

The Netherlands

NautaDutilh John J Allen and Professor Charles Gielen

1. SOURCES OF LAW

1.1 What are the principal sources of law and regulation relating to patents and patent litigation? (Briefly describe the role of international, federal or state laws and relevance of court decisions, list and briefly describe relevant statutes and international treaties)

The principal source of patent law is the Patent Act of the Kingdom 1995 (*Rijksoctrooiwet 1995*; or 'ROW 1995'). The ROW contains provisions on subjects such as patentability, patent ownership, infringement, licensing, patent agents and patent prosecution.

Specific administrative provisions on the Dutch patent register, fees and other patent prosecution issues may be found in the Executive Regulation concerning the Patent Act of the Kingdom 1995 (the '*Uitvoeringsbesluit ROW 1995*').

International treaties with relevance for the Netherlands are the 1883 Paris Treaty, the 1970 Washington Agreement (the 'Patent Cooperation Treaty'), the 1973 Straatsburg Treaty (the 'European Patent Convention' or 'EPC') and the World Trade Organisation Treaty (the Agreement of Trade Related Aspects of Intellectual Property). As far as patent law in the Netherlands is concerned, the EPC is the most relevant international treaty.

In the ROW 1995, various EC Regulations and directives are incorporated, such as those on supplementary protection certificates for medicines (EEC Regulation 1768/92/EC) and herbicides (EEC Regulation 1610/96), as well as the biotechnology directive (Directive 98/44/EC). More generally, EC Regulations or directives can play a significant role in patent litigation, either directly (such as the Anti-Piracy Regulation (Regulation 1383/2004) for border detention procedures) or indirectly through implementation in Dutch law, such as the Enforcement Directive (2004/48/EC).

The principal source of law for litigation, including patent litigation, is the Dutch Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*).

Case law is generally viewed as a supplementary source of law, used primarily for 'filling the gaps' or interpreting the 'law in the books'. The laws as laid down in statutes or civil codes are the principal source of law. Nevertheless, Supreme Court case law especially may have strong persuasive power in lower court proceedings.

1.2. What is the order of priority of the relevant sources, ie which take precedence in the event of a conflict?

Article 93 of the Dutch Constitution provides that international treaties with direct effect, ie which are sufficiently clear and are worded such as to grant rights to individuals, take precedence over national laws. The issue is, however of limited importance, since conflicting provisions in international treaties and the ROW 1995 are rare. To a very large extent, the ROW 1995 follows or directly incorporates the rules of the relevant international treaties.

2. COURT SYSTEM

2.1 In which courts are patents enforced? Are they specialised patents courts? If not, what level of expertise can a patent holder expect from the courts?

Patents are enforced before the District Court of The Hague, where a specialised patents chamber has been instituted. The dispute can be reviewed in full by the Court of Appeal in The Hague, without leave or permission being required. Once the appeal proceedings have been concluded, the Supreme Court may rule on issues of law, but not of fact.

2.2 To what extent are courts willing to consider, or are bound by, the opinions of other national or foreign courts that have handed down decisions in similar cases?

Dutch courts are only bound by judicial decisions in other jurisdictions if international treaties or national laws in the Netherlands explicitly provide so. In patent matters, there are no formal obligations on the court to take into account similar decisions in other jurisdictions, even if the matter concerns the same parties and the same European patent.

Article 26 of the 1969 Vienna Convention on the Law of Treaties could in theory require Member States to the EPC to duly observe decisions on similar national parts of European patents. However, this will be of little practical value since the EPC deals primarily with the granting of patents, although the provisions on nullity (eg Art. 138 EPC) or the scope of protection (Art. 69 EPC) are important exceptions which are meant to provide uniform patent law. Nevertheless, there are distinct national traditions in the application of these provisions throughout the EPC member states.

However, decisions of courts in other jurisdictions are often quoted or even presented as exhibits in patent litigation in The Netherlands. This being said, one can only speculate on this influence or persuasive powers of such judgments. It is believed that Dutch courts may give more weight, if any, to German or UK decisions than those from other jurisdictions, but it is even more widely believed that the merits of a foreign decision will bear more weight than its origin.

Dutch courts are, however, like all national courts in the Member States, obliged to adhere to decisions of the European Court of Justice, which is competent in patent law matters originating from EC instruments (such as supplementary protection certificates or the Biotech Directive). See for instance the recent European Court of Justice Case 431-04 (*MIT*).

