



The
LEGAL
500

**COUNTRY
COMPARATIVE
GUIDES 2020**

The Legal 500 Country Comparative Guides

The Netherlands

PATENT LITIGATION

Contributing firm

BarentsKrans



Marleen van den Horst

Partner | marleen.vandenhorst@barentskrans.nl

Jaap Bremer

Partner | jaap.bremer@barentskrans.nl

This country-specific Q&A provides an overview of patent litigation laws and regulations applicable in The Netherlands.

For a full list of jurisdictional Q&As visit legal500.com/guides

THE NETHERLANDS PATENT LITIGATION



1. What is the forum for the conduct of patent litigation?

First instance patent proceedings (both interim relief and final relief) are conducted at the District Court of The Hague. Appeals are conducted at the Court of Appeal of The Hague. Both courts have exclusive jurisdiction in patent matters and are equipped with a specialist patent division, consisting of judges with experience in patent matters, some with a technical background.

Appeals in cassation are heard by the Supreme Court, also located in the Hague.

2. What is the typical timeline and form of first instance patent litigation proceedings?

Dutch patent proceedings are not bifurcated, i.e. infringement and validity issues are heard together by the same court in one case. The court does not assess issues of claim construction separately. Damages matters are usually argued and decided in separate proceedings following the proceedings in which infringement and liability are established.

In the Netherlands, two types of patents exist: the Dutch (registration) patent (not examined) and the Dutch part of a European patent. Depending on the type of patent at issue there may be procedural differences. As the Dutch parts of European patents are more commonly used, our answers are limited to proceedings involving those.

In the Netherlands, final relief infringement and invalidity proceedings are usually conducted in a special form called 'accelerated patent proceedings'. A party needs to obtain a court order from the District Court of The Hague to be admitted to the accelerated proceedings. This order specifies the entire timeframe for the proceedings up to and including dates for exchanging briefs, submission rounds for exhibits and the date of the oral hearing.

The proceedings are 'front loaded': parties are expected to present arguments and evidence as soon as available.

Accelerated proceedings in first instance take 12-14 months from the date of service of the writ to the judgment.

Regular final relief proceedings are not conducted according to a pre-set timeframe and take approximately 18-20 months.

Interim relief proceedings, in which a preliminary assessment is made of the alleged infringement and/or the invalidity arguments, generally take 1-3 months. In exceptionally urgent cases, it can be even quicker.

3. Can interim and final decisions in patent cases be appealed?

Yes, see our answer to question 1. No permission is required to appeal patent decisions.

Proceedings before the Court of Appeal take, on average, approximately 1 to 1,5 years. In very urgent cases, the Court of Appeal may decide, upon request of the appellant, to conduct the appeal proceedings in an accelerated form. A case before the Supreme Court takes, on average, 1-1,5 year.

The enforcement of decisions of first and second instance courts is suspended pending the outcome of an appeal/cassation. However, a party may request an order to declare a judgement provisionally enforceable, which in the Netherlands is often done and regularly granted. A judgment in which a patent is invalidated is not declared provisionally enforceable.

4. Which acts constitute direct patent infringement?

With respect to a patented product, a patent confers the exclusive right to, in the course of business, make, use, put on the market or resell, rent out, deliver or otherwise

trade in the product, or to offer, import or stock it for any of the aforementioned purposes.

With respect to a patented process, a patent confers the exclusive right to, in the course of business, use the patented process or to use, put on the market, resell, rent out, deliver or otherwise trade in the product obtained directly as a result of the use of the patented process, or to offer, import or stock such product for any of the aforementioned purposes.

5. Do the concepts of indirect patent infringement or contributory infringement exist? If, so what are the elements of such forms of infringement?

The concept of indirect patent infringement is provided for under Dutch law. A party infringes a patent indirectly if it offers or supplies means relating to an essential element of the invention to a third party who is not authorized to use that invention. The party offering or supplying must know, or it should be evident in view of the circumstances, that those means are suitable and intended for use of the invention. It is not necessary that the patent is ultimately directly infringed.

Staple products can also be found to be ‘means relating to an essential element’, however, in such case it must be established that the party offering or supplying the staple products has induced that they be used to perform acts of direct infringement.

