

National Patent Litigation—The Netherlands

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I. Available Reliefs

In the Netherlands, the following forms of relief are available to patentees in an enforcement action:

- Injunctions (also cross-border as preliminary relief) ordering the defendant to cease and desist from (direct and/or indirect) infringement;
- A declaration that the defendant and/or the defendant's product infringes the patent
- Recall orders
- Orders for surrendering and/or destruction of infringing goods
- Orders for providing information concerning suppliers and/or customers
- Orders to pay damages or to surrender the profits made through the infringement
- Orders for accounting for profits made through the infringement
- An order forcing the infringing party to publish the court's decision
- Orders to compensate the (full) costs of the litigation (including lawyers' fees, and costs of European Patent Attorneys and experts).

II. Fact Finding and Preservation of Evidence

1. Prior to Litigation

Contrary to, for example, the U.S. and UK, Dutch law does not provide for pre-trial discovery. In order to preserve and obtain access to evidence that is in the opposing party's or in a third party's possession, a patentee may request a court to grant leave *ex parte*, before preliminary or final relief proceedings are initiated, to seize certain (pieces of) evidence, such as documents and computer files, to make a description or to take samples. Such seizure is executed by a bailiff. If necessary, for instance to identify or select the relevant pieces of evidence, the bailiff may bring an independent expert to assist. The party requesting leave for the seizure of goods has to demonstrate its interest therein, it has to specify which items should be seized and has to elaborate why the requested seizure is necessary. This may be the case, for instance, if there is reasonable concern that the evidence will be lost and other, less far-reaching, measures do not suffice to preserve the evidence.

When the seizure is levied, the bailiff hands the seized goods over to a third party for safekeeping. In order to obtain access to the seized goods, the patentee must commence follow-on inter partes proceedings. This may be in the form of preliminary relief proceeding or in the form of (an interlocutory claim in) final relief proceedings. Such proceedings may also be utilized to claim disclosure of certain specific other items which have not been seized but are in the opposing party's possession. The party claiming access to the seized evidence must have a legitimate interest in its request to access the (seized) goods, it has to designate the specific items it wishes to obtain access to (as fishing expeditions are not allowed) and has to demonstrate that a legal relationship exists between them and the opposing party. The latter requirement is generally fulfilled if the one party has infringed the other party's patent. Access may nevertheless be denied in case substantial interests of the opposing party so require, for instance if access would result in confidential information being disclosed.

Ex parte requests for leave to seize evidence are decided upon by the courts within a few days or, in very urgent matters, even in a few hours. Claims to access (seized) evidence tend to take much longer (ranging from about six weeks to six months, *inter alia* depending on whether the claim is made in PI proceedings or in final relief proceedings).

Finally, a party may also request a court to call for a pre-trial examination of witnesses or experts, somewhat similar to depositions as common under U.S. law, but held before a judge. For a pre-trial examination, it is required that the requesting party has sufficient interest in examining the witness or expert. One of the primary reasons for having a pre-trial examination is that it helps to retain testimony for later use. Another important reason for holding a pre-trial examination is to provide a party with the opportunity to preview the testimony that may later be given at trial. This allows the requesting party to determine its legal position before initiating legal proceedings. We note, however, that in Dutch patent cases it is quite uncommon for parties to request a pre-trial examination of a witness or expert.

2. During Litigation

Under Dutch law, measures for fact finding and pre-

servicing evidence may be taken both before and during litigation. The measures mentioned above may therefore also be taken during litigation.

If a court finds, during ongoing proceedings, that a party has the burden of proving a certain point and that party specifically offered to submit evidence to this end, the court may allow that party by means of an interim judgment to produce such evidence. Where the evidence offered consists of a witness testimony or expert evidence, Dutch civil procedure law allows the court to order a witness hearing to be held or an expert investigation to be conducted. Please note that this rarely happens in patent cases.

In addition to the above, the Dutch Code of Civil Procedure also allows the court to order a party, at its own initiative and at any given time during the ongoing proceedings, to produce facts or evidence in support of their position. Dutch courts very rarely make use of this possibility. If a party rejects producing facts or evidence without presenting serious cause for its refusal, the court may attach whichever consequences it deems necessary to the refusal.

