budget between € 30,000 and € 75,000 in summary proceedings and between € 50,000 and € 100,000 in an (accelerated) case on the merits for its own attorney at law and patent attorney costs. For more complex cases (e.g., in pharmaceutical/telecommunications cases), budgets of € 500,000 or higher are sometimes needed. Because the 'loser pays' principle applies, the claimant should also realise that in case of an adverse decision, it will be ordered to pay all or some of the costs incurred by the defendant. If, on the other hand, a favourable decision is received, the defendant may be ordered to pay all or some of the costs incurred by the claimant. When there is a relatively big difference between the costs incurred by the parties, the party with the lowest costs may protest against the claimed amount as being unreasonably high, with varying degrees of success. While the loser pays rule represents a significant advantage for the prevailing party, it makes budgeting rather difficult. After all, there is no sure way to estimate or control the opposing party's costs. In bigger cases, the opposing parties often make an advance mutual agreement as to an acceptable amount of costs to be claimed.

16. How long should parties expect to wait for a decision to be handed down at first instance?

Preliminary relief can be provided in a timeframe of between a few weeks and a few months. A decision in proceedings on the merits may take from between one-and-a-half years and two-and-a-half years. As mentioned previously, the Dutch patent courts have an accelerated patent regime procedure which is widely used. Here, the court sets in advance a schedule of dates for all

filings following the initial summons. The summons is followed by a reply by the defendant, usually combined with a counterclaim of invalidity. The claimant can then reply to the counterclaim. Further dates are set for filing evidence (e.g., expert statements). A trial date will be set approximately 10 months in the future, so that the decision at first instance can be expected within 12 months of the summons. It is very hard for a defendant to delay this procedure.

17. To what extent are the winning party's costs recoverable from the losing party?

See Question 15.

18. What remedies are available to a successful plaintiff?

A successful plaintiff can order a defendant to cease and desist from any direct or indirect infringement. Moreover, infringing goods can be seized and destroyed. A plaintiff can order a defendant to pay reasonable compensation and damages for the infringement (the defendant may have to show its administration in order to determine the scale of infringement). It is also usual for a successful plaintiff to require a defendant to inform its clients about the past infringement and attempt to recall infringing goods that have been sold.

19. How are damages awards calculated? Is it possible to obtain punitive damages?

Damages may be claimed only from a person that is knowingly, or with reasonable grounds to know, engaged in infringing activity. Besides a claim for damages, the rights holder may seek to have the defendant ordered to surrender any profits derived from the infringement and to give an account of profits. However, if the court determines that the circumstances of the case do not justify such an order, it may order the defendant to pay damages. In appropriate cases, the court may determine damages as a lump sum. There are no punitive damages in the Netherlands.

20. Under what circumstances might a court grant a permanent injunction? How often does this happen? Does the losing party at first instance have an automatic right of appeal? If not, under what circumstances might leave to appeal be granted?

Normally, if claimed, a court should grant a permanent injunction. There are few exceptions. For instance, the Patents Act allows the minister of economic affairs to grant a licence in view of the public interest. Also, non-use of a patent by the patentee may be grounds for third parties to force a licence.

21. How long does it typically take for the appellate decision to be handed down?

Appeals against any final decision and against some interlocutory decisions are possible.

22. Is it possible to take cases beyond the second instance?

Appeal proceedings typically take between 12 and 18 months. Any party has the right to refer questions of law to the Supreme Court. However, no questions relating to the facts of a case will be dealt with by the Supreme Court.

23. To what extent do the courts in your jurisdiction have a reputation for being pro-patentee?

Statistics seem to indicate that the Dutch courts are not known to be specifically patentee friendly or unfriendly.

24. Is your jurisdiction a signatory of the London Agreement on Translations?

The Netherlands is a signatory to the London Agreement on Translations. If the description is in English, only a Dutch translation of the granted claims is needed.

25. Has your jurisdiction signed the Agreement on the Unified Patent Court? If so, when do you expect it to be ratified?

The Netherlands is a signatory to the Agreement on the Unified Patent Court (UPC). There is no date set for ratification – it is generally expected some time in 2015. There are indications that the Netherlands will establish a local division of the UPC, but nothing has been confirmed yet.

26. Are there any other issues relating to the enforcement system in your country that you would like to raise?

In Europe, patent enforcement is dealt with on a country-by-country basis since the UPC is not yet in force. However, enforcement has been harmonised by the following:

- the EU Directive on the Enforcement of IP Rights (2004/48/EC); and
- the EU Regulation on Customs Enforcement of IP Rights (608/2013).

In addition, even though the EPC is directed more at procedures relating to the grant of a European patent and potential opposition against a granted patent, the EPC has some provisions that may have a bearing on national litigation as regards European patents, such as:

- Article 69 and its related protocol, which define how the claims of a European patent should be interpreted;
- Articles 105a and 105b, which provide the patentee of a granted European patent with the option to limit the claims of a granted European patent centrally with effect to all member states where the patent has been validated;
- Article 138(1), which lists the only possible valid grounds for revocation of a granted European patent; and
- Article 138(3), which allows a patentee to limit the claims of a granted European patent in national litigation procedures.

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