6. How is the scope of protection of patent claims construed?

The scope of protection of a patent is construed through the eyes of the person skilled in the art, who is understood to read the claims in light of his common general knowledge on the application date or priority date of the patent (whichever is the oldest date). Claim construction should strike a balance between a fair protection of the patentee and reasonable legal certainty for third parties. The present position of the Supreme Court is that protection should fall midway between two ‘extreme views’: one view being the adherence to the literal wording of the patent claims and the other view being an interpretation purely on the basis of the inventive concept behind the invention, the so-called essence of the invention. For the latter ‘view’, the question is what the patent has added to the state of the art in the eyes of the skilled person.

In the Netherlands, a doctrine of equivalents applies. Equivalence is mostly established through application of

the ‘function-way-result’ test. In this test, equivalence is found to be present if a feature performs substantially the same function in substantially the same way and therefore substantially the same result is obtained as is obtained with the feature literally cited in the patent claim(s). In some cases, the so-called insubstantial differences test has been applied.

In the Netherlands, some form of prosecution history estoppel has been recognised, but the case law is currently under development.

Use of the prosecution history by the patentee to defend a favourable claim interpretation is only allowed in exceptional circumstances, in order not to undermine legal certainty for third parties.

No restriction is, however, applied to a third party (for instance an alleged infringer), which may freely make use of the publicly available prosecution file to confirm a defended claim interpretation.

7. What are the key defences to patent infringement?

The key defences in the Netherlands are:

- Non-infringement;
- Invalidity of the patent;
- In case of standard essential patents: that enforcement amounts to abuse of a dominant position and/or breach of FRAND obligations;
- Prior use, prior to the date of application or the date of grant of the patent.

8. What are the key grounds of patent invalidity?

Key grounds for invalidating a patent in the Netherlands are:

- Lack of novelty, sometimes preceded by challenging priority;
- Lack of inventive step;
- Extension of subject matter of the claim;
- Extension of scope of protection of the claim;
- Insufficiency of disclosure;

Lack of clarity *per se* is not an invalidity ground in the Netherlands.

9. How is prior art considered in the context of an invalidity action?

In the context of novelty, the patent must adhere to the

criterion of absolute novelty, it must be novel over all of the prior art: written, oral and public prior use, independent of place of publication/use and language. This includes the subject matter of national patent applications which have been filed but not (yet) published.

The assessment of novelty is made on the date of the patent application or, where applicable, the priority date of the patent. The patented invention should, in order to be novelty-harming, be fully disclosed in one single piece of prior art, which disclosure should enable the skilled person to reproduce the subject matter disclosed therein using his common general knowledge.

In the context of inventive step, multiple pieces of prior art (generally two or three documents) may be combined to argue lack of inventive step.

10. Can a patentee seek to amend a patent that is in the midst of patent litigation?

Yes, in principle, the patentee may amend his patent during litigation. This can be done in two ways.

1. By filing auxiliary requests during the proceedings, both in first and second instance. The auxiliary requests should be filed as early as possible in proceedings, not doing so without good reason will lead to refusal of the court to assess the amendments. According to Dutch case law, in appeal, a limitation conducted after exchange of the main court briefs (i.e. the statement of grievances or the statement of reply respectively) will generally not be allowable, save for very special circumstances.

Auxiliary requests submitted in proceedings must fulfil the same requirements as applied during the examination of the patent. When filing auxiliary requests, the patentee should provide arguments as to the validity of the amended claims. The opposing party in proceedings must have the opportunity to respond to the amended claims and to argue their invalidity, either in a written statement or during the oral hearing.

2. In case of a European patent: by means of a central limitation *ex parte* procedure at the level of the EPO, which allows the patentee to have the claims of his granted patent limited for all the designated states.

11. Is some form of patent term extension

available?

In general, it is not. A patent expires 20 years after the date of application. For medicinal and plant protection products a supplementary protection certificate (SPC) may be applied for. This offers an additional protection for up to a maximum of five years. In addition, a Pediatric Extension of the SPC's term of protection may be available for an additional 6 months maximum if further research has been performed on the effect of a medicinal product in minors. The validity of the SPC can be challenged on various grounds, i.e.:

- invalidity of the basic patent;
- the product covered by the SPC is not covered by the basic patent;
- for the same product, an earlier SPC has already been granted;
- the first marketing authorisation has not been identified properly

12. How are technical matters considered in patent litigation proceedings?

Dutch courts assess technical matters in the context of validity, scope of protection and infringement. Parties may, and often do, retain experts to prepare expert declarations to explain and elaborate on relevant technical issues. Technical experts should focus only on technical aspects and refrain from making legal assessments. Party experts are often present at the hearing to be able to answer questions of the court. The questions are posed to the expert by or via the court. There is no cross-examination of experts or 'hot-tub' sessions.

