Resolution of Patent and Technology Disputes by Arbitration and Mediation: A View from the United States

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1. INTRODUCTION

Technology-related litigation can be very expensive and time consuming. According to a 2007 survey, the average US patent infringement case costs more than $2.5 million.[1] The high costs are generally due to the immense amount of discovery, expert testimony, and legal fees. In litigation, as Abraham Lincoln said: "[T]he nominal winner is often a real loser in fees, expenses, and waste of time." Prolonged proceedings are especially harmful in patent cases because patent rights are time-sensitive and modern technology advances very quickly.[2] Being caught up in litigation over patents can halt a company's development and business strategies with respect to the involved technology. The parties are faced with difficult business decisions, which are complicated by the unpredictability of the litigation outcome. For example, a company's on-going business can be hurt if it is uncertain about the patent rights of one of its products and decides to reduce or eliminate production until the dispute is decided.

Also, parties in technology disputes regularly complain that the courts and juries are unpredictable and often render under-informed decisions. This is due to a court system with lay jurors and judges who do not understand the technology or issues. Most practitioners from outside the United States are surprised by the US system of solving patent cases by jury trial. There is risk for parties involved in litigation due to inconsistent verdicts and the duration of the process. In cases involving new or complicated technology, time is wasted teaching the judge and jury about the issues, and even then decisions are often of low quality and unpredictable.

2. ADVANTAGES OF MEDIATION IN TECHNOLOGY-RELATED CASES

In mediation, the high costs associated with patent disputes are greatly reduced because there is generally more limited discovery, less reliance on expert testimony, and a fact mediator who is knowledgeable in the specific technological area.[3] According to one commentator, clients who successfully use mediation can save more than 70 per cent of the normal costs of litigation.[4]

By using mediation, the parties can also avoid some of the risk associated with litigation where the court designates one side the winner and the other the loser. The flexibility of mediation allows the parties to explore innovative solutions that would not be possible in a

[1] This is for patent infringement cases where there is between $1–$25 million at risk. For infringement cases in where there is more than $25million at risk, the average case costs well over $5 million. AIPLA Report of the Economic Survey, I-93 (2007).

[2] S.J. Elleman, "Problems in Patent Litigation: Mandatory Mediation May Provide Settlements and Solutions" (1997) 12 *University of Baltimore Intellectual Property Law Journal*759.

[3] Sarah Tran, "Experienced Intellectual Property Mediators: Increasingly Attractive in Time of 'Patent' Unpredictability" (2008) 13 *Harvard Negotiation Law Review* 313.

[4] Danny Ciraco, "Forget the Mechanics and Bring in the Gardeners" (2000) 9 *University of Baltimore Intellectual Property Law Journal* 70.

court setting. This is especially helpful in patent licensing and infringement cases in which the parties can explore mergers, cross-licensing, royalty rate negotiations, etc.[5] Patent cases are particularly susceptible to mediation because they bring with them more opportunities for win–win outcomes. Also, through mediation, the parties can avoid the risk of the judge or jury giving an unreasonable award. Therefore, the flexible mediation process not only saves the parties money, but can also provide an outcome that is better for both parties than any court decision.

Due to its flexibility and ability to commence early, mediation can provide the parties with a quicker resolution of their dispute. Patent rights are time sensitive and, as the life cycles of technical innovations become shorter and shorter, delayed litigation can result in costly lost opportunities.[6] For example, each month of exclusivity for a pharmaceutical drug can be worth millions and any wasted time litigating patents can cost the company dearly. Litigation can last several years and the company's wasted time can be a much greater loss than even the ample legal fees. Unlike litigation, the mediation process can begin within weeks of docketing so that the parties do not need to passively wait on a court's docket.[7] The parties can control how long the proceedings last and set deadlines to ensure that no time is wasted. Although the great majority of patent cases are settled, the settlement process, while the case is in court, can be very long and expensive.[8] Mediation can help speed up the settlement process and help the parties begin negotiating earlier.

Whereas litigation provides limited confidentiality for the parties, mediation allows the parties to customise and fortify confidentiality in order to protect trade secrets and other valuable information. In litigation, a party can request protective orders in order to keep valuable information from the other party or the public.[9] However, parties in mediation can agree to make the entire proceedings confidential, including the terms of the settlement. Mediation communications are typically protected and not admissible into evidence in other proceedings.[10]

One of the most important advantages of mediation is that it often allows the parties to continue or create an ongoing relationship. Patent licensing disputes generally arise between parties who have developed a contractual relationship of some type. Mediation is less adversarial than litigation, making it easier for the parties to continue a business relationship after the proceedings.[11] Instead of litigating over issues of the dispute, the parties can work together with the mediator in order to find a solution that will satisfy their interests. In cases where the parties have the common objective of preserving their relationship and are willing to cooperate, mediation generally proceeds smoothly and is very effective.

