

THE PATENT
LITIGATION
LAW REVIEW

FIFTH EDITION

Editor
Trevor Cook

THE LAWREVIEWS

THE PATENT
LITIGATION
LAW REVIEW

FIFTH EDITION

Reproduced with permission from Law Business Research Ltd
This article was first published in November 2021
For further information please contact Nick.Barette@thelawreviews.co.uk

Editor
Trevor Cook

THE LAWREVIEWS

PUBLISHER

Clare Bolton

HEAD OF BUSINESS DEVELOPMENT

Nick Barette

TEAM LEADERS

Joel Woods, Jack Bagnall

BUSINESS DEVELOPMENT MANAGERS

Rebecca Mogridge, Katie Hodgetts, Joey Kwok

RESEARCH LEAD

Kieran Hansen

EDITORIAL COORDINATOR

Leke Williams

PRODUCTION AND OPERATIONS DIRECTOR

Adam Myers

PRODUCTION EDITOR

Helen Sou

SUBEDITOR

Nadine Catto

CHIEF EXECUTIVE OFFICER

Nick Brailey

Published in the United Kingdom

by Law Business Research Ltd, London

Meridian House, 34–35 Farringdon Street, London, EC4A 4HL, UK

© 2021 Law Business Research Ltd

www.TheLawReviews.co.uk

No photocopying: copyright licences do not apply.

The information provided in this publication is general and may not apply in a specific situation, nor does it necessarily represent the views of authors' firms or their clients. Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information provided was accurate as at October 2021, be advised that this is a developing area.

Enquiries concerning reproduction should be sent to Law Business Research, at the address above.

Enquiries concerning editorial content should be directed
to the Publisher – clare.bolton@lbresearch.com

ISBN 978-1-83862-808-6

Printed in Great Britain by

Encompass Print Solutions, Derbyshire

Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

ANAND AND ANAND

BOULT WADE TENNANT LLP

CLIFFORD CHANCE

DERİŞ

G ELIAS & CO

GOWLING WLG RUSSIA

HOMBURGER AG

JADEK & PENSA

LINKLATERS LLP

LØJE IP

S HOROWITZ & CO

TAYLOR WESSING NV

VAZ E DIAS ADVOGADOS & ASSOCIADOS

VIEIRA DE ALMEIDA

WESTERBERG & PARTNERS ADVOKATBYRÅ AB

WILLIAM FRY

WILMER CUTLER PICKERING HALE AND DORR LLP

CONTENTS

PREFACE.....	v
<i>Trevor Cook</i>	
Chapter 1	OPPOSITIONS AND APPEALS BEFORE THE EUROPEAN PATENT OFFICE.... 1
<i>James Short and Rohan Setna</i>	
Chapter 2	BELGIUM 8
<i>Christian Dekoninck</i>	
Chapter 3	BRAZIL..... 21
<i>José Carlos Vaz e Dias, Marina Castro and Thiago Lombardi</i>	
Chapter 4	DENMARK..... 36
<i>Johan E Løje</i>	
Chapter 5	FRANCE..... 48
<i>Pauline Debré and Jean-François Merdrignac</i>	
Chapter 6	GERMANY..... 68
<i>Julia Schönbohm and Bolko Ehlgen</i>	
Chapter 7	INDIA..... 88
<i>Pravin Anand, Vidisha Garg and Vibhav Mithal</i>	
Chapter 8	IRELAND..... 108
<i>Laura Scott and Charleen O'Keeffe</i>	
Chapter 9	ISRAEL..... 122
<i>Tal Band and Dovev Apel</i>	
Chapter 10	NETHERLANDS 137
<i>Wim Maas</i>	

Chapter 11	NIGERIA.....	148
	<i>Fidelis Adewole, Ayodele Ashiata Kadiri and Arhanasius Akor</i>	
Chapter 12	PORTUGAL.....	160
	<i>Marta Alves Vieira</i>	
Chapter 13	RUSSIA.....	171
	<i>David Aylen and Vladislav Ugryumov</i>	
Chapter 14	SLOVENIA.....	188
	<i>Aleksandra Jemc Merc and Eva Gostiša</i>	
Chapter 15	SPAIN.....	199
	<i>Miquel Montañá Mora</i>	
Chapter 16	SWEDEN.....	212
	<i>Björn Rundblom Andersson and Petter Larsson</i>	
Chapter 17	SWITZERLAND.....	225
	<i>Andri Hess</i>	
Chapter 18	TURKEY.....	237
	<i>Mehmet Nazım Aydın Deriş, Okan Çan, Muazzez Korutürk and Oya Yalvaç</i>	
Chapter 19	UNITED KINGDOM.....	252
	<i>Trevor Cook</i>	
Appendix 1	ABOUT THE AUTHORS.....	263
Appendix 2	CONTRIBUTORS' CONTACT DETAILS.....	275