III. Strategic Options

1. Warning/Notice Letters

The sending of warning or notice letters to alleged infringers prior to initiating litigation, although this is not compulsory in order to successfully claim an injunction, is recommended. As damages are only awarded for infringing acts committed while the infringing party knew or reasonably should have known that it infringed the patent (art. 71 (3) Dutch Patent Act), sending warning or notice letters is required if a patentee wishes to claim damages. Also, there have been cases in which courts have refused to grant a cost award to the patentee even though infringement had been found, because the claimant had omitted to send a warning letter before commencing litigation and it had thereby deprived the opposing party from the opportunity to voluntarily comply with the claims.

2. Preliminary Relief

In the Netherlands, preliminary relief proceedings are an attractive option for patentees to enforce their rights. A judgment can be obtained very quickly, especially in very urgent cases, but such judgment is nevertheless based on a thorough assessment of the parties' arguments.

The claimant is required to establish that it has an urgent interest in obtaining the preliminary measures it claims. The required urgent interest is generally assumed to be present in cases of imminent or ongoing patent infringement. Judgments resulting in

a provisional order are immediately enforceable (upon request) and may be obtained within six to 12 weeks, depending on the urgency as well as the complexity of the matter. In some extremely urgent cases, for instance when a generic drug is about to be launched but not on the market yet, the The Hague District Court has been known to be prepared to set a date for a hearing within one or two weeks while rendering a provisional judgment on the same day of the hearing.

Preliminary relief proceedings are relatively informal. They are commenced by service of a writ of summons on the opposing party. The defendant may submit a statement of defence before the oral hearing, but it is not required to do so. In patent cases, however, it is recommended (and

appreciated by the court) to submit a statement of defence because it allows the court to have a good overview of all arguments to be decided upon before the oral hearing. This is also prudent from the defendant's strategic point of view, as the available time to put forward and explain the defence arguments during the oral hearing is limited.

The preliminary relief judge assesses the subject matter of the case in full, both as regards the infringement arguments and any potential invalidity defences. Decisions by which provisional measures are granted or rejected are well reasoned, leading them to often be referred to in parallel cases abroad. Although the preliminary relief judge cannot invalidate a patent, he/she will assess whether or not there is a serious, non-negligible chance that the patent will be invalidated in final relief proceedings. If so, the preliminary measures will be refused. The decision of the preliminary relief judge does not bind parties or the court in final relief proceedings, but it does provide an indication of what the outcome in final relief proceedings may be.

If provisional measures are granted (whether in first instance or in appeal), the court will determine a period (of usually six months) within which the claimant must initiate final relief proceedings. If the claimant fails to do so, the preliminary measures become vulnerable to cancellation.

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3. Main Proceedings

Final relief proceedings are commenced by service of a writ of summons on the defendant, followed by a statement of defence submitted by the defendant. The court may subsequently order a hearing in which parties are to appear, in which the court has the opportunity to ask the parties and their representatives questions and/or it may explore whether parties are willing to discuss a settlement. In patent cases such hearings are usually not scheduled; the court instead allows parties a second round of written submissions (statement of reply, followed by a statement of rejoinder). After the exchange of written submissions, the court will set a date for an oral hearing at which both parties will be able to plead their case.

Most patent cases are tried, however, in the form of so-called ‘accelerated patent proceedings on the merits’. These proceedings consist of only one round of written submissions, followed by a further exchange of exhibits and an oral hearing. Admittance to this special regime is accompanied by a mandatory and convenient schedule by which the dates of all procedural acts are provided to parties beforehand, including the date for the oral hearing.

Although no cross-examination of witnesses or experts takes place at the hearing, it is not uncommon that the court (informally) addresses a witness or an expert directly during a hearing if a party brought him or her along. In that case the opposing party and/or the opposing party’s expert will have the opportunity to reply to whatever has been said.