2.3 Do the courts deal with infringement and invalidity simultaneously? Or must invalidity actions be brought in separate proceedings? If so, before which court or government agency (eg the Patent Office)?

In proceedings in the Netherlands, infringement and validity will be dealt with by the same court, either in the same proceedings (when invalidity is raised as a defence), in separate but simultaneous proceedings (an invalidity action by way of a counterclaim), or in separate nullity proceedings.

2.4 Who can represent parties before the courts handling patent litigation and/or the government agency dealing with patent validity issues?

In proceedings before the court, the parties can be represented by lawyers and by patent agents. The parties must always formally be represented by a docket attorney. In the prosecution phase, most formalities must be fulfilled by either registered patent agents or lawyers, representation by lawyers in the prosecution phase being rather uncommon. Certain formalities may be performed by any authorised representative of a party, as is the case in litigation concerning administrative decisions of the national Patent Agency.

2.5 What is the language of the proceedings? Is there a choice of language?

The language of the proceedings is Dutch, although the court may on occasion accept exhibits in the French, German or English languages.

2.6 To what extent are courts willing to grant cross-border or extra-territorial injunctions?

Courts in the Netherlands have traditionally been very willing to apply foreign law, including foreign patent law. As a result, a quite liberal practice of granting cross-border or extra-territorial injunctions has been developed. However, since the decisions of the European Court of Justice in Cases C-4/03 (*GAT v LUK*) and C-539/03 (*Primus v Raçhe*), the scope for a cross-border injunction will be limited to those situations where the defendant is based in the Netherlands and the validity of the patents is not disputed. Where a defendant or co-defendant is a non-EU resident, a cross-border injunction (not affecting an EU Member State) may be an available relief.

2.7 To what extent do courts recognise the blocking effect of 'torpedo' actions abroad?

Torpedo actions have not normally blocked access to the Dutch Courts or have not had a suspensive effect, especially not if there is an urgent interest (which is assumed to be the case in infringement actions) to obtain a preliminary injunction. However, if it can be demonstrated that a judgment in a foreign jurisdiction is imminent, the court could refuse an extra-territorial injunction for that jurisdiction.

3. SUBSTANTIVE LAW

3.1 How is patent infringement assessed? To what extent does the doctrine of equivalents apply in an infringement action?

Patent infringement is assessed by comparing all the relevant features and elements of a product with all the elements of a patent claim. There is a doctrine of equivalence in the Netherlands. The infringement test and the equivalence test are both applied in a manner that would strike a balance between a fair and equitable protection for the patentee, and legal certainty for third parties. The 'function, way, result' test as developed by the European Patent Office is regularly applied by the Dutch courts. This means that there is equivalence if an element of a product has essentially the same function, operates in essentially the same way, with essentially the same result. In chemical and pharmaceutical cases an 'insignificant differences test' is applied.

3.2 What defences are available to an alleged infringer?

The alleged infringer can rely on any defence, ranging from disputing the infringement or the plaintiff's capacity or authority to initiate proceedings, to nullity defences, based on lack of patentable matter, added matter, novelty or inventive step (see also below, where the nullity grounds are explained in more detail).

3.3 To what extent can enforcement of a patent expose the patent holder to liability for an antitrust violation?

A patent holder could be exposed to liability for an antitrust violation, to the extent that the patent holder can be assumed to have misused a dominant position in the relevant market. This should be assessed in accordance with the EC (and practically identical) national competition law principles. There has not been such a finding in the Netherlands yet.

The Netherlands

3.4 On what grounds can a patent be invalidated?

A patent can be invalidated if:

- its subject is non-patentable matter as defined in Arts 2-7 ROW 1995 or Arts 52-57 of the EPC;
- there is a lack of novelty;
- there is a lack of inventive step (obviousness);
- there is a lack of clarity;
- it contains added matter;
- an extension of the scope of protection has occurred; or
- the patent holder is not entitled to the patent.

