1. **How common is it for preliminary injunctions to be awarded in patent infringement actions?**

   Preliminary injunction proceedings can be initiated in the Netherlands, subject to certain restrictions. If the court is of the opinion that the patent is infringed and that there is not a significant chance that the patent will be revoked in opposition proceedings and/or nullity proceedings, the Dutch court is likely to grant a preliminary injunction. However, it is not uncommon that the subject matter will be considered too complex to be dealt with in preliminary injunction proceedings. Therefore, preliminary injunctions are not granted very often in complex patent infringement cases.

2. **What are the considerations that a court would weigh up in determining whether or not to award a preliminary injunction?**

   **Urgent interest**

   In most preliminary injunction proceedings in patent infringement cases, it is assumed that the patentee has an urgent interest to act against infringement of its patent, provided that the patentee has not waited too long before initiating preliminary injunction proceedings.

   **Validity of the patent**

   In preliminary injunction proceedings the Dutch court will not render a decision in respect of invalidity arguments. The court will however anticipate on the outcome of the proceedings on the merits and/or the opposition proceedings. If the court is of the opinion that there is a significant chance that the patent will be revoked in opposition proceedings and/or nullity proceedings, the Dutch court is likely to decline the preliminary injunction.

   If the patent has been revoked in opposition proceedings, it is not likely that the court will grant a preliminary injunction, unless the patentee proves that the Opposition Division has made an obvious mistake and/or there is new information that has not been taken into account in the opposition proceedings.

   If the patent has been upheld in Opposition, it is likely that the court will assume the validity of the patent, especially if the arguments in the Opposition Proceedings are identical to the arguments put forward by the defendant in the nullity action and if the Opposition Division has dealt with the invalidity arguments extensively. If however the court is of the opinion that there is a reasonable chance that the patent will be revoked in appeal proceedings, (i.e. because of the fact that the Opposition Division has made an obvious mistake, or has not taken into
account certain (new) documents) it is likely that the court will decline the preliminary injunction.

**Infringement**

In the preliminary injunction proceedings the Dutch court will deal with the infringement arguments on a *prima facie* basis. If the court is satisfied that the patent is being infringed, it is likely that the court will grant a preliminary injunction (provided that the patent is considered to be valid). If there is a complex debate between the parties about whether or not the patent is being infringed, the court will be more reluctant to grant a preliminary injunction.

**Complexity of the case**

If the patent infringement case is considered to be too complex to be dealt with in preliminary injunction proceedings and if it is not possible for the court to assess on a *prima facie* basis if the patent is being infringed, the court will decline the preliminary injunction.

**Balance of interest**

Ultimately, a balance of the parties' interest will be decisive. The court will weigh the interests of the patentee in granting the injunction against the interests of the defendant in declining the injunction.

3. **What is the balance between the substantive issues of infringement and validity, on the one hand, and other considerations, such as urgency/delay, the „risk of injustice“ or „balance of convenience“ – the impact that granting (or not granting) the injunction would have, on the other hand?**

The patentee's legitimate interest to enforce its patent against infringing parties will in most cases prevail, unless there are exceptional circumstances that justify that the defendant's interests should prevail. The mere fact that the other party will suffer considerable damages will not be enough, especially not if the patentee offers security. If there is no doubt about the infringement and if the patent is considered to be valid on a *prima facie* basis, it will be likely that the court will grant a preliminary injunction, unless there are exceptional circumstances as a result of which the interests of the defendant should prevail.

4. **We summarise the procedure for obtaining a preliminary injunction:**

   (A) **What evidence would the patentee be required to submit?**

   The patentee will have to prove that he is proprietor of the patent, or that he is entitled to enforce the patent as a licensee (and/or on the basis of a power of attorney) and that the patent in suit is in force.

   Furthermore, the patentee has to prove sufficient likelihood of infringement. He has to substantiate that the product and/or method used by the defendant falls within the claims of the patent. To this end the patentee may submit "claim charts" in which the claims of the patent are being compared to the product on a feature by feature basis and/or he may
submit a report of a patent attorney or an expert in which the infringement is further substantiated. Furthermore, the patentee has to provide evidence of a (threatening) infringement.

The parties are free to offer evidence. They may submit witness statements, expert reports and/or written documents. Given the nature of the proceedings, it is not common that the court will allow witness hearings in preliminary injunction proceedings.

(B) How long does it typically take to obtain a preliminary injunction in a patent matter?

Depending on the schedule of the court, a preliminary injunction in a patent matter can be heard within two weeks as from notification of the writ of summons. If the matter is very urgent, a hearing can be requested on shorter notice. In general the decision will be rendered within about three weeks after the hearing. This period can be shortened as well. The appeal proceedings take somewhat longer, as the parties have to submit written statements prior to the hearing. In urgent proceedings the court of appeal can expedite the appeal proceedings.

(C) Would a ‘temporary injunction’ be granted in the meantime i.e. pending the outcome of the decision re grant of a preliminary injunction?

There are no temporary injunctions that can be requested pending preliminary injunction proceedings as such. It is however possible to request permission to seize infringing products.

(D) What is the typical cost of preliminary injunction proceedings?

The costs of preliminary injunction proceedings in first instance amount to EUR 120.000 – 175.000, depending on the complexity and the scope of the matter.

(E) Is the procedure separate from proceedings on the merits? If so, is it necessary to commence proceedings on the merits?

The preliminary injunction proceedings are separate from proceedings on the merits. In its preliminary decision, the court will determine a reasonable period within which the parties will have to start proceedings on the merits. If the parties do not initiate the proceedings on the merits within this period, the preliminary decision will lose its effect upon lapse of this period. It is possible to request a preliminary injunction pending the proceedings on the merits.

5. What bond or undertakings are required in order to secure a preliminary injunction?

There is no bond or undertaking required in order to secure a preliminary injunction.
6. What is the consequence in damages and costs if a preliminary injunction is awarded but the patentee is ultimately unsuccessful?

If the patentee is ultimately unsuccessful (in appeal against the preliminary injunction order or on the proceedings on the merits), he will be liable for all damages the defendant suffered as a result of the enforcement of the preliminary injunction. Furthermore, based in the new EC Enforcement Directive, the patentee may be ordered to pay the reasonable costs the defendant made to defend its position (this includes all lawyer fees).

7. If you have any further thoughts on the likelihood of obtaining a preliminary injunction or the tactical considerations that would be relevant then please identify these.

There are a number of patent infringement cases, dated after the GAT/LuK decision of the European Court of Justice, in which the Dutch court granted a preliminary cross border injunction. According to the Dutch court, it can grant a cross border injunction in preliminary injunction proceedings because it does not give a final decision on validity and or infringement but a preliminary decision. If the patent infringement case can be presented to court as a simple and straightforward case, there is a reasonable chance that the court will grant a cross border preliminary injunction.

8. If a preliminary injunction is not granted, how long would it take to achieve a decision on the merits of the case?

Regular proceedings on the merits normally have a duration of two and a half years. The duration can be shortened if the parties allow only limited extensions for submitting their written statements. The appeal proceedings on the merits approximately have a similar duration.

9. Is there a procedure by which these proceedings can be expedited?

In the Netherlands, the patentee can request the court to apply an accelerated regime for patent proceedings. If the request is granted, the court will predefine a schedule to which the parties have to adhere. Accelerated patent proceedings have a duration of approximately one year from the writ of summons to the final judgement.

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