PREFACE

Although patent litigators should always be mindful that patent litigation has, with some justification, been called the ‘pathology of the patent system’ – not so much as a criticism but more in recognition of how remarkably little patent litigation there is – when seen in relation to the ever increasing number of patents in force at any one time, patent litigation is also the anvil on which patent law is forged. This is because the ‘black letter’ law of patents tends to be terse by comparison to most other areas of law, and it is only with experience of how courts and tribunals interpret such law and apply it that one can start to appreciate its true scope and effect.

This, in part, explains how such similarly expressed statutory provisions as one finds in different patent laws can sometimes result in such different outcomes in different jurisdictions – disparities that are all the more evident when they concern the same product or process, and patents that, though in different jurisdictions, are all members of the same family, and are all intended to protect the same invention. As it becomes increasingly common for patent disputes to proceed in multiple jurisdictions, these differences in outcome have become ever more apparent.

Such disparities are not only a consequence of differing substantive laws, or differences in interpretation of similarly expressed laws, they can also be a consequence of the considerable procedural differences between jurisdictions, the nature of which is outlined in this Review. However, the Review does not only summarise patent litigation procedures: the respective contributors to it, as leading practitioners in each of their jurisdictions, also focus on recent developments in substantive patent law as demonstrated by the most important recent court decisions in their respective jurisdictions, meaning that this Review also provides insight into the current controversies that affect patent law generally.

The events of the past 18 months have not left patent litigation unscathed, and it will be interesting to see how the changes that the pandemic has brought, such as remotely conducted hearings, survive the much-hoped-for return to normality. Some indication of the strength of views engendered by this issue is provided by the arguments before the European Patent Office’s Enlarged Board of Appeal in Case G 1/21 regarding the legality of mandating online hearings during the pandemic. In rejecting in July 2021 the challenge to the validity of this measure, the Enlarged Board was careful not to express a more general opinion about the legality of mandating such hearings.

The pandemic has also been used as a pretext for certain interests to push for a waiver of the patent and trade secrets provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights, of which discussions are now taking place in the World Trade Organization, despite it not being intellectual property that has impeded the roll-out of

vaccines, and the manifest need for effective patent protection to incentivise the continuing search for new and improved medical treatments.

In the European Union, the big news this summer came in June 2021 when the German Federal Constitutional Court made an order regarding the constitutional challenge mounted to German adherence to the Agreement on a Unified Patent Court (UPCA). The order has the effect of allowing Germany to participate in the UPCA and the Protocol on the Provisional Application of the UPCA. German participation in those measures is a necessary prerequisite to their entry into force.

This decision provides for the prospect of the UPCA entering into force in the second half of 2022. The UPCA will allow (but not as yet mandate) traditional European patents to be litigated in a single court covering much of the European Union.

Such entry into force will also trigger the entry into force of EU Regulations that establish a new type of European patent, the European patent with unitary effect, which will allow patentees following the European route to opt for a single patent covering all the EU Member States that participate in the UPCA, as opposed to the traditional European patent, which has effect as a bundle of national patents. Litigation over this new type of patent will only be possible in the Unified Patent Court.

However, not all is plain sailing as not only must the UPCA regain its lost momentum, but it also appears that its implementation will proceed without formal amendment of the UPCA, despite it containing provisions that assume UK involvement in it. As the United Kingdom, as a result of its withdrawal from the European Union, can no longer participate in the UPCA, this may be seen as introducing a measure of uncertainty in respect of its legal basis. We should, however, know much more by the next edition of this Review.

Trevor Cook

Wilmer Cutler Pickering Hale and Dorr LLP
New York
October 2021

NETHERLANDS

Wim Maas¹

I OVERVIEW

Together with Germany, the United Kingdom and France, the Netherlands is one of the most popular European venues for patent litigation. Although the Netherlands is only a small European country of around 17 million people, the Dutch market is important for many multinationals as an entry gate to Europe from which their products are distributed to other European countries. Getting an injunction in the Netherlands could, therefore, effectively block the European distribution of an infringing product.

Another important reason why the Netherlands is considered a good venue for patent litigation is that there is a specialised patents court in The Hague, which has exclusive jurisdiction to render judgments in patent infringement and invalidity cases. Dutch patent judges are experienced, and the majority of the judges also started their careers in private practice as intellectual property lawyers. Some even have a technical background or were experienced patent litigators or patent attorneys before they moved to the bench.