3. ROLE OF THE MEDIATOR

In technology-related disputes, a successful mediation depends greatly on the mediator's strategy and contribution to the process. Mediators differ in the strategies they apply and

[5] W. Levenson Dean, "Let's Make a Deal: Negotiating Resolution of Intellectual Property Disputes Through Mandatory Mediation at the Federal Circuit" (2007) 6 *John Marshall Review of Intellectual Property Law* 369.

[6] Ciraco, "Forget the Mechanics and Bring in the Gardeners" (2000) 9 *University of Baltimore Intellectual Property Law Journal* 70, 71.

[7] Dean, "Let's Make a Deal" (2007) 6 *John Marshall Review of Intellectual Property Law* 369, 368.

[8] See Elizabeth Plapinger and Donna Stienstra, "Federal Court ADR: A Practitioner's Update" (2005) 14 *Alternatives to High Costs Litigation* 7.

[9] Federal Rules of Civil Procedure 2005 r.26.

[10] Dean, "Let's Make a Deal" (2007) 6 *John Marshall Review of Intellectual Property Law* 369, 369; Federal Rules of Civil Procedure.

[11] See CPR Technology Committee, *Alternative Dispute Resolution in Technology Disputes* (1993), p.3.

in their personalities. Mediation analysts have created two main orientations that have been used to describe mediators and their strategies, namely facilitative and directive. A facilitative mediator assumes that the parties are able to solve their dispute better than anyone else if they communicate and work together. The facilitative mediator's main mission is to facilitate clear communication between the parties and such mediators feel that it is inappropriate to give any type of opinion or suggestions as to what the parties should do. According to the facilitative orientation, any opinion given by the mediator might destroy the impartiality of the proceedings and the mediator likely knows too little to give an informed opinion in the first place.[12] This type of mediator typically conducts shuttle mediation, passing communications between the parties.

Unlike a facilitative mediator, a directive mediator believes that the parties need direction and advice from the mediator in order to effectively resolve the dispute. The mediators selected for disputes involving technology usually have experience or knowledge in the relevant industry or area of law. Directive mediators use their experience to help the parties and give guidance with respect to the issues of the dispute. Such a mediator uses the mediation proceedings to teach the parties to expand their vision on the issues and to generate options for resolutions.

A common complaint of attorneys and their clients in technology cases is that mediators do too little to help solve disputes, making mediation a waste of time. It follows that the most requested mediators are those that provide feedback to the parties or use some type of directive measures to help the parties.[13] Many parties prefer the directive style of former judges and mediators who act like judges in urging the parties toward settlement.[14] Whether it is true or not, most attorneys feel that they do not need a mediator in order to negotiate, and they only want a mediator who will make the mediation proceedings worthwhile.

In mediation of technology-related cases, the parties and the entire process can benefit from a somewhat directive mediator. In some situations a facilitative mediator is sufficient, when the parties are able to effectively negotiate with very little help from the mediator. More often, the parties are not ready to settle through negotiations because they have not arrived at a "moment of truth". Generally, opening the communication channels is not enough, and simple shuttle diplomacy between the parties is unlikely to be successful, absent the introduction of some leverage. Often, the parties must come to a realistic view of their risk in order to be motivated to settle early, and the mediator can help them predict a more realistic likely outcome if the dispute were litigated.

Many effective mediators are versatile and change their orientation and strategies as the dynamics and status of the mediation dictate.[15] In general, a mediator should begin the proceedings in a generally facilitative manner, but when that is not adequate, the mediator should try more directive measures. For example, a mediator might commence the proceedings by simply transferring communications between the separated parties without offering any input or active presence. However, when the negotiations break down or fail to progress, the mediator can begin offering advice and opinions to the parties. Some commentators have concluded that the best mediators are both facilitative and directive in varying degrees and depending on the progress of the mediation.[16]

[12] Dwight Golan and Jay Folberg, *Mediation: The Roles of Advocate and Neutral* (Aspen, 2006), p.118.

[13] J.W. Stempel, "Beyond Formalism and False Dichotomies: The Need for Institutionalizing a Flexible Concept of the Mediator's Role" (1997) 24 *Florida State University Law Review* 973.

[14] Stempel, "Beyond Formalism and False Dichotomies" (1997) *24 Florida State University Law Review* 973.