13. Is some form of discovery/disclosure and/or court-mandated evidence seizure/protection (e.g. saisie-contrefaçon) available, either before the commencement of or during patent litigation proceedings?

In the Netherlands, a party may seek permission from the Court to seize evidence relating to patent infringement. The objects of the seizure may be information/documentation related to the infringement, samples and/or a detailed description of the infringing products or processes. Certain restrictions apply to the seizure of evidence, for instance to safeguard the protection of confidential information/trade secrets. Also, the patentee is required to present certain *prima facie* evidence of infringement.

The seizure is levied by a bailiff, often with the assistance of an external independent expert. It may only be used only to conserve the evidence, i.e. after the seizure has been levied, the seized evidence is generally handed by the bailiff into the custody of a third party, who may not allow the patentee access to the seized materials without a court order. The seizure must, therefore, be followed by proceedings to obtain access to the seized evidence, as explained below.

There is no disclosure or discovery in the Netherland as known in Anglo-Saxon judicial systems. However, a party may seek to obtain a court order to access specific documents/evidence that are in the possession of another party and/or which are the subject of the aforementioned seizure. These can be records or other evidence such as (allegedly) infringing products and items related thereto (for instance machines and raw materials intended for manufacturing purposes). This (very) limited form of discovery may be obtained through stand-alone *inter partes* court proceedings or in the context of ongoing infringement proceedings.

To obtain permission, a party must demonstrate a legitimate (i.e. direct and concrete) interest, and it must explicitly specify which records or other products it wishes to access and why, so as to avoid that the disclosure order may be used to facilitate fishing expeditions. The specified documents/evidence should relate to a legal relationship to which the petitioner or a predecessor thereof is party, whereby actions arising from tort, including IP infringement, generally qualify as such.

14. Are there procedures available which would assist a patentee to determine infringement of a process patent?

The patentee has several ways to obtain evidence of infringement. This includes (prejudgments) seizure of evidence as set out above. The seizure must be followed by proceedings to obtain disclosure of the seized evidence. .

Another way in which infringement of a process patent may be argued in some cases, absent direct proof of application of the patented process, is by arguing reversal of the burden of proof. There is one situation where Dutch law provides for the reversal of the burden of proof: If the infringement relates to a patented process for the manufacture of a product which itself is new, it is assumed that the product in question has been manufactured using the patented process unless the defendant can plausibly establish that that is not the case.

15. Are there established mechanisms to protect confidential information required to be disclosed/exchanged in the course of patent litigation (e.g. confidentiality clubs)?

The hearings are public, however the written briefs and evidence submitted is not. Upon request, a court may order the hearing or parts of it to take place behind closed doors, may order that all persons involved in the litigation will treat certain matters confidentially and may omit such confidential information from the version of the judgment that will be publicly available.

In case parties must disclose trade secrets to the court (e.g. as evidence), without these trade secrets being, in themselves, subject of the dispute (e.g. in patent litigation), the court may decide to grant access to documents solely to a lawyer from an opposing party.

16. Is there a system of post-grant opposition proceedings? If so, how does this system interact with the patent litigation system?

There is no system in The Netherlands for post-grant oppositions. Patents can only be invalidated in court proceedings. When opposition proceedings before the EPO are pending, a court may, at its discretion, stay Dutch proceedings for the duration of the opposition. This happens only occasionally, for instance if a TBA hearing is only a few months away.

17. To what extent are decisions from other fora/jurisdictions relevant or influential, and if so, are there any particularly influential fora/jurisdictions?

The Dutch patent courts follow EPO case law closely and tend to align with EPO standard case law. They will also consider judgments from other jurisdictions that relate to the same or connected patents (members of the same family or regarding similar subject matter) and may comment on these decisions in their judgment (for instance, explain why its decision differs from a foreign one). Foreign decisions have no binding effect and the Dutch courts, although they consider foreign judgments carefully, are known for applying their own approach to the matter, even if this results in a decision (vastly) differing from the approach followed by foreign courts.

Special weight is often attributed to decisions of the German and UK Courts.