This year's patent litigation landscape is dominated by cross-border biotech and electronics/telecoms cases. There have been significant patent litigation proceedings in these two technical fields, which have led to (appeal) judgments in the past year, and many biotech cases have been settled just before judgment. It is estimated that every year around 40 to 50 patent cases are pending before the courts of The Hague.

In recent years, the number of complicated cross-border patent cases has increased considerably. Because there is no bifurcation in the Netherlands, it is also safe to assume that in almost all of those cases, the validity of the patent or patents in suit was also disputed, which makes the judgments in those cases of higher value for other jurisdictions as well.

Although the patents court has adopted an accelerated regime for patent cases that should lead to a judgment on infringement and validity in 12 months, the current heavy workload of the court has led to delays in passing judgments. In the past year, the patents court has done everything in its power to find a solution to deal with this workload, for instance, by recruiting newly qualified judges with expertise in the field of intellectual property. This has already had a positive effect on the judgments in patent cases in the accelerated regime.

Finally, a specific trend in the past year's patent litigation is that there were several very significant standard-essential patent cases pending in which a fair, reasonable and non-discriminatory (FRAND) defence was raised.²

1 Wim Maas is a partner at Taylor Wessing NV.

2 *Ericsson v. Samsung*, *SISVEL v. OPPO e.a.*, *Philips v. Wiko*, *Philips v. Xiaomi*, etc.

II TYPES OF PATENT

There are several ways to obtain patent protection in the Netherlands, of which filing a patent application with the Dutch Patent Office is the first. Second, the protection of patents in the Netherlands can ensue from a European application before the European Patent Office (EPO). In addition, the Netherlands is a member of the Patent Cooperation Treaty (PCT). Whether it be via a national application or an international treaty (the European Patent Convention (EPC) or the PCT), a patent that is issued for the Dutch region will be governed by the Dutch Patents Act (DPA).

i National Dutch patent application

National Dutch patents are granted through a patent application procedure before the Dutch Patent Office. Several requirements must be met before patent protection is granted: the invention must be novel, involve an inventive step and be capable of industrial application.

The term ‘unexamined’ is often used when referring to Dutch national patents. Even though patent application procedures always involve a search into the prior art (national or international, depending on the choice of the applicant), the actual grant of the Dutch national patent will not be affected by the results of the search; hence, the results of the search into documents that destroy novelty or are prejudicial to inventive step never prevent applications for Dutch national patents from being granted. The underlying idea is that this would allow smaller companies to obtain patent protection as it limits prosecution costs. Subsequent enforcement proceedings will then address the issue of the patent’s validity.

ii European patents

A European patent will be valid in the Netherlands once the corresponding patent application that designates the Netherlands is granted. The rules of the DPA will govern the Dutch part of the European patent. The DPA distinguishes, in some respects, between Dutch patents granted via a European application and those granted following a Dutch national application. The distinction in their respective treatments relates primarily to the unexamined nature of Dutch national patents. However, the remedies are the same for both types of patents.

Most of the patents valid in the Netherlands are issued following application procedures with either the EPC or the PCT.

iii Obtaining protection

The DPA provides that patent protection can be obtained for inventions that meet three conditions: they must be new, involve an inventive step and be capable of industrial application. In addition, the invention must be sufficiently disclosed in the patent and must be described clearly therein. These requirements reflect those stated in the EPC.

As is the case with the EPC, certain subjects are not considered to be inventions under the DPA. Those subjects include scientific theories and mathematical methods, aesthetic shapes, computer programs and business methods. The DPA also describes inventions that cannot be patented, such as the human body in the various stages of development, and the discovery of parts of it that include sequences or partial sequences of the genome, plant and animal types, methods that are predominantly biological in nature and methods for the treatment of the human or animal body.

To be more specific, the DPA provides that certain methods would be contrary to public policy and, therefore, cannot be patented. Those methods include human cloning,

methods whereby the genetic identity of humans is changed, using human embryos, methods changing the genetic identity of animals that would cause suffering without any medical use and methods that could damage the health of humans, animals or plants or lead to significant damage to the environment.

In the Netherlands, patent protection can be obtained by filing a patent application with the DPA. After 18 months have passed since the date on which the application was filed, the application will be recorded in the patent register at the earliest opportunity. The patent application is made public at that time. The patentee will then have to apply for a novelty search within a period of 13 months after the filing or the priority date.

While the search may bring to light documents that could destroy the novelty of the invention or be prejudicial to its inventive step, the results of the search have no impact on the actual grant of the patent. The patent will be registered at least two months after the publication of the search and is thereby granted, affording it a protection period of 20 years. After learning the results of the novelty search, the patentee can amend the patent application if need be.