[15] See generally L.L. Riskin, "Retiring and Replacing the Grid of Mediator Orientations" (April 2003) 21 *Alternatives* 69.

[16] Stempel, "Beyond Formalism and False Dichotomies" (1997) 24 *Florida State University Law Review* 973, 952.

There are several directive strategies and measures that mediators can use to guide the parties toward a resolution. To be a directive and successful mediator in technology-related cases, preparation is key. In order to help the parties better understand the issues involved and the possible solutions, the mediator must first learn and understand the issues and the parties' positions and interests. To achieve this, it is beneficial for the mediator to require documents and briefs from the parties, prior to the mediation proceedings. The mediator should also find out if the parties or their clients have experience in mediation, and how the case got to mediation. When first speaking with the parties, the mediator can try to obtain information about the relationship between the parties to determine how much directive help they might need.[17] By obtaining as much initial information as possible about the parties and their dispute, the mediator can be prepared to better help the parties reach a solution.

Often in technology-related cases, specific mediators are selected for their experience and knowledge in the relevant field or area of law. Directive mediators use their experience and knowledge to help the parties search for a resolution to the dispute which preserves the interests of both parties. Throughout the process, the mediator should help the parties focus on their interests and not their positions so they can avoid emotional drawbacks and focus on mutually beneficial solutions.

Another directive strategy that can help mediators usher the parties toward a resolution is to discuss with the parties their cases, positions, and interests. In exploring a party's claims, mediators can play "devil's advocate" by assuming the role of the other party in probing and asking questions about the case.

Although many analysts think mediators should be purely facilitative, mediators in patent disputes should not be afraid to use directive measures especially when the negotiations are not productive and the parties are not nearing a resolution. In many cases, the parties want more than just facilitation of negotiations which could be done on their own. Facilitation is very important, but a mediator who is also proactively directive can make mediation effective in more cases.

4. CONCLUSION

Mediation has many advantages, especially in technology-related disputes where the litigation proceedings are protracted and the costs are high. The effectiveness of the mediation proceedings often depends on the orientation and approach of the mediator. For highly co-operative parties, a purely facilitative mediator may be sufficient, but in most patent cases the proceedings benefit from a mediator who uses directive measures and strategies to help the parties be more realistic. By adopting these suggestions, the parties and mediator can assure that mediation is more effective and worthwhile.

5. INTERNATIONAL ARBITRATION OF PATENT DISPUTES

Arbitration provides many advantages over patent litigation such as lower costs, shorter proceedings, and specialised arbitrators. Beyond the general benefits of arbitration, international arbitration at the WIPO Center of Arbitration and Mediation may provide additional benefits for international parties.

Arbitration is beneficial to the parties in patent disputes because the arbitrators selected by the parties are generally experts having specific technological or scientific experience in the field of the disputed patents. Such arbitrators, chosen for their specific knowledge of the subject matter and law, often make arbitration more efficient than litigation and eliminate much of the confusion and delays generally encountered in patent cases. The arbitrators more easily understand the technology and issues, eliminating much of the need for expert witnesses and argument between the parties. Beyond expediting the process, an experienced

[17] M.C. Aaron, "At First Glance: Maximizing the Mediator's Initial Contact" (2002) 20 *Alternatives* 184.

arbitrator may afford the parties a more objective view without the biases of the general public. Being familiar with the relevant industry and practices, the arbitrator is less inclined to hold the parties to standards above that of the industry or punish a party excessively because it did something the general public might consider wrong. An experienced arbitrator, who is familiar with the industry and knows its norms, is in a better position to decide whether one party has wronged the other and what a reasonable award should be. Arbitration replaces unpredictable judges and juries with arbitrators who are familiar with the specific technical and business norms involved in the dispute. In some situations, the arbitration may include a panel of arbitrators with varying backgrounds to help with an assortment of issues within the dispute. For example, in a mechanical patent case, the parties might select a mechanical engineer with experience in the relevant technical area, a business attorney, and a patent attorney, in order to assure a good understanding of most of the issues in the dispute.[18]

Another major advantage of arbitration in technology cases is that it saves time. A shorter arbitration process can be very favourable for owners of patents and other types of intellectual property. The parties and arbitrator can determine the duration of the arbitration proceedings beforehand, and the parties can adapt their business plans accordingly. Arbitration is generally much shorter than litigation because of limitations on discovery and due to expert arbitrators who better understand the issues. In most arbitration proceedings, provisional or interim remedies are available so the parties can protect their patents by defining their rights temporarily before the final decision.[19] Such interim remedies are a significant advantage over litigation because a party can protect its time-sensitive rights soon after it files a claim. Due to its flexible proceedings, arbitration is much more efficient and, with an experienced and efficacious arbitrator, the costs can be less than half those of litigation.[20]

