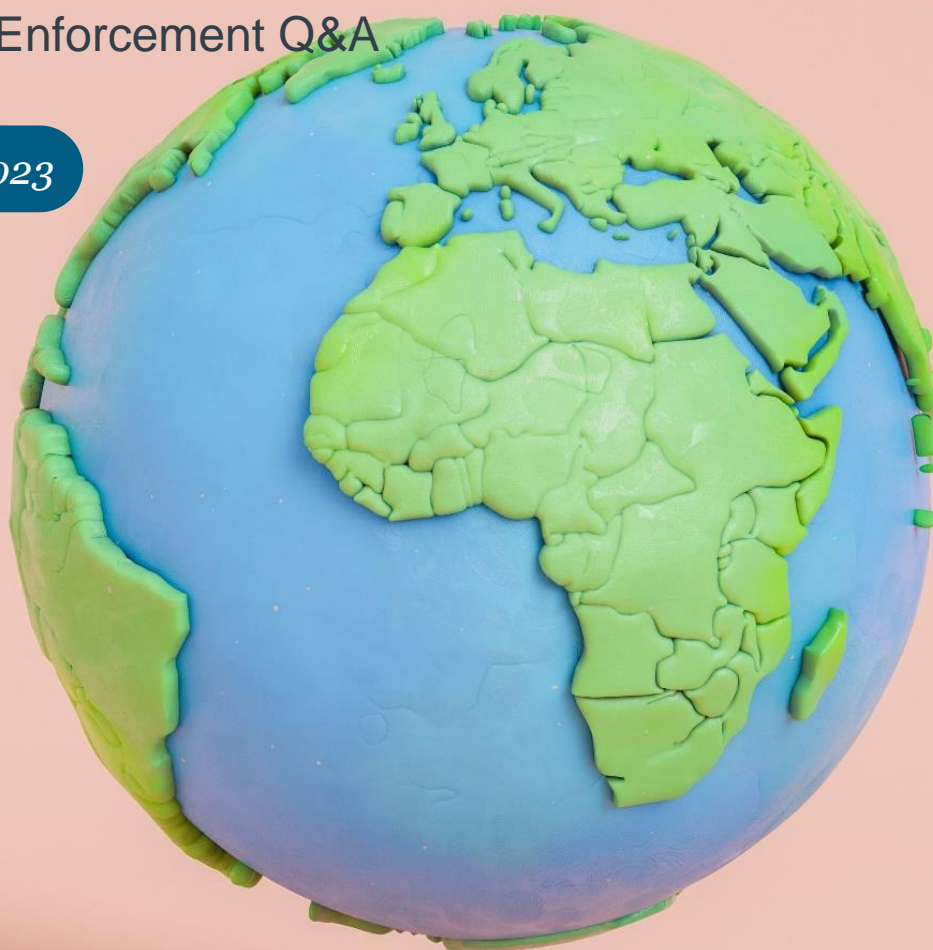


Bird & Bird

# The Netherlands

Patent Enforcement Q&A

*May 2023*



# The Netherlands – Patent Litigation

## Where can patent infringement actions be started? Is there a choice of venue?

Patent infringement proceedings are heard by specialised courts, namely the District Court of The Hague (first instance) and Court of Appeal of The Hague (second instance). The District Court of The Hague has exclusive jurisdictions to hear inter alia claims for PIs, invalidity, DNIs and entitlement.

## Are the judges' specialists? Do they have technical backgrounds?

There are specialised patent judges in the District Court of The Hague and the Court of Appeal of The Hague. If a case is heard by a panel of three judges, it may happen that one of the three judges would be less specialised. Some of the full-time and part-time judges also have technical backgrounds.

## How long does it take from starting proceedings to trial?

There are two procedural regimes for patent cases: the accelerated regime and the regular regime.

The aim of the accelerated regime is to have a hearing within one year, by setting fixed deadlines and fixing the hearing date at the outset of the proceedings. However, with a large influx of cases at the moment this period is more likely to fall between 12 and 18 months.

The regular regime has no fixed deadlines, and hence the time to a hearing date varies between cases. Furthermore, a hearing date is set in principle only after the written phase has closed. A final hearing may usually be expected to be between 12 and 24 months from commencement of proceedings.

## Can a party be compelled to disclose documents before or during the proceedings?

There is no general “disclosure” or “discovery” requirement.

However, the court may order a party to disclose specific documents or evidence upon a claim by the other party. This is possible both pre-action and during proceedings. The Court assesses the interests of the party involved in the disclosure and the relevance of the material. This may include an assessment on the likelihood of infringement based on the evidence reasonably available and the confidentiality of the material. Only specific documents can be sought.

The Court may also at any stage of the proceedings order any party to disclose certain documents or to clarify certain assertions.

## How are arguments and evidence presented at the trial?

Parties present their arguments and evidence by way of written submissions which are filed before the oral hearing.

At the oral hearing, each party has a fixed time to make oral submissions (usually around one and a half hours for initial submissions and then a few minutes for rebuttal submissions). The Court may ask questions to the parties and optionally to the experts present at the hearing.

Recently, it is also possible for the Court to convene short witness hearings at the first oral hearing. Other witnesses are usually heard only after the first decision of the Court, if the Court finds that further evidence is necessary following the detailed statements of the parties.

## How long does the trial generally last and how long is it before a judgment is made available? Are judgments publicly available?

The oral hearing (trial) usually takes about half a day.

At the end of the hearing, the Court indicates a date for the judgment (usually within 6 – 18 weeks from the hearing). However, it is possible that the actual decision is postponed.