This can be further explained as follows:

Non-patentable matter

In the Netherlands, non patentable inventions are, *inter alia*:

- inventions, the use of which would contravene public order or morality;
- certain inventions relating to the human body, including the discovery of bodily parts such as complete or partial gene sequences, cloning, the use of embryos;
- medical treatment and diagnostic methods;
- plant or animal varieties;
- methods of a predominantly biological nature, such as cross-fertilisation or selection for the reproduction of plants or animals, including the products thereof;
- inventions which contravene the Biodiversity Treaty;
- inventions relating to the cloning of humans;
- methods for obtaining germinal genetic identity of humans;
- inventions related to the use of human embryos;
- inventions that cause undue suffering for animals, environmental damage or health hazards.

Lack of novelty

In the Netherlands, a patent is considered to lack the required novelty only where all the features of an invention have been disclosed, prior to the application or priority date, if these features were present in a single public source. This test is applied very strictly by the Dutch Courts. Every single element of the invention must explicitly or implicitly be present, to be determined by a person skilled in the art, using his general knowledge, in a direct and unambiguous manner in one single prior art document, to the extent that it enables him to reproduce it. In a 2005 case (*Mettenda v SES et al*), the District Court of the Hague held that even if all elements of the invention are present in a single prior art document, this still will not be novelty destroying if it would take some effort to further combine these elements in order to discern the invention.

Lack of inventive step

For determining whether there is an inventive step the courts frequently rely on European Patent Office practices and approaches. It will determine the closest prior art, use a problem/solution approach as well as – in some cases – a ‘could/would’ test. The court has in some instances also accepted a secondary indication of an inventive step, i.e. the commercial success of an invention.

The court regularly combines prior art documents to come to the conclusion that an invention is obvious. Furthermore, for an inventive step to be present a ‘surprising’ or ‘additional effect’ is required, above the mere effects that can be foreseen by combining prior art inventions. However, the court has only rarely held a lack of inventive step on the basis of a combination of more than three prior art documents.

Lack of clarity

The court may invalidate a patent if it does not sufficiently disclose the invention, to the extent that a person skilled in the art can reproduce it on the basis of the wording of the patent.

Added matter

The court may determine that there is added matter if the person skilled in the art would come to the conclusion that essential elements of the invention were not (implicitly) present in the original patent application.

Extension of the scope of protection

If the patent claims are amended post-grant (such as during EPO opposition procedures), and the result would be that the scope of protection would be extended, ie the claims would be broader than before the amendment, the court in the Netherlands may invalidate the patent for extension of the scope of protection.

Lack of entitlement

Where the patent holder was not entitled to the patent, the court can invalidate the patent, although within certain time limits the party who is actually entitled to the invention may claim the patent as his own. Situations in which these problems may occur are normally within the context of employment relationships, the misappropriation of trade secrets and joint research and development projects.

3.5 Can a court only partially invalidate a patent? Can it transform the patent into a utility model?

In the Netherlands, courts can partially invalidate the patent. Pursuant to a – much-criticised – Supreme Court judgment in 1996 (*Spiro v Flamco*), courts apply a very strict requirement for partial nullification. It will only partially nullify a patent if a person skilled in the art could have foreseen, having identified the invalid parts of the patent, which part of the patent or patent claims could survive the nullification. If it cannot be foreseen exactly which part of the patent can remain in force, or where there are several alternatives for an amended patent, the courts should invalidate the patent in its entirety. Dutch courts cannot transform a patent into a utility model.

3.6 Is it possible to amend the patent claims during a law suit?

It is possible to amend patent claims post-grant. The ROW 1995 provides that a patent holder can voluntarily abandon or limit his patent by registering a deed to that effect in the national patent register. However, if a writ of summons initiating an invalidity suit is entered into the register, such a limitation or abandonment requires the consent of the plaintiff in the invalidity suit. The same applies if the patent is subject to an entitlement claim.

3.7 Are there any grounds on which an otherwise valid patent can be deemed unenforceable, owing to misconduct by the patent holder, or for some other reason (eg expiry of time limit)?

A patent holder may under some circumstances lose his right to enforce the patent, eg if he has acted in a way which would preclude a later claim (the patent holder is estopped or is deemed to have waived his enforcement rights). Also, the enforcement of his patent rights could qualify as an 'abuse of rights'. This will be assumed only under very exceptional circumstances, eg where it can be demonstrated that the only purpose of exercising the patent right is to cause damage or detriment to another person.

A patent holder can also not enforce a national patent once a European patent for the same invention has been granted for the Netherlands, which European patent has passed the opposition phase.