In litigation, time and money can also be wasted in re-arguing the district court's interpretation of the claim. In patent cases, the Federal Circuit reviews the patent claim interpretations of the district court judges under a *de novo* standard. In effect, the parties are forced to completely re-litigate the issue of patent infringement on appeal.[21] Generally, at least one of the parties appeals to the Federal Circuit and both parties are forced to expend more money and time arguing the same points to the Federal Circuit. In arbitration, the parties can agree to make the arbitrator's decision final and not subject to appeal.[22]

Arbitration proceedings are also considered to be much less adversarial, making it possible to preserve business relationships between the parties.[23] In arbitration, the arbitrator can closely monitor the proceedings and make sure that neither side is acting unfairly. An experienced arbitrator also tends to eliminate unnecessary arguments between the parties. The parties and arbitrator can agree on an efficient schedule for the proceedings and both sides are usually happier because less time and money is expended.

Whereas trials are public, arbitration proceedings are private and confidential. The 7th Circuit Court of Appeals stated that those who:

[18] Tom Arnold, "Booby Traps in Arbitration Practice and How to Avoid Them" (1994) 396 *Practicing Law Institute/Patent Litigation* 222.

[19] J.A. Fraser, "Congress Should Address the Issue of Provisional Remedies for Intellectual Property Disputes Which are Subject to Arbitration" (1998) 13 *University of Baltimore Intellectual Property Law Journal* 514, 515.

[20] Tom Arnold, *Patent Alternative Dispute Resolution Handbook* (1991), para.5.03.

[21] K.M. Ruch-Alegant, "Markman: In Light of De Novo Review, Parties to Patent Infringement Litigation Should Consider the ADR Option" (1998) 16 *Temple Environmental Law & Technology Journal* 308.

[22] M.M. Lim, "ADR of Patent Disputes: A Customized Prescription, Not an Over-the-Counter Remedy" (2004) 6 *Cardozo Journal of Conflict Resolution* 164.

[23] G.A. Paradise, "Arbitration of Patent Infringement Disputes: Encouraging the use of Arbitration Through Evidence Rules Reform" (1995) 64 *Fordham Law Review* 264.

"...want secrecy should opt for arbitration. When they call on the courts, they must accept the openness that goes with subsidized dispute resolution by public officials."[24]

The flexibility of arbitration allows the parties to establish complete confidentiality within the proceedings and with regard to the award. Thus, the benefits of arbitration in patent disputes are significant and parties should look closely at these benefits when deciding whether to pursue alternative dispute resolution.

6. INTERNATIONAL PATENT DISPUTES

Developments in technology, transportation, and communications have created a worldwide network of intellectual property transactions and relations. Large and small corporations now obtain patents and license patents in numerous countries throughout the world, and not only in their countries of origin. To protect its patents in the court system, a patent owner whose patent is being infringed in several countries must bring an enforcement action in each of those countries. International patent litigation is increasing and great difficulties exist due to differing intellectual property philosophies among the nations. With increasing international litigation, there is a greater need for international patent arbitration which can provide solutions to the complications of international litigation.[25]

Views regarding patent registration, the extent of patent rights and public policy differ internationally. In some countries, an inventor can receive broad patent rights without much effort and in other countries it is very difficult.[26] Other countries, mostly developing countries, offer very little protection for patents within their borders.[27] Concerns about the differing national patent laws likely inhibit trade and commercial interaction between individuals or companies from different countries. With increasing transnational patent disputes, opposing parties desire a neutral forum for resolution of their patent disputes. International agreements and ADR provisions provide patent owners more security and predictability in international commerce. International arbitration provides means for patent dispute parties to use a more cost effective, formal, and private resolution procedure that effectively consolidates all of the separate national claims into a single proceeding.[28]

In international arbitration, arbitral awards are enforceable throughout most of the world under the New York Convention 1958.[29] By contrast, national court judgments are not enforceable under any similar treaty.[30] The New York Convention has been adopted by more than 130 countries and makes arbitral awards recognisable and enforceable in each.[31] This allows a single arbitration to adjudicate and enforce the parties' rights in all relevant

[24] *Union Oil Co of California v Leavell* 220 F.3d 562, 568 (7th Cir. 2000).

[25] World Intellectual Property Organization, Press Release No.93, October 1, 1993.

[26] M.S. Cohen, "Japanese Patent Law and the WIPO Patent Law Harmonization Treaty: A Comparative Analysis" (1994) 4 *Fordham Intellectual Property, Media & Entertainment Law Journa*l 849.

