

Outline talk Robert van Peurseem – VP District Court The Hague – on evidence, experts

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- New Dutch proceedings after implementation Enforcement Directive: evidence seizure/description/taking of samples
- Different practices across Europe despite harmonisation – a Dutch example:
- 2-staged evidence collection proceedings: preservation and putting into custody *ex parte* and leave to obtain access to evidence thus preserved ("exhibition"), D will be heard

- Experts: 2 main forms
- 1) Party-expert witnesses (frequently if not always)
- 2) Court-appointed experts (not often) – surprising? →
- 6 explanations why Dutch Patent Courts don't use Court-appointed experts that often:
 - Specialised patent Court judges in The Hague and specialised professional patent bar
 - Usually narrow technical problem at stake – judges are taught by parties, providing often technical primers
 - Judicial attitude = trying to fully understand technology at hand
 - Consulting prosecution history file (Dutch estoppel doctrine HR *Dijkstra/Saier*) – technical discussions in the file
 - Parallel litigation in Europe (everything in English is accepted without translation by the Courts – easy to "import" materials from abroad)
 - Party-experts present at the hearing and questioned if need be

- Damages in a nutshell (should we come to that timewise)
- 2-step infringement proceedings:
 - Damage award/surrender of profits in separate damage calculation procedure – settled as a rule
 - Option to choose between either
 - Lost profits (causality) – no fixed rules, nett profits only – or
 - Account of profits
 - Calculation:
 - Reasonable royalties/license analogy with penalty % mark-up
 - Any other means determined by the Court (full discretionary power, also *ex aequo et bono*)