After the oral hearing, the court sets a date on which it plans to give its (final or interlocutory) judgment, usually six to 12 weeks after the oral hearing.

4. Claim Amendments During Pending Proceedings

Claim amendments during proceedings is possible both in first instance and in appeal and can be executed in two different ways: through central limitation at the patent office or by filing an auxiliary request in the proceedings. Patentees, however, should bear in mind that claim amendments have to be submitted at a sufficiently early stage of the proceedings to allow the opposing party to defend itself against the amended claim. If claim amendments are only first submitted shortly before the oral hearing in first instance or after the first round of exchanging statements in appeal and the opposing party objects to the claim amendment, the court is likely to reject the amended claim.

5. Protective Letters

Parties wishing to prevent being surprised by an *ex parte* injunction or an *ex parte* seizure or description of evidence may file protective letters with the District

Court of The Hague. Such letter should set out the arguments (which may be set out summarily) why the *ex parte* measure should be rejected, or why at least the party submitting the protective letter should be heard before any measure is granted.

The Court checks its protective letter database when it receives a request for *ex parte* measures. Whether the requested leave should be refused and/or whether the opposing party should be heard beforehand remains up to the discretion of the preliminary relief judge handling the case. If a well-argued protective letter has been submitted, this significantly decreases the chance that the preliminary relief judge will grant the requested *ex parte* measure without at least hearing the other party. Please note that if the Court receives an *ex parte* request and, in its decision to grant leave or dismiss the request, also considers the arguments as set out in a protective letter, it will provide the requesting party with a copy of that protective letter.

Protective letters are valid for a period of six months, which may be extended by subsequent periods of six months if so requested before the expiration of each period.

6. Declaratory Actions for Non-Infringement

A party may claim a declaration of non-infringement, provided it can demonstrate a legitimate interest in obtaining such declaration. Legitimate interest is assumed to be present if the party seeking the declaration has received a warning letter from the patentee or if the claimant is able to otherwise demonstrate that there is a real threat that the patentee will initiate infringement proceedings later on (for instance if the patentee is unwilling to confirm that it will not bring an action for infringement). Declarations of non-infringement may be obtained in final relief proceedings only and only with respect to possible infringing acts relating to Dutch patents or the Dutch part of European patents.

7. Enforcement Prior to Grant

In accordance with articles 53 and 70 of the Dutch Patent Act, a patentee can only force another party to stop infringing the patent after the patent has been granted. Articles 71 and 72 of the Dutch Patent Act, however, provide patentees with the possibility to obtain, post-grant, a compensation for use of subject matter falling within the patent application’s scope of protection during the period from application to grant. The amount of the compensation should be reasonable and is often calculated in accordance with the licence fee that a reasonable licensee would have had to pay. Another requirement is that the subject matter used should also fall within the scope of protection of the

patent as granted. Reasonable compensation may only be claimed in relation to acts committed during the period starting three months after the opposing party became (or was made) aware or reasonably should have known that it infringed the patent (application). Therefore, it is recommended to serve an official notification of infringement or at least a warning letter on the alleged infringer.

8. Customs Seizure

The port of Rotterdam and Schiphol airport are major points of entry for goods coming from outside the EU. Therefore, taking action through Dutch customs is a very effective way of preventing that infringing goods enter the EU. Patentees may request Dutch Customs Authorities to detain infringing goods under Regulation (EU) 608/2013. The application for customs detention must be sent to the specialized IP Department of Dutch Customs in Groningen. It should contain information on the patents on which the request is based and it should contain as much information (*e.g.* brand names, information on logistical routes, warehouses used etc.) as possible to enable customs officials to identify the infringing goods. Experience shows that Dutch Customs is quite efficient at identifying infringing goods and that it is cooperative when it comes to taking effective action against patent infringement. An application for customs detention is valid for one year, but may be extended upon request.

IV. Procedural Aspects

1. Court System and Specialization

The District Court in The Hague (first instance) and the Court of Appeal in The Hague (second instance) have exclusive jurisdiction in patent cases, both in final relief and in preliminary relief proceedings. Both courts have a specialised Intellectual Property Chamber, which consists of judges with extensive experience in intellectual property matters, including complex patent cases. A number of these judges have a technical background, but all judges are very experienced in dealing with complex technology.