18. How does a court determine whether it has jurisdiction to hear a patent action?

The Dutch patent courts have jurisdiction in interim relief proceedings to preliminarily assess the infringement and validity of foreign patents. Under certain conditions, they can issue cross-border preliminary injunctions. It is furthermore possible to obtain a cross-border injunction in final relief proceedings, but if an invalidity argument is raised by way of defence or counterclaim, the court will either reject the cross-border injunction or stay the proceedings awaiting the outcome of invalidation proceedings in the country where the relevant patent is registered.

An anti-suit injunction in the Netherlands is possible but very rarely issued. It may be awarded in cases of clear abuse of procedure, when starting new proceedings would constitute a tort.

19. What are the options for alternative dispute resolution (ADR) in patent cases? Are they commonly used? Are there any mandatory ADR provisions in patent cases?

ADR is used in certain cases, but court proceedings remain the preferred option and are generally much cheaper. There are no mandatory ADR provisions for patent cases in the Netherlands.

20. What are the key procedural steps that must be satisfied before a patent action can be commenced? Are there any limitation periods for commencing an action?

Dutch law does not provide for mandatory procedural steps before patent proceedings regarding European patents may be commenced. However, it is deemed prudent to send a cease and desist letter before starting infringement proceedings, including a reasonable term for ceasing the use of the patented technology. In case of invalidity actions, the plaintiff is recommended to send a warning letter, requesting the patentee to withdraw his patent or to confirm that he will not enforce it. Dutch case law has shown that refraining to send these letters may affect a later cost order.

Additional requirements apply in case of enforcement or invalidation of a Dutch national patent, since such patents are granted without examination. Since cases regarding Dutch patents are rare, this point will not be elaborated in further detail.

An infringement action must be commenced within 20 years of the date of infringement. Recovery of damages for infringement is limited to a period of five years from the day after the patentee became aware of the damage and the responsible party.

21. Which parties have standing to bring a patent infringement action? Under which circumstances will a patent licensee have standing to bring an action?

In the Netherlands, only the patentee can bring an infringement action. The patentee may institute claims for damages or surrender of profits on behalf of himself and on behalf of licensees, but licensees may also join proceedings instituted by the patentee to claim damages themselves. However, Dutch law also provides for the possibility for licensees to bring an independent claim for damages if they have obtained authorisation from the patentee.

Furthermore, licensees may start patent infringement actions with a power of attorney from the patentee, although it is recommended to then commence an action in name of both.

22. Who has standing to bring an invalidity action against a patent? Is any particular connection to the patentee or patent required?

According to Dutch law, invalidation proceedings may be instituted by 'any party'. No special interest or connection is required.

23. Are interim injunctions available in patent litigation proceedings?

In the Dutch system, *inter partes* interim injunction proceedings are often used in case of urgent patent enforcement. Decisions are given fairly quickly while still allowing for a thorough assessment of the case. Once a decision is granted, final relief proceedings need to be commenced within six months in order to avoid the decision becoming vulnerable to cancellation.

To obtain an interim injunction, the patentee must argue that there is an 'urgent interest'. An ongoing infringement usually offers sufficient basis for the judge to assume urgent interest. However, a delay of approximately six months or more after first knowledge of the infringement in enforcement, for which delay no explanation is provided, may lead to a finding of a lack

of urgency.

The standard applied in interim relief proceedings is that the injunction should be rejected if a serious, non-negligible chance exists that the patent will be found invalid or not infringed in final relief proceedings. As a result, the judge will make a full (yet preliminary) assessment of the infringement and invalidity arguments.

In recent years, the balance of interests has also become an increasingly important factor. The Judge will assess how the interests of parties will be affected if an injunction were granted or denied, respectively. The extent to which the damage incurred as a result of the (granting or rejection of an) injunction can be calculated afterwards, is also a factor taken into account.

Interim injunction proceedings generally take 1-3 months.

Although Dutch law also provides for the possibility of *ex parte* interim injunctions when a case is very urgent and the infringement easy to establish and clear-cut, in practice this hardly ever occurs.

24. What final remedies, both monetary and non-monetary, are available for patent infringement? Of these, which are most commonly sought and which are typically ordered?