The Netherlands

3.8 Can a patent holder bring a law suit claiming both patent infringement and unfair competition for the same set of facts?

In the Netherlands, a patent holder can bring a law suit claiming both patent infringement, infringement of other intellectual property rights as well as unfair competition, as long as the claims are sufficiently interrelated.

4. PARTIES TO LITIGATION

4.1 Who can sue for patent infringement (patent holder, exclusive licensee, non-exclusive licensee, distributor)? Does a licensee need to be registered to sue?

Patent holders can sue for infringement, claiming damages and/or the surrender of profits on their own behalf, as well as on behalf of their licensees and persons holding a preferential creditor right by a deed of pledge. However, the right to compensation for damages and the surrender of profits cannot accumulate and the patent holder will have to make a choice. Licensees and pledgees can also seek damages and/or the surrender of profits on their own behalf, if they participate as co-claimants in the procedure initiated by the patent holder, or if the patent holder has granted them the right to sue for patent infringement independently, which right does not need to be publicly registered.

4.2 Under what conditions, if any, can an alleged infringer bring a law suit to obtain a declaratory judgment on non-infringement?

An alleged infringer need only show that he has a legitimate interest in obtaining a declaratory judgment of non-infringement, which will almost always be the case if the alleged infringer is a competitor of the patent holder and if there is (even a slight) possibility that the patent holder will initiate proceedings against him. Usually, the alleged infringer will request that the patent holder confirm that he will not sue for infringement. If the patent holder refuses this, there will be a sufficient interest.

4.3 Who can be sued for patent infringement? Can the company directors be sued personally? Under what conditions, if any, can someone be sued for inducing or contributing to patent infringement by someone else?

Both legal and natural persons can be sued for infringement. It is uncommon and difficult, due to the strict tests that apply under Dutch law, to sue company directors personally, since they are usually not considered to be acting in person, but in the capacity of the company representative. However, it could be possible where it can be established that the patent infringement involves a personal act of a director, wilfully exceeding his authority as a director, or where it can be demonstrated that the director wilfully assumed liabilities which were outside the financial depth of the legal entity.

The Dutch Patent Act grants the patent holder the right to act against 'indirect infringement', meaning any act whereby persons knowingly supply infringing third parties with means that are fit for infringing the patent and intended for the purpose of doing so. Alternatively, it may be possible to act against inducement to infringe a patent by way of initiating an action based on tort law.

4.4. Is it possible to add or subtract parties during litigation?

It is possible to add parties during litigation. A third party may join in or intervene in proceedings of their own accord if they can establish a sufficient interest in doing so. Such an interest is deemed to be present if that third party may – by joining the proceedings – prevent loss of rights or other prejudice. Under certain restrictions, parties (mainly plaintiffs) can be subtracted as well.

5. ENFORCEMENT OPTIONS

5.1 What actions are open to a patent holder when seeking to enforce his rights in your country?

A patent holder can initiate proceedings in a civil court or request the public prosecutor to take action against infringers, ie by notifying the authorities of the infringement. The latter is quite uncommon and reflects the priorities of the public prosecution authorities in the Netherlands. Other types of enforcement include the court-sanctioned seizure or arrest of allegedly infringing goods, as well as production means, and border detention on the basis of the Anti Piracy Directive (see *infra*).

5.2 Are criminal proceedings available? If so, what are the sanctions?

Criminal proceedings against patent infringement can be initiated by the public prosecutor. However, criminal proceedings in patent cases are uncommon. The public prosecutor has the liberty to decide which cases to pursue; due to policy reasons patent infringement cases are often not pursued. The potential sanctions range from up to four years' imprisonment where the infringement is carried out on a commercial scale.

5.3 Are border measures available?

Border measures are available under the EU Anti Piracy Regulation 1383/2003. The patentee can file an application for action by customs authorities to seize goods falling within the scope of protection of its patents. The possible actions include seizure and notification of the patentee by the customs authorities. A third party with interests in the goods, ie the party sending or receiving the shipment, the party arranging customs clearing or holding the goods, can then either concede to destruction of the goods or petition the court to release the goods. In this last situation, a court will then determine the merits of either party's claim. Because of the possibility that goods, allegedly infringing patents, may be released upon the provision of a bank guarantee, it is recommended that a regular seizure order be obtained from the court as soon as the customs detention is in place.

