

Kluwer Patent Blog

A Dutch Treat - Picking Up the Bill in Patent Litigation

Rik Lambers (Brinkhof) · Wednesday, March 10th, 2021

What is it with the Dutch and money? How much truth is there in the cliché that the Dutch are cheap? Do we really get back to business after a romantic diner and split the bill to the cent? Where does this ‘going Dutch’ come from? That term, according to the Oxford English Dictionary, connects to phrases which have “an opprobrious or derisive application, largely due to the rivalry and enmity between the English and Dutch in the 17th century”. That is, the century of the Anglo-Dutch wars, the [Raid on the Medway](#), and several less successful interactions with our past favorite frenemies. Some under the bravery-inducing effect of *jenever* (the origin of gin), also known as ‘Dutch courage’.

Romantic diners aside, ‘going Dutch’ is not the norm when it comes to cost reimbursement in Dutch patent litigation (and to be clear: the courage of Dutch patent litigators is not due to drinking ‘jenever’ before a trial). In patent cases the winner pays nothing, but takes it all (at least, if (a threat of) enforcement is at issue; not in a ‘pure’ nullity actions, cf. the EU Court of Justice’s [Bericap/Plastinova judgment](#)). The losing party has to pay the legal costs of the winning party. No splitting bills. There may be some haggling about the amount of the winner’s bill (we’re still Dutch), and the court may lower the bill somewhat in view of reasonableness and fairness (not just because we’re Dutch, but because of Art. 14 of the EU Enforcement Directive). But...no Dutch treat in patent litigation.

Not before long, a losing party would have run the risk to be presented with the full bill, practically all costs of the winner (possibly with some haggling and reasonableness/fairness reduction). But no more: the Dutch patent courts have set caps (so-called indication tariffs) on the maximum costs to be reimbursed in patent litigation. For example, for the District Court these caps are (other amounts apply for the Court of Appeal and Supreme Court):

Case	PI (summary proceedings)	Merits proceedings
Simple	€ 10,000	€ 30,000
Normal	€ 40,000	€ 75,000
Complex	€ 80,000	€ 150,000
Very complex	€ 120,000	€ 250,000

Caps already applied in other IP cases for some years (but are lower than in patent cases). The courts, referring to the EU Court of Justice's [United Video Properties judgment](#), explains that these IP caps were introduced to provide parties guidance to assess the reasonableness and fairness of the legal costs and to estimate and increase the predictability of possible cost risks at an early stage. One may wonder if the haggling over costs in past procedures also played some role.

The courts have provided some criteria to determine if a case is simple, normal, complex or very complex (e.g. scope of the facts, grounds for the action and the defense, and the financial interest). Clearly, the proof will be in the pudding, i.e. upcoming cases and jurisprudence, as the courts provide little guidance on those criteria. Based on their past experiences, the courts note that it is expected a mechanical engineering case will be considered 'normal', a pharmaceutical case 'complex', and a telecom case with a FRAND defense as 'very complex'. The nature of the technology will not be considered decisive. And, the parties can still agree on a lump sum that exceeds the caps to be paid to the 'winner'.

These caps have been announced some months ago already (September 2020). Why then start about who has to pay the bill now? Because the cap only applies to cases for which a judgment has been set on or after 1 September 2020. Therefore, with some delay, we may expect the 'new' costs orders to make it into the courts' judgments the coming months (and years). At the moment, while a first capped order was granted (reducing 175K to 75K, the case being considered 'normal'; [decision here in Dutch](#)), 'old' cost orders are still granted. For example, two recent decisions - set for judgment before 1 September - contain costs orders exceeding 1 million euros (decisions [here](#) and [here](#), in Dutch).

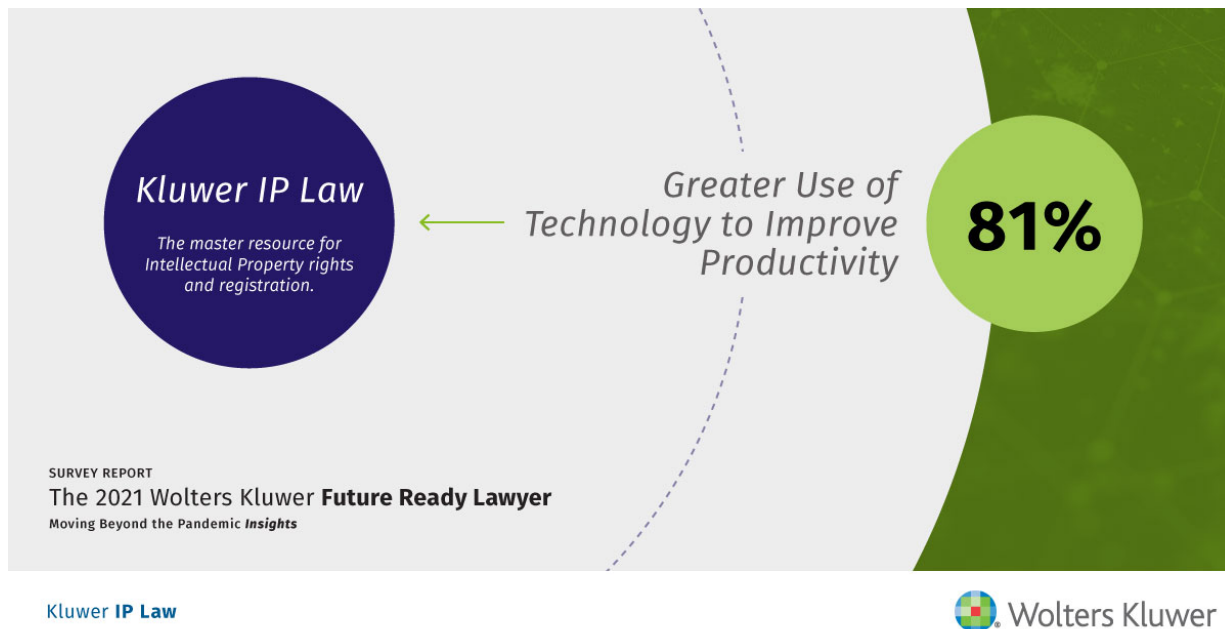
In sum, while patent litigation is still not going Dutch on costs, picking up the bill may hurt a (little) bit less.

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