In final relief patent infringement proceedings, the most important remedies the patentee may obtain are:

- An injunction
- An order for the infringer to provide information on the scope of the infringing acts, including information on suppliers, (professional) customers, (re)sellers and quantity, turnover and profit gained through the infringement
- An order for recall and destruction of infringing products
- An order to inform relevant parties of the infringement decision by letter, on the website, social media and/or other publication
- All of the above orders may be secured by penalty sums
- Award of damages

25. On what basis are damages for patent infringement calculated? Is it possible to

obtain additional or exemplary damages?

The patentee is entitled to compensation for lost profits or to claim surrender of the profits of the infringer. In addition, the patentee may claim compensation for other forms of damage, such as loss of value of the patent. No additional or exemplary damages can be awarded under Dutch law. Alternatively, damages may also be calculated on the basis of fictitious royal fees.

Usually infringement and liability for damages are established during patent infringement proceedings, but not the amount, which is established in separate damages calculation proceedings.

26. How readily are final injunctions granted in patent litigation proceedings?

If the court finds a product or process to infringe a valid patent, it will in principle grant an injunction. However, especially in standard essential patent cases, the enforcement of a patent that is valid and infringed may, under certain circumstances, be found to contravene competition law, which may be a cause for rejecting the claimed injunction.

27. Are there provisions for obtaining declaratory relief, and if so, what are the legal and procedural requirements for obtaining such relief?

The court can award a declaration of non-infringement in final relief proceedings. It is possible to obtain a declaration stating that a certain product was already known in the state of the art on the priority or filing date of a patent or is a non-inventive variant thereof ('Arrow-declaration'). There are no specific procedural requirements.

28. What are the costs typically incurred by each party to patent litigation proceedings at first instance? What are the typical costs of an appeal at each appellate level?

Costs for patent litigation in the Netherlands vary widely, depending *inter alia* on the complexity of the technology of the patent in suit. In first and second instance final relief proceedings, costs will generally range from 80.000 – 500.000 euro. A Supreme Court case may cost between 15.000 and 200.000 euro.

29. Can the successful party to a patent litigation action recover its costs?

A successful party in patent enforcement litigation is entitled to recover its costs from the losing party to the extent they are reasonable and proportionate. A pure invalidity action (i.e. an action which is not a response to a threat of enforcement) does not entitle the winning party to compensation of full costs. Only a very small portion of the actual costs may be recovered.

Since September 1, 2020, the Dutch system works with indicative fee caps for patent enforcement litigation, in which the maximum fee that a winning party may claim in lawyer’s and European patent attorney’s fees is set out. The amounts which can be claimed depend on the type of proceedings and the complexity of the case. It is theoretically still possible to successfully claim higher amounts, but the courts have indicated that this will only be granted in exceptional cases. Parties in practice often agree on the amount to be awarded to the winning party, which agreement is followed by the Courts.

These indicative fee caps relate only to lawyers’ costs and to costs of European patent attorneys. They do not include the costs of party experts, disbursements such as costs for conducting experiments or translations, court fees and VAT.

Dutch law stipulates that a defendant in interim injunction proceedings may request a security bond in respect of damages and procedural costs from a claimant seeking an injunction. However, such bond is practically never awarded.

30. What are the biggest patent litigation growth areas in your jurisdiction in terms of industry sector?

The high tech industry sector, especially chip manufacturing, (standard essential) telecom technology and the biologics/biosimilar industry.

31. What do you predict will be the most contentious patent litigation issues in your jurisdiction over the next twelve months?

Standard essential technology, biosimilars and medical devices.

32. Which aspects of patent litigation, either substantive or procedural, are most in need of reform in your jurisdiction?

In pure invalidity actions, the winning party is currently not entitled to claim a full cost award, which means that companies have to spend very substantial amounts of money to invalidate patents, which costs they are not able to recover. By contrast, the patentee enforcing the same patent is entitled to claim a full cost award. This disbalance should be addressed.

Also, there is some concern that the recently introduced indicative fee caps in patent cases will result in the winning party in patent enforcement proceedings not being able to recover a substantial part of its costs. If this is indeed the case, it needs to be addressed.

33. What are the biggest challenges and opportunities confronting the international patent system?

Whether or not the Unified Patent Court system will become operational and, if it does, whether it will provide the advantages that had initially been envisaged, especially given the recent withdrawal of the UK and in light of Brexit.

Contributors

Marleen van den Horst
Partner

marleen.vandenhorst@barenskran.nl



Jaap Bremer
Partner

jaap.bremer@barenskran.nl

