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Belgium
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1. What are the most effective ways for a European patent holder whose rights cover your jurisdiction to enforce its rights in your jurisdiction?

A patent holder has several options to enforce its rights in Belgium. It can initiate proceedings on the merits, summary proceedings, *ex parte* proceedings or *saisie-contrefaçon* proceedings.

Two types of proceedings on the merits are available: classic and accelerated. Classic proceedings take longer, but in such proceedings the patent holder can apply for both injunctive relief for the future and damages for past infringements, as well as for other measures available under the Patent Act (see Question 16). Accelerated proceedings are also on the merits, but the procedure is the same as in summary proceedings, with no need for urgency. In accelerated proceedings the patent holder can apply only for injunctive relief and publication measures, but not for damages.

When urgency is established, the patent holder can also initiate summary proceedings in order to obtain preliminary injunctions (see Question 13). In extremely urgent matters requiring an immediate decision to prevent or stop the infringement, the patent holder can apply for *ex parte* measures.

Another option is *saisie-contrefaçon* – which is an *ex parte* procedure specifically tailored to the infringement of IP rights which can be used to secure evidence and, as an accessory, to freeze allegedly infringing goods (see Question 6).

Finally, the patent holder can file a criminal complaint as patent infringements are considered to be criminal offences. This

is recommended only in clear cases of infringement where there are no doubts as to the infringer's intentions.

2. What level of expertise can a patent owner expect from the courts in your jurisdiction?

Belgium has no specialist patent courts. However, the Patent Act provides that only five Belgian courts can hear patent cases, in order to ensure a degree of specialisation. Belgian judges typically have a purely legal, non-scientific background. Therefore, in complex patent litigation the courts tend to use a court-appointed expert to provide technical or scientific advice.

3. How do your country's courts deal with validity and infringement? Are they handled together or separately?

The Belgian courts are competent to deal with infringement and validity; there are no separate courts for validity issues. Although infringement and validity are not always dealt with simultaneously, this is often the case. Indeed, in most patent infringement cases the defendant will invoke the invalidity of the patent as a defence and file a counterclaim based on one of the grounds for nullification set out in the Patent Act. If, on the other hand, the alleged infringer initiates proceedings in order to obtain a declaratory judgment for non-infringement or invalidity, in most cases the patent holder will file a counterclaim for patent infringement.

4. To what extent is cross-examination of witnesses permitted during proceedings?

The Judicial Code establishes a set of rules for calling witnesses. Witnesses will testify before the judge who conducts the examination. The parties'

lawyers cannot conduct an examination or cross-examination. In patent cases (and commercial matters in general), witnesses are rarely heard. Commercial proceedings such as patent litigation are mostly based on written evidence.

5. What role can and do expert witnesses play in proceedings?

As stated above, patent litigation is mostly based on written evidence. The parties are free to submit any evidence they wish. In patent litigation, technical reports from patent attorneys or other experts are usually submitted. Such reports have the same value as a party's statement. If there is still any doubt as to technical issues, the court can appoint an independent expert.

6. Is pre-trial discovery permitted? If so, to what extent?

There is no pre-trial discovery in Belgium. A party can request that the other party submit specific documents only if such documents are relevant to the case and if the other party should have or is presumed to have these documents.

Moreover, the Judicial Code provides for a "counterfeit seizure" – a kind of discovery measure. This is an *ex parte* procedure which can be used for two purposes: for a descriptive seizure (ie, securing evidence to prove the existence, extent and origin of the patent infringement) and as an accessory for an effective seizure (ie, freezing allegedly infringing goods). To obtain an order for a descriptive seizure, it is sufficient that there be a *prima facie* valid and enforceable patent and that the allegation of infringement be plausible. These conditions are usually met. An effective seizure can be ordered only on the additional conditions that the existence of the infringement cannot be reasonably contested (eg, on the basis of a foreign judgment or an expert report), and that the interests of the patent holder prevail over those of the alleged infringer or the general interest. The judge can also request the deposit of a guarantee before granting any measure.