Appeals from judgments of the Court of Appeal are heard by the Supreme Court. In patent cases, the Supreme Court is often presided by a very experienced judge who is a former patent judge in the District or Appellate Court of The Hague. The Advocate General who tends to be appointed to patent cases before the Supreme Court is also a very experienced former patent judge.

2. Bifurcation

In Dutch patent litigation, infringement and validity arguments are heard together by the same court. There is no bifurcation.

3. Who Can Sue

Patentees can, of course, sue an infringing party. They may also claim damages on behalf of licensees and pledgees.

Besides patentees, licensees and pledgees themselves may bring actions for damages too as co-claimants in infringement proceedings initiated by the patentee. Licensees and pledgees may also bring an independent action for damages against an alleged infringer if they have been authorized to do so by the patentee. They do, however, not have the right to claim an injunction or other measures to stop infringement, unless the patentee has granted them a power of attorney to do so.

4. Who Can be Sued

Actions for infringement or damages may be brought against the party committing the infringing acts, regardless if they are natural persons or legal persons.

Article 73 (1) of the Dutch Patent Act also provides patentees with the possibility of suing a third party (such as suppliers of parts of an infringing product) for indirect infringement, if such a third-party supplies or offers to supply, means relating to an essential element of the invention, for putting the invention into effect, provided that the party knows or that it is obvious that those means are suitable and intended for that use.

Furthermore, in accordance with article 11 of the IP Enforcement Directive (Directive 2004/48/EC), article 70 (9) of the Dutch Patent Act provides patentees with the possibility to bring an action for infringement against intermediaries. An injunction against an intermediary usually contains an order by which the use of that intermediary's services are prohibited.

Finally, a party who facilitates patent infringement but does not commit an infringing act itself, may be sued based on tort. For instance, a Dutch company holding a Portuguese marketing authorization (MA) for an infringing drug who allows its Portuguese affiliate to use this MA to sell infringing products in Portugal, was found to have committed a tortious act.

5. Admissibility of Evidence

In light of the principle of freedom of evidence, evidence may be submitted in all kinds of forms, including documents, affidavits, witness and/or expert statements, research reports, audio and/or visual materials. Even unlawfully obtained evidence may be filed with the court in civil law matters (including patent disputes).

When submitting evidence, it is important to keep in mind that all evidence on which a party wishes to rely must be submitted to the court and provided to the opposing party in time. The court may, upon request

of the opposing party or *ex officio*, reject or disregard a piece of evidence if it has been submitted too late in the proceedings. In general, evidence will be disregarded if the court finds that the opposing party is harmed in its defence due to the fact that it has insufficient time to respond to that piece of evidence. Deadlines for submission of exhibits are an important factor in this regard, but the court may also refuse a piece of evidence which has been submitted before the deadline, if it finds that the party submitting it could have submitted it earlier in the proceedings. This is especially relevant in accelerated patent proceedings on the merits. New exhibits may also be filed for the first time in appeal. In further appeal, however, no new evidence may be submitted as the Supreme Court only deals with matters of law, not matters of fact.

6. Structure of the Proceedings

Proceedings are frontloaded, in the sense that the patentee should present a full argumentation of the infringement, including evidence, in its writ of summons. This is especially the case in accelerated patent proceedings on the merits. The rules applicable to such proceedings dictate that all arguments and exhibits must be submitted at the earliest possible moment. Arguments and exhibits put forward at a later stage may, as mentioned, be disregarded by the court.

Final relief proceedings are initiated by serving a writ of summons on the defendant(s) by the plaintiff. If the plaintiff wishes to be admitted to the special regime of the District Court of The Hague, a separate request thereto has to be filed with that court prior to serving the writ on the defendant. After service of the writ of summons and submission of the exhibits referred to in the writ, the defendant files its statement of defence, including all exhibits on which it relies in the statement of defence. If the defendant wishes to file a counterclaim, for instance claiming the invalidation of the patent, he must do so in his statement of defence as well. The patentee will subsequently be allowed to submit a statement of defence against the counterclaim. In accelerated patent proceedings, no further exchange of written statements takes place. In regular final relief proceedings, parties will generally be allowed a second round of written statements (statement of reply, followed by statement of rejoinder).