While Dutch national patents are not examined per se, the validity of the patent will become the issue at the heart of any enforcement action initiated by the patentee.

Most of the patents enforced in the Netherlands are Dutch parts of European patents that have been issued by the EPO after a thorough examination of the European patent application.

The wording of the patent claims determines the scope of protection of a Dutch patent. The patent claims must be interpreted in light of the descriptions and the drawings accompanying the patent. In Dutch case law, reference is often made to Article 69 of the EPC and the protocol belonging thereto.³ In some cases, the prosecution file may be relevant for the scope of protection of patents in the Netherlands.

III PROCEDURE IN PATENT ENFORCEMENT AND INVALIDITY ACTIONS

In the Netherlands, patents can be enforced through the regular system of civil proceedings. The EU Enforcement Directive 2004/48/EC (the Enforcement Directive) has been implemented in the Dutch Code for Civil Procedure (DCCP), which includes such measures as *ex parte* injunctions, seizure of evidence and full cost orders for losing parties.

Typically, Dutch enforcement of a patent starts with a letter to the alleged infringer, stating the details of the infringement, the patent that is invoked and the steps that the infringer is requested to take. If no settlement is reached, the patentee will typically start preliminary injunction proceedings or proceedings on the merits.

The majority of all Dutch patent cases are brought before the District Court of The Hague because this court has exclusive jurisdiction to hear all patent infringement and invalidity cases. Some patent disputes start with pretrial measures, such as a seizure that does not fall within the exclusive jurisdiction of the court of The Hague; however, in practice, other courts will request assistance of The Hague judges to render a decision in those cases.

3 *Aga v. Occlutech*, Dutch Supreme Court, 25 May 2012, Case No. ECLI:NL:HR:2012:BV3680.

i Requirements for jurisdiction and venue

If the defendant has its place of business in the Netherlands, or if the actual patent infringement takes place on Dutch territory, Dutch courts can assume international jurisdiction to take cognisance of disputes. Once international jurisdiction has been established, to the extent necessary, the jurisdiction of the relevant district court is determined in much the same way.

The court of the district in which the defendant has its office, or in which the infringement actually takes place, will have local jurisdiction. These rules allow the possibility of multiple district courts having jurisdiction within the Netherlands; however, in respect of patent infringement and the validity of patents, exclusive jurisdiction lies with the District Court of The Hague.

ii Obtaining relevant evidence of infringement and discovery

Dutch procedural law does not provide for a general concept of discovery or disclosure of documents. In principle, the parties are free to collect the evidence that they require in the proceedings, and the Dutch courts are free to weigh that evidence as they deem appropriate.

The implementation of the Enforcement Directive has led to the implementation of certain possibilities to seize and safeguard information in the DCCP. The rules allow the patentee to request the district court in preliminary relief proceedings to grant permission to seize evidence that is in the possession or under the control of the infringer. The preliminary relief judge will assess those requests for permission, mostly on an *ex parte* basis. The requests must explain and elaborate why a legitimate fear of infringement exists.

After permission for a seizure has been granted, the patentee may direct a bailiff to inspect the premises of the infringer. Accordingly, the bailiff will do so with the help of the necessary experts, such as IT specialists or technical experts.

Any information collected by the bailiff will not be handed over to the patentee directly. The information will initially be held by a custodian who has been appointed for this purpose when the leave for seizure was granted. The patentee will then have to institute separate proceedings on an *inter partes* basis, requesting the court for disclosure of the relevant documents that were seized. The patentee will not be able to access the seized documents until the court grants the request for this disclosure.

iii Trial decision-maker

The District Court employs specialised judges to adjudicate patent cases, all of whom are seasoned experts. Some of the specialised patent judges on the Court's payroll can boast technical acumen as well. Proceedings on the merits are typically heard by a three-judge division. Preliminary relief proceedings, in which patentees have an urgent interest in relief, are adjudicated by a single judge, who is referred to as the preliminary relief judge.

Although the procedural rules that apply in the Netherlands allow courts to appoint independent experts who specialise in a particular technical field or to request the parties to produce additional evidence to support the facts they are relying on, parties rarely ask for such an appointment; instead, in patent cases, the parties to the proceedings are usually assisted by technical experts of their own choosing, who will file written expert statements on behalf of the party that engaged them. These experts often show up at the hearing as well.

