

Patent Litigation In The Netherlands: What You Need To Know

By **Matthew Bultman**

Law360 (August 20, 2018, 3:45 PM EDT) -- The final European stop on Law360's look at prominent patent jurisdictions is the Netherlands, a small country that punches above its weight in the patent litigation landscape, with fast-moving and inexpensive proceedings that allow patent owners to score powerful injunctions.

With a population of 17 million people, the Netherlands is slightly smaller than the state of New York. But despite not being a major economic market, the country has long been regarded as a heavyweight jurisdiction for patent enforcement.

The Dutch system is among the most cost-effective in the world, with proceedings that are overseen by highly regarded judges. And the country serves as a major distribution hub for Europe, meaning the impact of an injunction could reach well beyond its borders.

"If you can get a finding of infringement and an injunction in the Netherlands, you can effectively use that as a chokepoint to stop a lot of the inflow of the infringing products into the rest of the EU," Nitin Subhedar of Covington & Burling LLP said. "That's why the Netherlands is a particularly attractive forum for a patent holder to consider if you're trying to reach products in Europe."

Here is what you need to know about patent litigation in the Netherlands.

There's Only One Court

There is one court for patent litigation in the Netherlands, the District Court of The Hague, which has a specialized IP division.

There are no jury trials in the district court. Rather, cases are decided by a panel of three judges. These judges have an expertise in patent law and some have technical training as well, according to attorneys who said litigants can expect judges to be proficient in both the law and the technology.

The court of appeals, which is also in The Hague, has specialized IP judges as well.

"What you get is a small pool of very experienced judges that only deal with patent cases," Jelle Drok of Freshfields Bruckhaus Deringer LLP said.

Most district court cases are brought under the accelerated regime in patent cases, or ARPC. Cases in the accelerated regime follow a schedule that is set by the court at the outset, and judgments are generally reached within a year. That is less than half the average time to trial in the U.S.

"[The ARPC] gives the parties a lot of clarity about what to expect, and it gives you a relatively quick judgment," Drok said.

Injunctions Can Be Powerful

Although the Netherlands accounts for less than 3 percent of Europe's population and is not a major economic market, an injunction from a Dutch court can pack a strong punch.

The port of Rotterdam, in the city of Rotterdam near the North Sea, is the largest port in Europe, and a number of foreign companies, including many from Asia, have set up distribution centers in the Netherlands. So an order stopping the inflow of infringing products could cause a big disruption in a company's distribution of goods throughout Europe.

"What makes it a big threat is that the Netherlands for many companies functions as a distribution hub," Gertjan Kuipers of De Brauw Blackstone Westbroek NV said. "So it is not just the Netherlands that is being affected, it is the countries more downstream of the Netherlands."

Generally, when the court finds that a patent has been infringed, an injunction will be granted, attorneys said. It is extremely rare for a permanent injunction to be denied, in contrast to the United States, where such orders can be difficult for patent owners to obtain.

Dutch courts also sometimes issue cross-border injunctions that cover other European countries. This is something that other national courts have been reluctant to do, Bas Berghuis van Woortman of Simmons & Simmons LLP said.

Damages are available in the Netherlands when infringement is shown. These awards, which are meant to compensate patent owners for the infringement, can include money the patentee lost or the profits that were made by the infringer.

But in many cases, damages are determined in a separate proceeding after it has been decided that the patent is valid and has been infringed. Attorneys said it is rare that damages ever actually make it in front of the court.

"Nine times out of 10, once the liability is established, parties don't want to litigate about it and they simply come to a deal," van Woortman said.

No Discovery, One-Day Trials Make For Quick Proceedings

The Netherlands does not have a system for pretrial discovery like the U.S. or the U.K. And there are no depositions. This is part of the reason cases move quickly. But it can also present challenges if a patent owner needs to find evidence that is only in the hands of its adversary.

Still, attorneys said there are ways to fill the gap, through things such as reverse engineering and expert analysis. Information that is obtained through discovery in other jurisdictions can also be admissible in a Dutch court.

"Generally speaking, if you're able to establish ... the elements of your infringement claim and you can do that through the written submissions, there's certainly a path, even without discovery, to get to infringement findings," Subhedar said.

Certain mechanisms are available to obtain documents and other evidence. For example, patent owners can ask for seizure of evidence from their adversary. But attorneys said such orders can be difficult to obtain.

"We have some instruments, but they are in my view very ineffective," said Wim Maas of Taylor Wessing LLP, who has written about the topic.

Litigation in the Netherlands is focused largely on the exchange of briefs. The actual trials tend to be short, lasting just one day, according to attorneys, who said proceedings perhaps aren't as detailed as one might expect in the U.S. or the U.K.

"If a U.K. judge makes a judgment, every stone has been turned," Maas said. "Maybe in the Dutch system, like the German system, we balance it a little bit more to the side of efficiency and more cost-effective."

It's Cheap ... and the Loser Pays

Indeed, patent litigation in the Netherlands is, relatively speaking, fairly inexpensive. A case in the district court will typically cost \$150,000 to \$250,000, attorneys said.

Taylor Wessing ranked the Netherlands as the second most cost-effective country for patent enforcement in its 2016 Global Intellectual Property Index, trailing only Germany. The U.S., by comparison, was 26th in the report.

The Netherlands also allows the winning side to recoup reasonable legal costs from the losing side. Drok said it's not unusual for the two sides to compare legal fees before the court makes a decision on the merits and strike a deal about what the losing side will pay.

"Then the parties simply inform the court a settlement [on the costs] has been made and that settlement follows a decision from the court," he said.

The proceedings are conducted in Dutch, although the court can accept submissions in other languages, including German and English. This is unlike some other courts in Europe, and attorneys said it can help to save on translation costs.

--Editing by Brian Baresch and Aaron Pelc.

This story is part of a series highlighting some of the world's most prominent patent venues. Previously, we looked at patent litigation in Germany, the United Kingdom and China.