The proceedings are concluded by an oral hearing. Before the oral hearing, parties are allowed to submit additional exhibits. At the oral hearing, the court will set a date at which it intends to hand down its judgment.

Like final relief proceedings, interim relief proceedings are initiated by serving a writ of summons on the

defendant, by which the defendant is summoned to appear at an oral hearing at which hearing the case will be pleaded. In patent infringement cases, the defendant usually chooses to file a written statement of defence before the oral hearing. At the oral hearing, the preliminary relief judge will set a date at which judgment will be rendered. In exceptionally urgent cases, the judge may decide on the case at the end of the oral hearing.

7. Timing Including Preparation

The average length of final relief proceedings in first instance is about nine to 12 months from the moment a writ of summons was served until the oral hearing. As said, the court will set a date at which judgment is to be handed down, usually six to 12 weeks after the oral hearing. Although the court strives to render judgment as quickly as possible, postponements by the court of the date on which judgment is handed down are possible.

In interim relief proceedings, the decision of the court is usually handed down within four to 12 weeks (and sometimes even within one to two weeks in exceptionally urgent cases).

8. Costs and Cost Reimbursement

Like in all other jurisdictions, the costs of patent litigation in the Netherlands, including attorney and European patent attorney fees and expert costs, may vary significantly, with the costs of final relief proceedings in first instance in the vast majority of cases ranging from approximately EUR 80,000 for relatively straight-forward mechanical cases up to approximately EUR 500,000 in very complex pharma & biotech or telecom/standard essential patent cases. In preliminary relief proceedings, costs tend to range from EUR 30,000 to EUR 200,000. The costs in appeal are usually similar to or slightly less than the costs of the litigation in first instance.

The prevailing party is entitled to have its costs reimbursed in full, provided that such costs are reasonable and proportionate. It is furthermore required that the proceedings concern either patent enforcement proceedings or proceedings to obtain a declaration of non-infringement initiated in response to a concrete and imminent threat of enforcement. The court must assess *ex officio* whether the costs claimed are reasonable and proportionate. Nevertheless, in the vast majority of cases, the winning party is awarded 75 percent—100 percent of the costs as claimed. If parties come to an agreement on the amount of costs that will be awarded to the prevailing party, the court respects the agreement and does not enter into an assessment of the reasonableness and proportionality of the amount agreed upon.

9. Enforcement of Decisions

Decisions (containing or upholding orders) of all

courts are often declared immediately enforceable, since parties tend to request this in their submissions. Decisions to invalidate a patent are, however, generally not declared immediately enforceable. The enforceability of a decision that has not been declared immediately enforceable, is suspended if an appeal is lodged against the decision.

In the event a judgment is enforced, the losing party, seeking to prevent (further) enforcement, can commence preliminary relief proceedings requesting an order to suspend the enforcement, arguing that enforcement will cause irreparable damage. Such order is granted only in exceptional cases. The chances of successfully suspending the enforcement of an enforceable decision are therefore, and understandably so, quite small.

If the winning party decides to enforce a judgment that has not yet become final, that party risks being liable in case that judgment is overturned on appeal or, if the judgment was rendered in preliminary relief proceedings, in final relief proceedings. Liability in this case may arise from merely ‘warning’ the opposing party that the judgment is to be enforced or by simply serving the judgment on the opposing party. However, if the losing party voluntarily complies with the judgment, without there being any sign that the winning party wishes to enforce the judgment, the winning party does not risk such liability.