The examination and cross-examination of party witnesses, be they experts or not, has no place in the proceedings as litigation advances primarily through the exchange of written briefs.

iv Structure of the trial

Dutch proceedings on the merits are conducted mainly by the exchange of written briefs in which the parties set out their arguments and defences. This exchange is often followed by a court hearing during which the parties will have the opportunity to present further arguments. Proceedings are initiated with a writ of summons, in which the claimant describes the patent that it invokes, the infringement against which the action is brought, and the relief that is requested.

In setting out the particulars of the case, the claimant must be as complete as possible. The claimant is also required to substantiate its claims in the writ of summons with evidence. Writs of summons in patent cases typically provide a technical background to the technical field at the heart of the dispute.

Being served a writ of summons, the defendant will be given the opportunity to file a statement of defence. The statement of defence enables the defendant to raise defences and file exhibits that support its position. With the statement of defence, the defendant can avail itself of the opportunity to bring a counterclaim against the claimant. It can do so, for example, to claim the invalidity of the patent in question.

The course of events to follow hinges on the proceedings themselves. The court will either schedule a hearing after the statement of defence and after the claimant has had the opportunity to respond to the counterclaim, or it will allow the parties to continue the exchange of written arguments, after which a court hearing usually follows.

During the hearing, the parties will argue their case before the court. Court sessions in patent cases generally last around four or five hours. The court may take longer to hear the parties if the complexity of the patent matter at hand merits it. For reasons of judicial efficiency, however, Dutch courts do not allow full elaboration on every single part of the arguments exchanged between the parties, thereby preventing needless repetition of what has already been argued in the written statements.

Patent cases in which the validity of a patent is challenged offer the patentee the opportunity to file auxiliary requests. Pursuant to those requests, the court may decide to uphold the patent in its present form or in amended form.

In the Netherlands, evidence in proceedings is usually presented by the production of documents. Similarly, witness testimony is usually produced by filing written statements. District courts schedule separate sessions if they want to hear witnesses. While this is certainly an option, it rarely happens in patent cases.

v Infringement

In their adjudication of patent cases, the Dutch courts will interpret the claims in conformity with Article 69 of the EPC and the protocol belonging thereto. Dutch case law provides a number of criteria applicable to that article. Besides literal infringement, the Dutch courts can also establish infringement by equivalence.

In consonance with Supreme Court case law, the patentee's actions during the patent's prosecution can be a relevant factor in the assessment of the scope of patent protection.

vi Time to first-level decision

In general patent cases, proceedings on the merits usually take around 12 to 16 months from the moment that the writ initiating the proceedings is filed until the court renders a decision in the first instance. The District Court of The Hague has established an accelerated regime for patent cases, which is known as the 'VRO-regime'. This regime can be used for (non-) infringement claims and revocation actions.

On the basis of this regime, the dates on which the substantive documents must be filed and on which the hearing will take place are set out in a fixed schedule before the proceedings are set to commence. Because the parties are bound to this schedule, a first instance decision can typically be handed down within 12 months of the date on which the writ of summons is filed. Decisions in preliminary relief proceedings can be rendered within a few weeks, and even sooner in cases of extreme urgency.

In cases involving a manifest infringement causing irreparable harm to the rights holder, the Dutch system also allows for an *ex parte* injunction. Injunctions such as those can be issued without hearing the defendant and can be obtained in days.

vii Protective letters

In the Netherlands, it is not common practice to protect against *ex parte* preliminary relief by filing protective letters. The only court that facilitates the filing of protective letters is the court of The Hague. Although this court is the exclusive court for patent infringement and invalidity cases, seizure requests do not fall within the exclusive jurisdiction of this court and are, therefore, filed with other district courts that do not hold a register for such letters. If such a court involves a judge from The Hague court – which is allowed but certainly not mandatory under Dutch procedural law – the judge will most probably check The Hague register of protective letters.

A protective letter does not protect against an *ex parte* request per se, but the judge will weigh those counter arguments in his or her decision-making process. The preliminary relief judge could also decide to hear the alleged infringing party before he or she decides upon the request, but only after he or she gave the opportunity to the patentee to withdraw the request. It is also possible that the judge will only grant the *ex parte* preliminary relief under certain additional conditions to safeguard the interests of the alleged infringer; for instance, by obliging the patentee to file a bond, a deposit or some sort of other monetary guarantee.

viii Liability for enforcing a patent

Under Dutch law, it is, in principle, possible to exercise patent rights against alleged infringers, even when those infringement claims are later dismissed by a court. A patentee cannot be found liable in those cases. The only exception is when the patentee should have reasonably known at the time he or she enforced the patent against the alleged infringers, often by way of a warning letter or summons, that the patent was invalid or not infringed. For instance, if he or she already knew of certain prior art that would invalidate his or her patent, enforcing the patent anyway would be regarded as an unlawful act against the alleged infringer.