5.4 To what extent are alternative dispute resolution (ADR) methods (such as arbitration or mediation) available to resolve patent disputes? If arbitration is available to assess invalidity, will your Patent Office recognise and execute an arbitral award declaring a patent invalid?

The parties to a dispute concerning patent infringement are free to agree on alternative dispute resolution methods. The ROW 1995 only mentions the court's authority to declare a patent invalid after it has been granted by the Patent Office. It is therefore unclear if a court can, by merely approving an arbitral award in *exequatur* proceedings, sanction such a finding. However, under the ROW 1995 the patent holder may abandon a patent or patent application by registering a deed, and the parties can therefore validly agree in a dispute resolution or settlement agreement that a patentee will abandon one or more patents if the outcome of such proceedings is a finding of invalidity. Such an agreement creates an enforceable obligation.

6. PROCEDURE IN CIVIL COURTS

6.1 What is the format of patent infringement proceedings?

There are three different proceedings open to a party in case of patent infringement: preliminary relief proceedings, regular proceedings on the merits, and accelerated proceedings on the merits.

Preliminary relief proceedings are easily accessible, fast and flexible but do not allow the full range of legal measures (such as witness hearings) due to time constraints. The President of the District Court in the Netherlands will hear almost all patent cases if there is an urgent

The Netherlands

interest, which is assumed to be present where an injunction is requested and the patent holder acts within a reasonable time after he has discovered the infringement. The President will only refrain from a decision if a patent case is extremely complicated. These proceedings result in a provisional order (usually an injunction and accessory corrective measures such as an accountant's statement on the scope and duration of the infringement, and the calculation of the profits generated therewith), which is directly enforceable although it will not be binding in subsequent proceedings on the merits. A judgment in preliminary relief proceedings, which normally can be obtained within six to eight weeks, must be followed within six months by proceedings on the merits, unless parties settle the dispute.

The party initiating proceedings on the merits may choose between either accelerated patent proceedings or regular proceedings. A party wishing to enter accelerated patent proceedings must petition the court for permission to do so. This choice is made prior to initiating the proceedings and is final.

All proceedings are initiated by summoning the opposing party with a writ. In preliminary relief proceedings, the writ is followed by the exchange of exhibits and an oral hearing. At the latter occasion the parties may submit pleading notes with the court. In accelerated proceedings on the merits, after the proceedings are initiated the defendant may submit a statement of defence, together with its exhibits. Thereafter, an oral hearing takes place. In regular proceedings on the merits, the parties may exchange one extra written brief each, at such intervals as to allow a proper reply to the other party's arguments.

6.2 Are disputed issues decided by a judge or a jury?

Patent cases in the Netherlands are decided by one or three specialised judges. There are no jury trials in the Netherlands.

6.3 To what extent are documents, affidavits, witnesses and/or (court-appointed or private) experts used? Is it possible to cross-examine witnesses?

Under Dutch civil law parties are free to offer evidence; the court is then free to assess the offered evidence. As a consequence documents, affidavits, witnesses and/or experts are used. Due to the specialisation of the court in patent matters, the court does not normally appoint independent experts.

6.4 To what extent is pre-trial discovery permitted? If it is permitted, how is discovery conducted? If it is not permitted, what other, if any, mechanisms are available for obtaining evidence from an adverse party or from third parties?

Pre-trial discovery is not permitted. Under the Dutch legal procedure a party can petition the court to order a party to supply documents related to patent infringement, to which the petitioning party is a party. The requested documents can be in the possession of any party, including the opposing party. The court determines the extent of this disclosure and any measures related to confidentiality of the disclosed information. In addition, at present, the seizure procedures are sometimes used for collecting evidence as well. The ROW 1995 is interpreted such that the patent holder has the right to claim infringing goods as his own, which entitles him to provisionally seize goods and have these stored by an independent party. These proceedings are sometimes used to investigate the infringing character of the goods.

With the implementation of the Enforcement Directive 2004/48, procedural laws in the Netherlands will soon include additional and even more effective measures (such as descriptive seizures) to obtain evidence prior to actual litigation.

6.5. What level of proof is required for establishing infringement or invalidity?

The plaintiff must substantiate its allegation that an infringement has taken place. If the defendant does not substantively dispute this, the court must assume that an infringement has taken place. If the infringement is disputed properly, the plaintiff must prove the infringement, in which case he may use all available means (documents, witness or expert statements). The court has a wide discretion in weighing the available evidence.