Judgments are publicly available, but some confidential information may be redacted. Judgments are usually proactively published shortly after the decision, but otherwise they may be obtained by a request to the Court.

### Can a defence of patent invalidity be raised? Are infringement and validity issues heard together?

Invalidity is commonly raised as a defence and/or counterclaim.

Validity and infringement are dealt with in the same proceedings and are not bifurcated.

### Are infringement proceedings stayed pending resolution of validity in the national patent office (or, if relevant, the EPO) or another court?

The Court has discretion to stay proceedings if opposition proceedings are pending or if other proceedings are pending that may be relevant for the outcome of the case (such as invalidity proceedings between other parties or entitlement proceedings).

Generally, the Courts are reluctant to stay proceedings pending EPO opposition proceedings unless the decision depends on the outcome of the EPO proceedings (for example with multiple auxiliary requests) or the EPO decision is imminent. But in each case, this is up to the Court's discretion.

### Are preliminary injunctions available? If they are, can they be obtained *ex parte*? Is a bond necessary? Can a potential defendant file protective letters?

Preliminary injunctions are available if there is an "urgent interest" and is fact dependant. Urgent interest is generally deemed to be lacking if the patentee, after gaining knowledge of the infringement, fails to act in a sufficiently expedient manner without a good reason (negotiations on a settlement may be such a good reason). If the patentee lingers for too long, i.e. 2 years, urgent interest can be lost. Whether a preliminary injunction is granted depends upon a weighting of interest, combined with a preliminary substantive assessment of both the infringement and validity.

*Ex parte* injunctions are technically possible, but are extremely rare in patent matters (as opposed to counterfeit trademark infringement).

The Court may order a bond, but this is not customary. A bond may also be required for the legal costs of the proceedings, depending on the domicile of the claimant. If an injunction is later lifted (in appeal or proceedings on the merits), a party is generally liable for damages caused by enforcing a preliminary injunction. However, it is not yet clear whether this can be reconciled with the CJEU decision C-688/17 in Bayer Pharma.

Protective letters may be filed before the District Court of The Hague.

### Are final injunctions available as of right? Is a bond necessary?

Final injunctions are almost always available following a finding of infringement. An injunction will only be denied in exceptional cases. A decision may be enforced pending appeal, depending on the circumstances. In exceptional cases, the Court may declare the injunction as provisionally un-enforceable or to condition this upon placing a bond.

### What other remedies are usually ordered if a patentee is successful?

Available remedies include damages (or account of profits), delivery up and/or destruction of infringing goods.

A choice between damages or an account of profits is available if there was wilful infringement or if the infringer could have reasonably known to infringe (there is no defence of a good faith invalidity belief). The infringer is ordered to provide accounts to calculate damages or profits.

## Would the tribunal consider granting cross-border relief?

Cross-border relief is available if the Dutch court has jurisdiction on the matter. This is at least the case if the defendant is domiciled in The Netherlands or if one of the defendants is domiciled in the Netherlands and the claims are sufficiently closely connected.

In the case where the validity of a foreign patent is in issue, the case on the merits needs to be stayed pending a final decision on the validity of the foreign patent. However, the Dutch court can still grant cross-border relief on a provisional (preliminary) basis pending the outcome of the validity decision, and courts are generally prepared to grant such relief. The Court conducts a preliminary substantive assessment on the validity of the foreign patent (for example based on the evaluation of the validity of the Dutch equivalent of the patent) to ensure that an invalidity action against the foreign patent will likely not succeed.

## Is there a right of appeal from a first instance judgment? How long between judgment at first instance and hearing the appeal?

There is an automatic right to appeal (no permission or leave to appeal is required). The appeal needs to be instituted within 3 months (or 4 weeks in case of a preliminary injunction). The decision on the appeal can be expected within 12 to 24 months.

## Is an appeal by way of a review or a rehearing? Can new evidence be adduced on appeal?

Appeals are *de novo*, i.e. the Appellate Court will evaluate all relevant facts and evidence anew. This may include both new evidence as well as new grounds/arguments, including in principle new infringement allegations or new validity attacks. If necessary, the Appellate Court may also hear witnesses.

A further appeal is possible to the Supreme Court on matters of law or where the decision lacks sufficient reasoning so as to make it incomprehensible. Permission to appeal is not required but appeals to the Supreme Court can only be filed by attorneys admitted to the Supreme Court bar, who would first need to determine that there is an arguable case for Supreme Court review. The Supreme Court also has to possibility to refuse to hear an appeal.

## What is the cost of a typical infringement action to first instance judgment? If the issues of invalidity and infringement are bifurcated, what is the cost of the invalidity action? Can the winner's costs be recovered from the losing party? How much is the cost of an appeal?

Depending on the complexity of a case, and on whether both infringement as well as validity are at issue, the costs in first instance are likely to be around €100,000 - €600,000.

The costs for appeal are generally somewhat lower but given the *de novo* nature of appeal these may approach the first instance costs.

The "reasonable costs" of the prevailing party can be recovered from the losing party. There are indicatory fees for the "reasonable costs" that serve as customary upper limits, which are the same in first instance and appeal: €30,000 for simple cases, €75,000 for normal cases, €150,000 for complex cases and €250,000 for very complex cases.

*Note: The information in this document relates to litigation through the national jurisdiction and not the UPC.*

## *Author*



*Peter van Gemert*

Partner

+31703538954  
peter.van.gemert@twobirds.com



*Hester Borgers*

Associate

+442030176888  
hester.borgers@twobirds.com

twobirds.com

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