Enforcing an injunction or other relief granted by the court against an infringer can also amount to liability of the patentee if a higher court later in appeal lifts the injunction or the relief and rules in favour of the alleged infringer.

Sending warning letters to, inter alia, customers or trading partners of an alleged infringer is often considered an unlawful act against the alleged infringer; however – if, based on general tort law, unfair competition or misleading advertising – the infringement claims

are later dismissed in court. In those cases, the court often orders a patentee to cease and desist from making the unfounded allegations and send a rectification letter to all parties that have received the warning letter.

ix Costs

In the majority of patent cases, the court fees in the Netherlands are very low compared to other countries and are, therefore, not a cost factor to take into account before initiating a patent case in the Netherlands. The only significant costs are those of the lawyers, supporting patent attorney, experts and translations. The fees of the lawyers will be the highest cost factor to consider. Although it highly depends on, *inter alia*, the complexity of the case and the technology involved and the amount of patents invoked, the lawyers' fees involved with patent cases will generally be €75,000 to €250,000. The costs of a patent attorney offering trial support is often a smaller percentage of the lawyer's fees – often around 20 to 25 per cent.

As of 1 September 2020, the cost regime in patent cases no longer accounts for full compensation of all costs involved (lawyer's fees, patent attorney's fees, expert costs, translation costs, etc); instead, indicative fees will apply for each type of proceedings and depending on the complexity of the matter at hand. For preliminary relief proceedings, the indicative fees vary from €10,000 to €120,000. The indicative fees for proceedings on the merits in first instance vary from €30,000 to €250,000. This means that the losing party is, in principle, ordered to pay such indicated costs of the prevailing party.

If the costs for which compensation has been requested are not reasonable and fair in light of the complexity of the case, it is possible to raise a substantiated objection against those costs; however, in many patent cases, parties used to reach a cost agreement before the oral hearing, which the court accordingly executed in its final judgment. This is expected to still be possible unless the cost agreement (substantially) exceeds the indicative fees.

IV SUBSTANTIVE LAW

This section provides an analysis of the main substantive law aspects relating to patent infringement and validity in the Netherlands, referring wherever possible to recent noteworthy developments in the legislation, case law or court practice.

i Infringement

In the Netherlands, there are two types of infringement. Article 53 of the DPA deals with direct infringement (which can be literal infringement or infringement by way of equivalence). The patentee has the exclusive right to:

- a* make, use, put on the market, resell, hire out or deliver the patented product or otherwise utilise it as part of his or her business, or to offer, import or stock it for any of those purposes; or
- b* use the patented process in or for his or her business or use, put on the market, resell, hire out or deliver the product obtained directly as a result of the use of the patented process or otherwise utilise it as part of his or her business, or to offer, import or stock it for any of those purposes.

Article 73 of the DPA also forbids indirect or contributory infringement. The patentee may institute the claims at his or her disposal in enforcing his or her patent against any person who, in the Netherlands or the Netherlands Antilles offers or delivers, in or for his or her

business, means relating to an essential element of the invention for the application of the patented invention in the Netherlands or the Netherlands Antilles, to persons other than those who are entitled to apply the patented invention (e.g., by way of a licence), provided the person knows or it is evident considering the circumstances that those means are suitable and intended for that application. If the means delivered or offered are products that are generally available in commerce, there will not be contributory infringement.

It is possible under certain conditions to also hold liable other persons (e.g., directors of infringing companies, foreign suppliers and accessories) involved with the infringement, but this is dealt with under the general law of tort. This is, however, not common practice in Dutch patent cases.

ii Invalidity and other defences

In patent infringement proceedings, the most important defences are those directed at the invalidity of the patent. The district court can deal with those defences in the same proceedings that involve the actual infringement.

In preliminary relief proceedings, the preliminary relief court will make a provisional assessment of the validity of the patent in question. Although the right cannot be invalidated for the Netherlands in those proceedings, infringement claims will be denied if the court considers it likely that the patent will be found invalid in proceedings on the merits. Claims on the grounds of inequitable conduct or similar defences are not recognised within the Dutch system.

In patent cases, the validity of patents can be challenged on account of non-patentable subject matter (inter alia, lack of novelty or inventive step), insufficiency of disclosure (lack of enablement), and extension of subject matter beyond the content of the application as originally filed (added matter). This can be done in much the same way that challenges would be lodged with the EPO.