6.6. How long do patent infringement proceedings typically last? Is it possible to expedite this process?

Preliminary relief proceedings may be heard within two weeks of a writ of summons being issued. If there is a pressing need, this period can be shortened. A judgment is issued usually three weeks after the hearing; however, this period can be shortened as well. Accelerated proceedings on the merits typically last about one year from the writ of summons to the final judgment. In that case, the litigation takes place in accordance with a predefined schedule, determined by the court prior to initiating the proceedings. Regular proceedings on the merits generally last up to two and a half years. It is possible to expedite regular proceedings on the merits somewhat if the litigants allow only limited extensions between the exchange of the briefs.

Similar periods of time apply to the appeal proceedings. However, appeal in preliminary relief proceedings is usually somewhat longer than first instance preliminary relief proceedings, since in appeal there is an exchange of written briefs prior to the oral hearing. However, the Court of Appeal can, in urgent cases, comply with requests of the parties for expedited appeal proceedings. There is no separate accelerated proceedings regime for patent cases on appeal, therefore accelerated proceedings on the merits follows the regular rules of procedure on appeal.

6.7 What options, if any, are available to a defendant seeking to delay the proceedings? Under what conditions, if any, can proceedings be stayed? How can a plaintiff counter delaying tactics of defendant?

In preliminary relief proceedings and accelerated proceedings on the merits there are limited or no possibilities for defendants to delay the procedure. A defendant can claim that the matter is too complicated; however this rarely results in the desired delay. With respect to the accelerated proceedings on the merits parties will need to adhere to a schedule set by the court and this leaves no room for delaying tactics. Regular proceedings on the merits leave some room for delaying tactics. However, after a short stay, further delays may only take place if there is *force majeure* or if the opposing party consents. The court may stay the proceedings pending the outcome of EPO opposition proceedings which have more than a remote chance of being successful. The most efficient method of avoiding delaying tactics is by initiating accelerated proceedings on the merits.

7. FINAL REMEDIES

7.1 What remedies are available against a patent infringer (final injunction, delivery up or destruction of infringing goods, publication of the decision, recall-order, monetary remedies, etc)?

A patent holder has a wide range of remedies available to him, the most common being: an order to cease and desist direct or indirect infringement; surrender/destruction of infringing goods; surrender of profits; publication of the decision; a recall-order; damages; an order to provide information concerning suppliers and/or customers; and an award in litigation costs. Until recently, most remedies were available in case of multi-jurisdictional infringement, but in view of the ECJ decisions in cases C-4/03 (*GAT v LUK*) and C-539/03 (*Primus v Roche*) the courts will be forced to take a much more restrictive approach.

7.2 To the extent it is possible to obtain a final injunction against future infringement, is it effective against the infringer's suppliers or customers?

It is possible to obtain a final injunction against infringement, but this is only effective against the parties to the litigation and will not as such affect their suppliers. However, it would be possible to include suppliers in the litigation if there is a case for indirect infringement. The same applies to customers of the infringer, as these customers will be considered to infringe the patent on their own account.

7.3 What monetary remedies are available against a patent infringer (reasonable royalty, lost profits, account of profits, or some other basis)? Are punitive damages available? If so, under what conditions?

Monetary remedies can be sought if the infringer knowingly, or with reasonable grounds to know, engaged in the infringing activity. Such remedies include payment of compensation for damage or – alternatively – the surrender of the profits made with the infringing activities. The prejudiced patent holder is entitled to compensation for all the damage he has incurred, although normally this will be calculated as a reasonable royalty. Under Dutch law, it is not possible to claim punitive damages.

8. PRELIMINARY RELIEF

8.1 Is preliminary relief available? If so, what preliminary measures are available (eg preliminary injunction) and under what conditions?

Under Dutch law, preliminary relief is possible in separate preliminary relief proceedings or, by separate request, for the duration of regular proceedings on the merits. Preliminary relief proceedings are often used to secure an injunction in a fast and effective way. However, some restrictions apply.