7. Do the courts in your jurisdiction apply a doctrine of equivalents?

Equivalents are liable for patent infringement when they produce a similar technical effect in a similar way (same function) and a similar result that is not necessarily identical (leading to

the same result) as the patented invention.

8. Are certain patent rights (eg, those relating to business methods, software and biotechnology) more difficult to enforce than others?

In general, no type of patent is more difficult to enforce than others. However, complex patents of any type are unlikely to be dealt with in summary proceedings, as it will be difficult to establish *prima facie* infringement. For such complex matters, where the difficulty lies in the technology itself rather than in the legal questions, the Belgian courts will most likely appoint a judicial expert.

9. How far are courts bound by previous decisions made in cases that have covered similar issues?

As a general rule, Belgian courts are not bound by decisions of other courts in similar cases, whether Belgian or foreign.

10. Are there any restrictions on who parties can select to represent them in a dispute?

Only Belgian or foreign lawyers registered with one of the Belgian bars can represent parties in court. It is possible for a party to represent itself, but this is not recommended in patent cases. Patent attorneys are not allowed to represent parties in court.

11. Are courts willing to consider the reasoning of courts in other jurisdictions that have dealt with similar cases?

Even though Belgian courts are not bound by it, they can take into account the reasoning of other courts that have handed down decisions in similar cases. The Brussels courts tend not to look at foreign judgments, whereas the Antwerp courts are more inclined to do this. It is unlikely that foreign judgments can be used to overcome the *prima facie* validity of a European patent, but they might play a role in establishing non-infringement.

12. How easy is it for defendants to delay proceedings and how can plaintiffs prevent them from doing so?

Usually, a defendant will invoke the nullity of the plaintiff's patent to delay proceedings. It can file a counterclaim within the framework of the infringement proceedings or initiate separate proceedings in order to obtain a

declaratory judgment of the invalidity of the plaintiff's patent. If separate proceedings are initiated, the courts may stay the infringement proceedings. If still possible, the defendant may file an opposition before the European Patent Office (EPO); in such cases the Belgian courts tend to stay the proceedings, although this is not the case in summary proceedings. To counter these delaying tactics, in urgent matters the plaintiff can initiate summary proceedings to obtain a preliminary injunction.

13. Is it possible to obtain preliminary injunctions? If so, under what circumstances?

In urgent matters, patent holders can initiate summary proceedings in order to obtain preliminary injunctions. Preliminary injunctions will be granted under the following conditions:

- Preliminary injunction proceedings are available only when there is "urgency" – that is, when the patent holder has reason to fear imminent damage in the absence of a preliminary injunction and when the mere initiation of proceedings on the merits would not lead to a timely decision to prevent such imminent damage.
- To obtain a preliminary injunction, the patent holder must establish the existence of a *prima facie* valid patent and provide *prima facie* evidence of the infringement. In preliminary injunction proceedings, no full legal analysis of the parties' IP rights is carried out. Belgian courts generally presume that European patents are *prima facie* valid, even if opposition proceedings are pending before the EPO.
- Preliminary injunctions will be granted only after considering the various interests at stake (ie, the interests of both the patent holder and the alleged infringer, as well as those of third parties and the general public). In general, however, the courts often find in favour of the patent holders in order to protect investments, research and development.

14. How much should a litigant plan to pay to take a case through to a decision at first instance?

It is difficult to provide for a range of costs on patent litigation, as these depend on several factors (eg, the complexity of the case, the number of pleadings to be filed, possible expert testimony, pre-trial costs). Moreover, in most cases the assistance of a patent

attorney is required. The costs of litigation on the merits at first instance in a matter may amount to between €50,000 and €150,000.

15. Is it possible for the successful party in a case to obtain costs from the losing party?

In principle, costs are recoverable. A distinction should be made between legal costs on the one hand, and lawyers' fees on the other. As a rule, the unsuccessful party will be ordered to bear all legal costs (ie, costs related to service of documents, registration on the court docket, court-appointed expert fees, witness hearings (if any) and other expenses). Lawyers' fees are recoverable only on a fixed-rate basis, in principle determined on the amount claimed. Despite the fact that these rates were recently increased, generally they do not cover all lawyers' fees.