The Dutch court also recognises the *Gillette* defence, which is a hybrid defence between an inventive step defence and an infringement defence. If an alleged infringer applies a product or a process that was already known in the prior art, or an obvious variant thereof, it cannot be infringement; otherwise, the patent would be invalid as not novel or not inventive.⁴

The court accepts the problem solution approach as a test to substantiate an inventive step defence; however, it also recognises that the problem solution approach is only a test and that is not mandatory to apply it.

In the end, the only real test is whether a defendant is able to substantiate the obviousness of an invention. He or she can do so with all evidence available as long as he or she shows that the evidence is not tainted with hindsight.⁵

Other defences against infringement can be that there is a licence in place, exhaustion of patent rights, other competition law defences (e.g., a FRAND defence) or experimental use exceptions. Lack of knowledge is never a defence against infringement; however, it may be a relevant defence against a damages claim.

⁴ Case example regarding the *Gillette* defence: *Smart Technologies ULC v. CTouch Europe BV*, District Court of The Hague, 26 July 2017, Case No. ECLI:NL:RBDHA:2017:8247.

⁵ Case examples regarding the problem solution approach: *Sandoz BV and Hexal AG v. Merck Sharp & Dohme Corp.*, Court of Appeal, 1 May 2012, Case No. ECLI:NL:GHSGR:2012:BW4600 and *Sun v. Novartis (zoledronic acid)*, District Court of The Hague, 25 November 2015, Case No. ECLI:NL:RBDHA:2015:14337.

V FINAL REMEDIES FOR INFRINGEMENT

Remedies that are most often sought in Dutch patent cases are:

- a* injunctions;
- b* accountability relating to the trade and infringing products (prices, quantity of products, customers, suppliers, etc.);
- c* destruction of the products;
- d* damages or the surrender of profits; and
- e* compensation of legal fees.

The above-mentioned remedies are easily obtained by a patentee if infringement has been found by the court. In practice it does not require any further substantiation, although in theory a defendant could argue for all remedies – except the injunction and the damages or surrendering of profits, which are always ‘automatically’ granted in the Netherlands – that there is a lack of interest. The defendant will then have to substantiate those arguments to convince the court of this alleged lack of interest because, in practice, a court will automatically grant those remedies if requested as it follows from the DPA and the DCCP that a patentee is also entitled to those remedies in the case of infringement.

Rectification can be requested as an additional remedy; however, if disputed, the patentee must show its legal interest in why a rectification letter is required.

As already mentioned, in the Netherlands, the court will always grant an injunction if infringement has been found. The wording of the injunction comprises general terms (e.g., ‘the defendant is ordered to cease and desist infringement of the patent in suit’) on pain of a penalty sum. The duration of the injunction is indefinite and will last until it has been lifted in appeal or in proceedings on the merits (in the case of a preliminary injunction). If the injunction is not lifted, it will last until the patent expires, unless the parties reach an agreement.

The territorial scope of an injunction is typically only the Netherlands; however, the Dutch patent court has shown that it is not reluctant to grant cross-border injunctions in preliminary injunction proceedings. In theory, a cross-border injunction is also available in proceedings on the merits, but in practice this does not really work because the court will then have to stay the proceedings until a decision on the validity of the patent has been rendered in the other countries for which an injunction was sought. This would lead to an almost indefinite stay of the infringement case for those countries.

Relief by the court will typically be granted notwithstanding appeal, meaning that the decision will be enforceable immediately once it has been served on the defendant and before a decision on appeal is available. If the first instance decision should be set aside on appeal, the party enforcing the first instance decision will generally be liable to bear the damage it thereby causes.

VI OTHER TYPES OF PATENT PROCEEDINGS

Except for patent proceedings relating to infringement or invalidity, it is also possible to start proceedings in the Netherlands for, inter alia, declarations of non-infringement, a compulsory licence and challenges of ownership of a patent. A special trend in biotech cases seems to be asking for an *Arrow* declaration,⁶ which under certain conditions is possible in the Netherlands.

An *Arrow* declaration is a declaratory judgment of the court that a certain product was already known in the prior art. This offers a party the opportunity to acquire more certainty about the infringing nature of its own product before entering the market, even though the patents of the patentee are not (all) granted in their final form yet.

Criminal court proceedings cannot be initiated by a civil party. Only the Public Prosecution Service can start criminal proceedings. If the public prosecutor decides not to prosecute an infringer, the patentee, if he or she has filed a criminal complaint, could start a procedure under Article 12 of the Dutch Code of Criminal Procedure before the competent Court of Appeal. In practice, however, patent infringements in the Netherlands are rarely dealt with in criminal proceedings.