Preliminary relief, by its nature, is meant to provide only a temporary solution. For instance, no actual damages can be sought (although parties can be ordered to provide security) and no counterclaim aimed at invalidating the patent in suit is allowable as preliminary relief, although a provisional declaratory judgment of non-infringement would be possible. Possible preliminary relief include prohibitions from infringing the patent, an order to pay an advance payment of damages (under strict conditions) and an order to provide financial and other information concerning the infringement in an accountants' report.

8.2 Is ex parte relief available, where defendant is given no notice at all? If so, under what conditions?

Soon, after the implementation of the EU Enforcement Directive (2004/48/EC), the patent holder may seek to obtain an *ex parte* injunction. However, in view of the effective preliminary relief proceedings in the Netherlands, it is expected that an *ex parte* injunction will only be granted in exceptional circumstances. Other already available forms of *ex parte* relief in the Netherlands include the seizure of allegedly infringing goods and the provisional arrest of financial or tangible assets.

8.4 Is plaintiff entitled to ask for an order that defendant's premises are searched and a description of the infringing goods (and the accounting relating thereto) is made in order to establish proof of infringement (saisie-contrefaçon)? If not, what other mechanisms, if any, are available for seizing and preserving evidence for trial?

The searching of a defendant's premises in order to gain evidence or information about infringement is not permitted under Dutch law. However, allegedly infringing goods may be seized (with the court's permission, given in *ex parte* proceedings), and in practice these are then examined, sampled or tested. After the implementation of the Enforcement Directive

(2004/48/EC) in Dutch law, the possibility of collecting and preserving evidence will be extended significantly. Among other things, a descriptive seizure will be introduced in the Dutch Code of Civil Procedure.

The Anti-Piracy Directive (2003/1383/EC) provides a patent holder with the options of stopping goods in transit and taking samples. This has led to certain (controversial) instances where cargo in transit (eg in the Rotterdam ports) was seized and sampled under the Directive, but released immediately afterwards (so as to avoid liability for delays).

8.5 Can the defendant put the validity of a patent in issue in preliminary injunction proceedings?

It is possible to base a defence in part or in whole on the invalidity of the patent in suit. Although invalidity is not ruled upon in preliminary injunction proceedings, the court may anticipate that the patent in suit may be invalidated in the main proceedings, and on that basis deny claims based on patent infringement.

8.6 What is the format of preliminary injunction proceedings?

The proceedings start off by the plaintiff submitting a draft writ of summons, requesting the president of the court to set a date for the oral hearing. Thereafter the plaintiff serves the writ of summons on the defendant, which document should contain the plaintiff's claims, his arguments and the evidence on which he relies. The defendant should submit his evidence prior to the subsequent oral hearing, where both parties state their case. Judgment is usually given within two to four weeks of the hearing.

8.7 To what extent are documents, affidavits, witnesses, and/or (court-appointed or private) experts used in preliminary injunction proceedings?

In patent cases in the Netherlands, witness or expert hearings are relatively rare. The parties mainly provide documentary evidence and their own expert statements. The Dutch Civil Procedure Code prescribes an open system of evidence. In general, the courts are free in their appreciation of any given form of evidence, excepting certain formal pieces of evidence (eg notarised deeds) that by law are to be accepted as evidence of certain facts. Parties are allowed to present counter-evidence. In preliminary relief proceedings, the court has an even greater freedom than usual, since the normal rules concerning the burden of proof and compulsory evidence do not apply and the court may arrive at its preliminary judgment by any means it deems necessary. Judgment is therefore often rendered on the balance of probabilities. A judgment in preliminary relief proceedings, however, does not bind the court in proceedings on the merits.

8.8. What level of proof is required for establishing infringement or invalidity in preliminary injunction proceedings?

The president of the court may grant the patent holder's claims if there is, within the context of a *prima facie* ruling, a sufficient likelihood of infringement. Infringement claims may be awarded if the allegations of infringement are plausible and sufficiently substantiated. Although invalidity is not ruled upon in preliminary injunction proceedings, the court may anticipate that the patent in suit may be invalidated in the main proceedings, and deny claims based on infringement on that ground.

8.9 How long do preliminary injunction proceedings typically last?

Preliminary injunction orders may be obtained within several weeks or months, which will depend mainly on the availability of the court, the complexity of the case and the urgency. In its basic form, the proceedings are initiated with a written argument contained in the writ of summons, followed by an oral hearing which lasts for several hours.

The Netherlands

8.10 Where a preliminary injunction is granted, is it necessary to start main proceedings to confirm the preliminary injunction?