10. Appeal

Appeal against a judgment in first instance is instituted by serving a writ of summons in appeal on the opposing party. The writ may contain the grounds of appeal, but it may also contain merely a formal notification that appeal has been instituted on grounds which will follow later, in the statement of grounds of appeal. The respondent subsequently files its statement of defence in appeal, which may also contain a cross-appeal. If a cross-appeal is instituted by the respondent, the other party will be able to file a statement of defence against the cross-appeal. This exchange of written submissions is followed by an oral hearing.

The appeal proceedings are *de novo* proceedings, *i.e.* new arguments may be brought forward and new exhibits may be submitted for the first time. In accordance with established case law, however, new arguments and exhibits broadening the scope of the subject matter of the case (such as auxiliary requests), may in principle only be submitted in or together with a party’s written submissions (*i.e.* in the statement of grounds of appeal and in the statement of defence in appeal).

Similar to proceedings in first instance, the oral hear-

ing in patent proceedings in appeal tends to take place within nine to 12 months from the day the appeal has been filed with the court. The Court of Appeal informs the parties at the oral hearing about the date at which it intends to render judgment. Usually, this date will be six to 12 weeks after the hearing, but postponements are possible. In exceptionally urgent cases, the Court of Appeal may, upon request and by way of exception, handle a case in an accelerated manner, which allows it to significantly reduce the term within which parties are to file their submissions.

Proceedings before the Supreme Court are initiated by serving a writ of summons in cassation on the opposing party. These proceedings, in principle, consist of two written rounds. However, the second round may be replaced by an oral hearing upon a party’s request, which request is only granted in highly exceptional cases. Before the Supreme Court renders judgment, the Advocate General with the Supreme Court will first give its opinion. Parties are allowed to submit a brief response to the opinion. Proceedings in appeal before the Supreme Court tend to take up from 12—18 months.

11. Service Abroad

Service of judicial documents abroad is mainly regulated by the EU Service Regulation (Regulation (EC) No. 1393/2007) and by the 1965 The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters.

In accordance with the EU Service Regulation, documents to be served in another EU Member State have to be accompanied by a request thereto in (one of) the official language(s) of the designated Member State (or the EU) and have to be submitted with a Dutch bailiff (the transmitting agency). The bailiff will forward the judicial documents to the relevant receiving agency in the concerned Member State for service on the other party.

Service abroad to non-EU countries mostly occurs in accordance with the 1965 The Hague Convention. The Public Prosecutor’s Office of the District Court of The Hague (the Dutch Central Authority) is the competent authority to forward the judicial documents (accompanied by a covering request in accordance with the model in Convention) to the Central Authority of the state of destination without any legalization or other formalities being required.

In the event the opposing party resides in or is established in a country which is not a Member State to the EU and/or the 1965 The Hague Convention, service abroad occurs in accordance with article 55 of the Dutch Code of Civil Procedure. This article stipu-

lates that the judicial document has to be served by a bailiff to the Public Prosecutor's Office of the competent district court. The Public Prosecutor's Office will then forward this document to the Dutch Ministry of Foreign Affairs, which will request the consular agency in the state of destination to serve this document on the opposing party. In addition, the bailiff also has to send a copy to the opposing party by registered mail. The minimal period for summoning a party, residing in a State where the EU Service Regulation applies or a Member State to the 1965 The Hague Convention within Europe, is four weeks. In all other cases, the minimal period for summoning a party residing outside the territory of the Netherlands is three months. The above mentioned terms, however, may be shortened by the court upon request of the claimant.

12. Influence of Foreign Decisions

Although foreign decisions in parallel patent cases do not bind the Dutch courts, the courts often take foreign decisions into consideration (sometimes even *ex officio*), in particular decisions of the UK and German courts. It is common for parties to submit foreign judgments as exhibits with the courts. Decisions in the English, French and German languages officially do not have to be translated, although submitting a translation is recommended for decisions in the French and German languages. If a Dutch court diverges from the decision of the UK or German court, it almost always explains in its decision what the reason is for deciding differently. In most cases, the reason is not that the Dutch court disagrees with the foreign judges' application of the law, but because different arguments have been raised and/or different evidence has been submitted.

13. Protection of Confidential Information

Although the Dutch legal system follows the principle that justice should be public, Dutch civil procedure law provides certain options to secure the confidentiality of confidential information submitted in patent proceedings.