VII APPEAL

Dutch law provides that decisions in the first instance are open to appeal. The Court of Appeal in The Hague has exclusive jurisdiction to hear appeals of patent cases. Under the Dutch system, appeals are *de novo*. The Court of Appeal has complete jurisdiction to decide on both the main claim (e.g., infringement) and the counterclaim (invalidity or revocation), subject to the parts of the decision with which the parties take issue. In those appeal proceedings, parties are free to adopt new positions and adduce new evidence.

As is the case in first instance proceedings, most proceedings are conducted through the exchange of written briefs between the parties, after which the case will be heard by the Court of Appeal. Defendants on appeal also have the opportunity to file a counter-appeal, in which they can advance their own grievances to the decision rendered in the first instance. Appeal cases are typically handled by a panel of three judges, taking anywhere between 16 and 20 months from the moment the appeal is filed until an appeal decision is reached.

It is difficult to predict the likelihood of overturning a decision. As appeals are *de novo*, one could argue that a party has the same chance of overturning the decision as he or she had winning the first instance case; however, because the first instance court is also a very experienced court, one could also assume that to win in appeal, a new line of reasoning, or at least a different emphasis on the arguments as brought forward in first instance, will be required to be successful in appeal. In almost all bigger patent litigation cases, the losing parties file an appeal against the decision in first instance, and those appeals are often successful.

The costs of an appeal are quite similar to the costs in first instance. In 2020, the appeal court fee for the majority of patent cases was only €760. Depending on, inter alia, the complexity of the technology, the facts of the case, the amount of patents in suit and pretrial remedies sought, lawyers' fees are around €30,000 to €250,000.

6 The name originates from an English case: *Arrow Generics Ltd v. Merck & Co Inc.*

VIII THE YEAR IN REVIEW

A specific trend in the past year's patent litigation is that there were several very significant standard-essential patent (SEP) cases pending in which a FRAND defence was raised.⁷ The Court of Appeal of The Hague has shown itself to be very strict if an implementer of an SEP does not act swiftly enough in taking a FRAND licence.⁸ I expect that SEP holders who believe their counterparties apply hold-out strategies will favour filing infringement suits at the Dutch patent court to try to force them to come to the negotiation table by threat of (in the Netherlands, still) an automatic injunction, which may be cross-border in preliminary relief proceedings.

There has been a lot of activity in the biotech and pharma fields. For instance, many biosimilar cases have been initiated in the past few years, but the majority of those cases are settled just before judgment. The Dutch patent court – like the UK High Court – has also expressed a willingness to hear *Arrow* declarations. It ruled that it had a discretionary power to grant a declaration (an *Arrow* declaration) that a generic pharmaceutical was known or obvious at the priority date.⁹

The availability, in principle, of *Arrow* declarations is very useful for generic pharmaceutical companies confronted with delaying tactics of the innovator company, effectively preventing the usual remedy of revocation proceedings in respect of granted patents.

IX OUTLOOK

I expect that more holders of SEPs will choose the Netherlands as a venue to sue non-willing licensees. The activity in pharma patent cases will probably stay the same as in previous years.

7 *Ericsson v. Samsung, SISVEL v. OPPO e.a, Philips v. Wiko, Philips v. Xiaomi*, etc.

8 *Philips v. Asus*, Court of Appeal of The Hague, 7 May 2019, Case No. ECLI:NL:GHDHA:2019:1065; *Philips v. Wiko*, Court of Appeal of The Hague, 2 July 2019, IEF 18562.

9 *Pfizer v. Roche*, District Court of The Hague, 8 May 2019, Case No. ECLI:NL:RBDHA:2019:4515.

ABOUT THE AUTHORS

WIM MAAS

Taylor Wessing NV

Wim Maas is a partner at Taylor Wessing's Dutch offices. The patents team, comprising three partners and 12 associates is part of the international patents team of Taylor Wessing, which is recognised as one of the largest and best-known in Europe. Wim focuses on litigation in patent cases, trade secrets and other technology-related disputes within the fields of telecoms, IT, pharma and electronics. He has been a lead lawyer in several high-profile, cross-border disputes.

Wim is a regular lecturer on dispute resolution topics and is the author of many publications in the field of patent enforcement and procedural law.

TAYLOR WESSING NV

Rue des Colonies 56
1000 Brussels
Belgium
Tel: +32 2 3202 251
c.dekoninck@taylorwessing.com

Parnassusweg 807
1082 LZ Amsterdam
Netherlands
Tel: +31 88 0243 020
Fax: +31 88 0243 003
w.maas@taylorwessing.com

www.taylorwessing.com

an **LBR** business

ISBN 978-1-83862-808-6