16. What are the typical remedies granted to a successful plaintiff by the courts?

The Patent Act provides for several remedies, such as injunctions against the infringer and intermediaries, damages, supply of information regarding the (scope of) infringement, recall and destruction of the infringing goods and publication of the judgment. If infringement is proven, the court will usually grant damages and an injunction against the infringer. In the event of bad faith on the part of the infringer (which is rarely accepted), the patent holder can apply to forfeit infringing goods and an account of profits by way of compensation. However, such alternatives will be deducted from the final compensation.

17. How are damages awards calculated? Is it possible to obtain punitive damages?

In principle, all damages caused by patent infringement must be compensated: direct damage (ie, the loss of profits caused by the sale of a competing infringing product) and indirect damage (ie, loss of reputation or exclusivity). The Belgian courts enjoy a large degree of discretion in awarding damages. In certain cases a detailed calculation of the damages is made based on, for example, accounting evidence submitted by the claimant and/or an expert. The importance of the infringement and the duration thereof are often taken into consideration when determining damages. When the compensation cannot be determined by

the court on the basis of objective criteria, the court may grant compensation as a lump sum based on an assessment in equity (*ex aequo et bono*). Punitive damages are not allowed under Belgian law. However, in certain cases the courts may order the forfeiture of infringing goods. In practice, this may be equivalent to an award of punitive damages.

18. How common is it for courts to grant permanent injunctions to successful plaintiffs and under what circumstances will they do this?

A permanent injunction can be ordered only by the judge dealing with the merits. If patent infringement is established, the court must issue an injunction against all infringers designed to stop the infringement; the Patent Act does not allow the court to establish infringement but not to issue an injunction. The injunction will remain valid for as long as the patent remains valid.

19. How long does it take to obtain a decision at first instance and is it possible to expedite this process?

A classic infringement trial on the merits may take 12 to 15 months at first instance. Accelerated proceedings on the merits may take four to eight months. Summary proceedings may take anywhere from six to eight weeks to four to eight months. Everything depends on the court's schedule, the speed of the production of evidence, the complexity of the case, the number of parties involved, the exchange of written pleadings by the parties and the appointment of an expert.

20. Under what circumstances will the losing party in a first instance case be granted the right to appeal? How long does an appeal typically take?

Almost all first instance judgments, including interim judgments, may be

appealed. The grounds for appeal are not limited and no permission to appeal is required. Appeal proceedings are a re-hearing of both the facts and the legal issues. As a rule, an appeal must be lodged within 30 days of serving the first instance judgment. This period is extended for parties located abroad.

Appeals relating to substantive proceedings take between two and three years, depending on the circumstances of the case (eg, its complexity and the number of parties involved). Appeals relating to injunction proceedings or summary proceedings generally take less time (six months to one year).

Appeal court decisions can be appealed to the Supreme Court, but only on points of law. These proceedings take around two years.

21. Are parties obliged to undertake any type of mediation/arbitration prior to bringing a case before the courts? Is ADR a realistic alternative to litigation?

There is no obligation to undertake any type of mediation or arbitration before bringing a case before the courts. Patent disputes may be handled by ADR. The Belgian Mediation and Arbitration Centre has built up a strong reputation over the years.

22. In broad terms, how pro-patentee are the courts in your jurisdiction?

As a rule, the Belgian courts are impartial – but in practice, they tend to be rather pro-patentee. However, the court's approach depends on the particular circumstances of the case.

23. Has your jurisdiction signed up to the London Agreement on Translations? If not, how likely is it to do so?

Belgium has not yet ratified the London Agreement on Translations. As language issues are usually sensitive in Belgium, it might take some time before Belgium ratifies the London Agreement. *iam*



Kristof Roox specialises in IP litigation in a variety of technological and commercial fields, with a particular focus on complex patent litigation in the pharmaceutical and life sciences sector. He advises on many aspects of IP portfolio management, including licensing, protection of trade and domain names, trade secrets, counterfeiting and piracy, technology transfer and strategic IP planning. He also has extensive experience in a wide variety of media law issues.

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