First of all, parties, in light of the principle of freedom of evidence, are not obligated to submit confidential information in the proceedings. Absent an order to disclose certain specific documents as discussed above, the parties are free to decide what they do and do not wish to submit.

If a party wishes to submit a piece of evidence containing confidential information as an exhibit, that party can request the court to order the opposing party to keep this information confidential and/or to have the trial take place (fully or partly, insofar as the confidential information is discussed) behind 'closed doors'.

The court's decision to hold a trial behind closed doors requires a weighing of the interest of the principle that justice should be public against the interest of the requesting party to keep certain information confidential. Such interests could be, for instance, that a deterioration of a party's competitive position would take place as a result of the fact that information about that party's production costs or applied technologies becomes public. If the request is granted, the court will refrain from stating the contents of the confidential information in the publicly accessible version of its decision. If the request is made jointly by both parties, the court is more likely to agree to grant the request. Violation of an order to keep certain information confidential constitutes a criminal offence in accordance with article 272 of the Dutch Criminal Code. In telecom/standard essential patent cases, it often happens that (part of) the trial takes place behind closed doors.

If a party wishes that evidence containing confidential information should not be disclosed to the opposing party either, that party may also file a special request with the court. However, the principle of hearing both sides requires that the opposing party has to consent in only the court being able to have access to and use the information. If the opposing party does not consent, the court must deny the request. In such case, if member(s) of the court have seen the contents of the confidential information, these judges would then have to withdraw themselves from the case at hand and have other judges replace them. The confidential documents would be returned to the requesting party.

Finally, it is worth noting that if a party files a claim for disclosure of a certain document from the other party, the court will also take the need to protect confidential information into consideration. Courts may also appoint an (independent) expert to review the documents under strict confidentiality instead of the opposing party. If the request to disclose a document to the opposing party is granted despite the confidential nature of the documents, the court may attach consequences to violating the confidentiality of the documents concerned.

V. Claim Construction

1. Most Important Rules for Literal Claim Construction

The scope of protection of patents in the Netherlands is determined in accordance with article 69 of the European Patent Convention and the Interpretation Protocol. This means that the scope of protection of a patent is determined by its claims, whereas the description and the drawings shall be used for interpreting the claims. Against this background, the scope of

protection of a patent is assessed by determining how the person skilled in the art, using his common general knowledge, would have interpreted certain claims on the priority date.

In standard case law, the Dutch Supreme Court has emphasized that the essence of the invention should be regarded as one of the (many) viewpoints to be considered in determining a patent's scope of protection. This means that Dutch courts are able to take the essence of the invention into consideration, but it is not the decisive factor when it comes to claim construction and defining scope of protection.

Under all circumstances and in accordance with established case law, courts have to consider that any interpretation of a claim should always result in a fair protection for the patentee with a reasonable degree of legal certainty for third parties.

Furthermore, it has been decided in Dutch case law that consideration of the prosecution file history is permitted outright where the prosecution file history contains information to the disadvantage of the patentee. This is especially relevant if the patentee has defended a narrow interpretation of the claim in order to achieve that the patent is granted, or if a patentee has limited its claim during prosecution in light of patentability (especially novelty and inventive step) objections from the examiner. However, if the prosecution history file contains information that may be used to support a broader definition of the scope of protection than would be justified by reading the claim in light of the description and drawings, courts have to exercise restraint in using the prosecution history file to this end.

2. Doctrine of Equivalents

In the event that a feature of a patent claim has not literally been fulfilled in the allegedly infringing product or method, the court will establish whether or not use has been made of equivalent measures. If that is the case, this too may lead to an infringement of the patent.

Technical equivalence is most often determined by using the function-way-result test. This test assesses whether the element in the infringing embodiment essentially fulfils the same functions in essentially the same way with essentially the same results. If that is the case, this element is considered as an equivalent of the element in the patent's claim. In chemical and pharmaceutical patent cases, courts have also been known to occasionally apply the insubstantial differences test, which comes down to assessing whether the alleged infringing product or process is substantially different from what has been patented. Application of the insubstantial differences test, however, is uncommon.