A preliminary injunction should be followed up by initiating main proceedings, within an amount of time set by the courts under Art 260 of the Dutch Civil Procedure Code (see also Art 50 para 6 of TRIPS). Failure to do so will result in the loss of the injunction's effect.

9 APPEAL PROCEDURE

9.1 What avenues of appeal are available for a defeated party in main proceedings or preliminary injunction proceedings? Under what conditions?

Appeal is possible in regular or accelerated proceedings on the merits as well as in preliminary relief proceedings. The appeal is brought before the Court of Appeal in The Hague, without any form of leave being required. The case can be reviewed in full, or, at the request of the appellant, can be limited to specific points of law or fact.

9.2 How long do appeal proceedings typically last?

Appeal proceedings typically last 12 to 18 months. In preliminary relief proceedings, this can be much shorter, but usually these last approximately six months.

10. LITIGATION COSTS

10.1 What level of cost should one expect to incur to take a case through to a first instance decision, preliminary injunction proceedings and/or appeal proceedings?

The costs of patent litigation in the Netherlands, as in all jurisdictions, may vary significantly, depending on the complexity of the case, the strategy of the litigants, the type of proceeding (regular proceedings on the merits, accelerated proceedings on the merits or preliminary relief proceedings), the pace of the litigation and the procedural complications (such as witness or expert hearings).

On average, the cost of first instance litigation will normally be within the range of €40,000–100,000, although a recent EPO survey (Assessment on the impact of the European Patent Litigation Agreement (EPLA) on European Patent litigation (February 2006)) suggests slightly higher costs (ranging from €60,000–200,000). On appeal, the costs are normally within the same range or slightly less.

10.2 Are costs recoverable from the losing party?

The costs are only recoverable to a (very) limited extent. In the Netherlands, awarding the entire litigation costs is viewed as limiting effective access to court. However, as a result of the implementation of the enforcement Directive there may be greater opportunity to recover litigation costs in the near future, although it is difficult to predict how the case law on this subject will develop.

11. FORTHCOMING LEGISLATION

11.1 What are the important developing and emerging trends in your country's patent law?

The European Court of Justice decisions in cases C-4/03 (*GAT v LUK*) and C-539/03 (*Primus v Roche*) will significantly restrict the traditional liberal Dutch approach to granting cross-border injunctions. Therefore it may be expected that the Netherlands will seek alternative ways to promote cost-efficient, cross-border European patent litigation, eg through its promotion of a uniform European patent litigation system, as laid down in the European Patent Litigation Agreement (EPLA).

Another important development is the continuing implementation of (European) measures aimed at strengthening the patent holder's (enforcement) rights, eg by providing for evidence collection/preservation measures and border measures.

11.2 To the extent it relates to patent enforcement, please outline any major patent legislation in the pipeline.

The implementation of the EU Enforcement Directive 2004/48 will strengthen the patent holder's enforcement rights. Although a number of these remedies are already available to a patentee in the Netherlands, the most notable additions are *ex parte* preliminary relief proceedings and certain evidence collection proceedings (including the descriptive seizure or *saisie contrefaçon*).

12. USEFUL REFERENCES

12.1 Please identify any useful works of reference relating to patent law and patent litigation in your country including useful websites.

Literature

Van Nieuwenhoven Helbach, Huydecoper, Van Nispen *Industriële eigendom (Deel 1)* (Deventer, Kluwer, 2002)

Wichers Hoeth, Gielen (ed), Hagemans (ed) *Kort begrip van het intellectuele eigendomsrecht* (Zwolle, WEJ Tjeenk Willink, 2000)

Gielen and Verkade (eds) *Tekst & Commentaar: Intellectuele eigendom* (Deventer, Kluwer, 2005)

Nieuwenhuis, Stolker and Valk (eds) *Tekst & Commentaar: Burgerlijk Wetboek* (Deventer, Kluwer, 2005)

Van Mierlo, Van Nispen and Polak (eds) *Tekst & Commentaar: Burgerlijke Rechtsvordering* (Deventer, Kluwer, 2005)

Schuurman and Jordens (series) *Rijsoctrooiwet 1995* (Deventer, Kluwer, 2003)

Useful links (in Dutch)

- www.octroocentrum.nl
- www.rechtspraak.nl
- www.boek9.nl