

Netherlands

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1. What are the most effective ways for a European patent holder whose rights cover your jurisdiction to enforce its rights in your jurisdiction?

The most effective way to enforce IP rights in the Netherlands is by summary proceedings – that is, a relatively short procedure which takes from three to six months. However, since infringement cases generally also encompass nullity arguments, summary proceedings are usually followed by proceedings on the merits, which take approximately two years. One benefit of Dutch infringement cases is that if the alleged infringer is located in the Netherlands, the courts can issue a cross-border decision (ie, a decision that is effective in one or more other European countries).

2. What level of expertise can a patent owner expect from the courts in your jurisdiction?

The Dutch court system has a high level of expertise as only one court (the Hague District Court) can hear patent cases. That court hears more than 30 first instance cases each year and around 15 on appeal. Furthermore, one of the judges usually has a technical background in addition to legal qualifications.

3. How do your country's courts deal with validity and infringement? Are they handled together or separately?

In proceedings relating to a patent dispute, validity and infringement are handled together. The Hague District Court has exclusive jurisdiction at first instance with respect to disputes involving validity and infringement. In proceedings relating to a

European patent dispute, the court may stay the proceedings if an opposition to the European patent has been filed.

4. To what extent is cross-examination of witnesses permitted during proceedings?

The court may order that witnesses be heard during proceedings at the request of one of the parties or of its own discretion. The same applies to experts. Both parties can pose questions to witnesses and experts.

5. What role can and do expert witnesses play in proceedings?

To assist the court in a ruling, a judge may order that an expert witness be heard. However, before proceedings are pending, a plaintiff may also request a preliminary hearing with an expert witness to help ascertain the chances of a successful trial. According to Dutch patent law, the Dutch Patent Office and the European Patent Office can also be called on to provide expert witness statements.

6. Is pre-trial discovery permitted? If so, to what extent?

Pre-trial discovery as such is not a standard part of Dutch legal proceedings. It is possible to hear a witness before starting court proceedings in order to preserve and/or obtain the evidence. However, other means of obtaining evidence under judicial supervision exist.

In accordance with the EU IP Rights Enforcement Directive (2004/48/EC) and the rules on judicially ordered surrender of evidence, the Civil Procedure Code provides that IP owners may obtain a judicial order to obtain access to specific evidence that is under the control of the opposing party or a third party, or to preserve such evidence, subject to the protection of confidential information. Injunctions aimed at

conserving evidence may be obtained in an *ex parte* procedure. A court order is needed to obtain access to the information.

7. Do the courts in your jurisdiction apply a doctrine of equivalents?

The Dutch courts generally rely on the “function-way-result” test to analyse features not literally defined in the patent. This test assesses whether, when compared to the patented invention, each differing feature:

- Has essentially the same function.
- Is applied essentially in the same way.
- Leads essentially to the same result.

If the answer to all three is yes, the alternative constitutes an infringement by equivalence.

Particularly in patent cases relating to chemical inventions, the courts also use the insubstantial differences test. In this test, the court assesses whether a difference between a product and a claim is material (ie, whether essential properties of the product differ). This test is analogously applied to claims relating to a process and products directly obtained by a process.

8. Are certain patent rights (eg, those related to business methods, software and biotechnology) more difficult to enforce than others?

Patent rights concerning subject matter that is excluded from patentability (eg, scientific theories; mathematical methods; schemes, rules and methods for performing mental acts, playing games or doing business; plant or animal varieties) are subject to validity attacks based on the exclusion provisions. The Dutch courts have a tendency towards harmonisation of European patent case law. Therefore, their interpretation of the exclusion provisions can be expected to follow European legislation and case law.

9. How far are courts bound by previous decisions made in cases that have covered similar issues?

Formally, the courts are not bound by previous decisions; they are bound only by the law. However, in practice, the courts take relevant previous decisions into account. In particular, Supreme Court jurisprudence is considered to be authoritative and is followed at all instances, including by the Supreme Court itself. Only in exceptional cases will the Supreme Court deviate from its earlier case law – for example, where previous case law is no longer considered to be socially acceptable.

10. Are there any restrictions on who parties can select to represent them in a dispute?

In case of litigation, generally both parties are legally obliged to appoint an attorney at law as representative. The defendant is allowed to present its own case in summary proceedings. In some specific legal proceedings, such as advisory proceedings in patent cases before the Netherlands Intellectual Property Office, both parties are usually represented by patent attorneys. Under all circumstances it is strongly advisable to retain a specialised attorney at law and a patent attorney.

11. Are courts willing to consider the reasoning of courts in other jurisdictions that have dealt with similar cases?

Dutch courts take into account decisions of foreign courts that have dealt with parallel or similar cases, especially the reasoning given by other specialist patent courts in other European member states. However, this does not mean that the court will necessarily adopt a similar decision. The court is not bound by such jurisprudence and will form its own opinion based on all facts and arguments.

12. How easy is it for defendants to delay proceedings and how can plaintiffs prevent them from doing so?

Under Dutch procedural law, the patentee can choose between two different proceedings: regular proceedings or accelerated proceedings. The defendant cannot delay accelerated proceedings, since the parties are bound to prior fixed deadlines. In regular proceedings the defendant has several possibilities to delay the proceedings, such as:

- Initiating incidental proceedings.
- Changing its lawyer.
- Requesting an order to produce evidence.
- Failing to appear but appearing at a later stage in order to prevent a decision by default.