In the assessment, whether or not protection should be granted based on the doctrine of equivalence, a distinction has to be made between foreseeable and unforeseeable equivalents. Since article 2 of the Protocol to article 69 EPC dictates that in determining the scope of protection, due consideration should be given to equivalent measures, the courts first have to determine whether the person skilled in the art would find that the patent claims, in view of the description and the drawings, should be construed in such a way that equivalents that were foreseeable on the (priority) application date fall within the scope of protection.

The answer to this question has to be found in light of what the person skilled in the art, using his common general knowledge, knew on the (priority) application date and what the patent contributed to the state of the art. The claim should be construed taking into account this context. Among the relevant features to be taken into consideration are the contents of the patent, the essence of the invention, the state of the art, the purpose of the patent(ed method), the advantages of the invention, knowledge about existing substances, the relation among existing substances and the degree to which existing substances may also lead to the intended result. It follows from case law that there is little room for any further protection of equivalents, other than as set out above.

Where protection is sought for an equivalent that was not foreseeable at the priority date, for instance where it concerns a new element which did not exist at the priority date, this new element may only be protected in accordance with the doctrine of equivalence if the new element was not obvious for the person skilled in the art on the priority date. In the assessment of determining whether an unforeseeable equivalent also constitutes an equivalent element, the skilled person's knowledge on the date of the (alleged) infringement may be taken into account as well.

VI. Liability

1. Direct Infringement

In accordance with article 53 of the Dutch Patent Act, any natural person or legal person who manufactures, uses, brings on the market, sells, offers for rent, supplies or in any other way trades in patented products (falling within a patents' scope of protection) may be held liable for patent infringement. In addition, persons may also be held liable for direct patent infringement if a person applies a patented method in or for their business or uses in their business, brings on the market, sells, offers for rent, supplies or in any other way trades in products, which are created through the use of a patented method.

2. Indirect Infringement

Besides bringing an action for direct infringement,

patentees can also sue for indirect infringement in accordance with article 73 (1) of the Dutch Patent Act. This article provides patentees with the possibility to bring an action against third parties (such as suppliers of parts of patented products). For indirect infringement, it is required that a person, in or for his business, supplies or offers to supply, means relating to an essential element of the invention for putting the invention into effect, provided that this person knows or that it is obvious that those means are suitable and intended for that use.

3. Divided Infringement

Although in our view it is reasonable to assume that the Dutch courts will consider that situations of divided infringement by multiple actors, who are all jointly involved in an infringing act, each of them carrying out elements of the claimed infringement while no single accused infringer fulfils all elements of the claim, constitute infringement as well, there is no authoritative case law available regarding this subject.

VII. Particular Defenses

1. Limitation of Claims

In accordance with article 138 (3) EPC, patentees have the right to limit their claims during pending proceedings before the Dutch courts, both in first instance as well as in appeal. Limitations of claims in the form of auxiliary requests may be filed in pending proceedings, also after the opposing party has filed a (counter)claim for invalidation of the patent.

Nevertheless, in accordance with established case law, the filing of a limitation of claims itself has to comply with the principles of due process. If a patentee seeks to limit its claims, it should therefore do so in due time, securing that the opposing party has the opportunity to reply to the consequences of the claim limitations. If claim amendments are only first submitted shortly before the oral hearing in first instance or after the first round of exchanging statements in appeal, there is a good chance that the court will reject the amended claim in accordance with the Dutch Code on Civil Proceedings.

2. Exhaustion

The patentees exclusive rights are exhausted with respect to products falling within the scope of protection of the patent concerned insofar these products have been put on the market in the European Community or European Economic Area by the patentee or with the patentee's consent.

3. Conversion of an Invalid Patent Into a Utility Model

Patents cannot be converted into utility models, as utility models are not protected under Dutch law.

VIII. Statistics

N/A. ■

Available at Social Science Research Network (SSRN): <https://ssrn.com/abstract=3271066>.