13. Is it possible to obtain preliminary injunctions? If so, under what circumstances can this be done?

Preliminary injunctions can be obtained in circumstances where urgency is required. In addition, *ex parte* preliminary injunctions can be obtained (eg, in case of imminent infringement). In comparison to other jurisdictions, it is almost always possible to commence preliminary proceedings in the Netherlands, as the court will assume that infringement must be stopped as soon as possible.

14. How much should a litigant plan to pay to take a case through to a decision at first instance?

At first instance the costs of litigation may amount to between €50,000 and €200,000. The unsuccessful party may be ordered to bear the winning party's reasonable and proportionate costs, including the costs of the attorney and patent attorney. Therefore, the costs of unsuccessful court proceedings can be twice the amounts mentioned above. The costs awarded may be lower than those requested. The courts will mitigate the award of costs where these are unreasonable or disproportionate.

15. Is it possible for the successful party in a case to obtain costs from the losing party?

Yes. As the EU IP Rights Enforcement Directive has been implemented in the Netherlands, in general, reasonable and proportionate legal costs and other expenses incurred by the successful party shall be borne by the unsuccessful party, unless equity does not allow this.

16. What are the typical remedies granted to a successful plaintiff by the courts?

Typically, the courts grant an injunction to prohibit all infringing acts. In addition, compensation for damages can be claimed. Further, the recall, removal and destruction of the infringing goods and, if appropriate, the materials and tools used for the production of those goods can be claimed. It is also possible, where applicable, to obtain an order for information on the origin and distribution networks of the infringing goods.

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

Damages awards are calculated according to the loss of turnover, profit and licence fees, and any other damage resulting from the infringement. Alternatively, the patentee may claim the profit gained by the infringing party from the infringing activities. Damages are calculated from the date on which the infringing party became or should have become aware of the patent infringement. The court will often award the patentee penalty fees in the event that the infringer continues to infringe the patent, but this can be done only as part of an injunction. Punitive damages for infringement in the period before the order of an injunction are not available.

18. How common is it for courts to grant permanent injunctions to successful

plaintiffs and under what circumstances will they do so?

The court allows an injunction to be claimed for the period of patent protection. The injunction applies from the date of the first injunction for future infringement. This is the most common outcome for successful plaintiffs in Dutch court proceedings in nearly all circumstances.

19. How long does it take to obtain a decision at first instance and is it possible to expedite this process?

There are three types of proceedings: summary proceedings, accelerated proceedings and proceedings on the merits. Summary proceedings are available and the required urgency is almost always presumed in patent cases. They may be concluded within two months but, due to their provisional nature, do not invalidate the patent at issue. Proceedings through the accelerated regime may take around one year to reach a verdict, while proceedings on the merits take at least two years.

20. Under what circumstances will the losing party in a first instance case be granted the right to appeal? How long does an appeal typically take?

A party can appeal final decisions and interlocutory decisions – the latter only when the decision explicitly states that a party can appeal the decision.

In a procedure on the merits both parties can file an appeal within three months of issue of the first instance decision. The period for filing an appeal in interim injunction proceedings is four weeks from the date of the first instance decision.

The appeal procedure begins by the appealing party serving a writ on the other party; this writ must subsequently be brought to court. The writ need not yet contain the grounds for appeal. For proceedings on the merits, after serving the writ the appealing party has six weeks to file the statement of appeal. The respondent on appeal then has six weeks to file the statement of defence on appeal. The period in which to file a statement of defence regarding an ancillary claim is also six weeks. In interim injunction proceedings, these six-week periods become four weeks. An appeal must be brought based on the (mis)application or violation of procedural or material rules by the court. New defences cannot be filed unless they were raised in the first instance proceedings.

After the statements have been filed, the parties can request the court to:

- Hear a witness or expert.
- Schedule an informal hearing.
- Order the parties to argue the case.

After this, the court may allow the parties to file another deed. This makes it hard to say how long proceedings last, but in general it can take 18 months to two years to obtain a final decision on appeal.

21. Are parties obliged to undertake any type of mediation/arbitration prior to bringing a case before the courts? Is ADR a realistic alternative to litigation?

In a dispute over a patent or any other IP right the parties may attempt to settle out of court by way of ADR before bringing the case before the courts. ADR is a mediation or arbitration carried out in the presence of an expert in the disputed field. The technical features can be discussed in order for the parties to reach an agreement, which must be accepted by both parties. ADR is not widely used in IP cases.

A case may be brought before the court directly with no mediation or arbitration prior to the litigation.

22. In broad terms, how pro-patentee are your the courts in your jurisdiction?

Historically, the Netherlands has been considered to be a patentee-friendly country, although the Dutch courts are becoming increasingly critical in invalidation proceedings. In recent

decisions the Hague District Court has invalidated an increasing number of patents. However, since the entry into force of European Patent Convention 2000, the requirements for amending a European patent during invalidity proceedings have been less strict.

23. Has your jurisdiction signed up to the London Agreement on Translations? If not, how likely is it to do so?

The Netherlands has signed up to the London Agreement on Translations. For European patents with English as the official language, only a translation of the claims into Dutch is required. For European patents granted in French or German, a translation of the description in English or Dutch and a translation of the claims in English are required.

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

Relative to the courts of other jurisdictions, the Hague District Court can be considered a specialised patent court. Usually the court at first and second instance includes a retired patent attorney with a technical background. Historically, the court is more willing to grant injunctions in summary proceedings than courts in other jurisdictions after hearing the full arguments from attorneys at law and patent attorneys of both parties. *iam*



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Mr Land participates in litigation before the German, Dutch and French patent courts. He is an expert in the differences between European and US patent law, having attended the USPTO summer school. He is an active member of various professional societies.

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