[27] Luxman Nathan, "Will the Pirates Walk the Plank? Prospects for Reform in India's Intellectual Property Rights Standards" (1994) 6 *Helvidius, Columbia University Undergraduate Journal of Law & Public Policy* 44.

[28] R.H. Smit, "General Commentary on the WIPO Arbitration Rules, Recommended Clauses, General Provisions and the WIPO Expedited Arbitration Rules" (1998) 9 *American Review of International Arbitration* 5.

[29] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3.

[30] Smit, "General Commentary on the WIPO Arbitration Rules" (1998) 9 *American Review of International Arbitration* 5, 6.

[31] See Michael Buhler *et al*., *Practitioner's Handbook on International Arbitration* Frank-Bernd Weigand, (ed) 2002), p.9. See also UN Commission on International Trade Laws, *Status of Conventions and Model Laws*, P6, UN Doc.A/CN.9/583 (May 9, 2005).

countries. The convention requires courts to enforce arbitral awards from foreign countries if the following requirements are met: the award is within the arbitrator's jurisdiction, the arbitration meets the minimal standards of fairness, the award is something amenable to arbitration, and the award does not violate public policy in the state where it is to be enforced.[32] These requirements are generally easy for the parties to satisfy in most cases. The last requirement is the most difficult and worrisome, but it has been construed narrowly.

7. WIPO

The World Intellectual Property Organization (WIPO) has played an important part in the protection of international intellectual property since its creation in 1967.[33] WIPO has participated in the registration of international patents and the development of international patent legislation.[34] It has many years of experience dealing with international intellectual property issues, unlike any other international institution. WIPO created the Arbitration and Mediation Center with its own sets of arbitration and mediation rules. WIPO designed its Center and rules specifically for the resolution of intellectual property disputes. At the WIPO Center, mediation is carried out by neutral intermediaries and arbitration is performed by either a neutral arbitrator or a neutral three-arbitrator panel. The Center and its rules offer patent dispute parties one alternative to international litigation.

Cost and time

The WIPO Arbitration Rules are set up to decrease confusion and unnecessary arguments between the parties in order to save time and costs. WIPO provides a recommended arbitration clause which states:

> "Any dispute, controversy or claim arising under, out of or relating to this contract and any subsequent amendments of this contract, including, without limitation, its formation, validity, binding effect, interpretation, performance, breach or termination, as well as non-contractual claims, shall be referred to and finally determined by arbitration in accordance with the WIPO Arbitration Rules. The arbitral tribunal shall consist of [three or one arbitrator]. The place of arbitration shall be [specify place]. The language to be used in the arbitral proceeding shall be [specify language]. The dispute, controversy or claim shall be decided in accordance with the law of [specify jurisdiction]."[35]

In this clause, WIPO recommends encompassing non-contractual as well as contractual claims relating to the agreement. This is important because in patent disputes the parties often assert infringement claims under a tort regime.[36] WIPO's recommended clause also includes the number of arbitrators, the place of arbitration, the language of the arbitration, and the law to be applied. This helps to avoid procedural disputes and other delays by forcing the parties to agree on these aspects long before the dispute arises. If the parties do not include a place and language in the arbitration agreement, then the WIPO rules give a procedure for selecting the language and place. Finally, the WIPO recommended clause includes a choice-of-law

[32] New York Convention Art.V(1)(b)–(2)(b).

[33] M.L. Cordray, "GATT v. WIPO" (1994) *Journal of the Patent & Trademark Office Society* 121.

[34] Frances Williams, "GATT Joins Battle for Rights to Protect—Frances Williams on Differences with WIPO over Intellectual Property Jurisdiction", *Financial Times*, July 7, 1994, p.7.

[35] WIPO Recommended Dispute Resolution Clauses, available at *http://www.wipo.int/amc/en/mediation/contract-clauses/clauses.html#4* [Accessed December 26, 2007].

[36] Smit, "General Commentary on the WIPO Arbitration Rules" (1998) 9 *American Review of International Arbitration* 5, 12.

provision which ensures that the parties' chosen law governs all claims in the arbitration, including infringement, tort, or statutory claims.[37]

Confidentiality

Some critics feel that the WIPO rules should be more narrowly focused on intellectual property cases because the rules are rather broad and could effectively be used to arbitrate any general business dispute.[38] However, WIPO generally specialises in intellectual property disputes. For example, WIPO rules provide detailed confidentiality provisions that may stop a party or business from falsely alleging infringement for the purpose of obtaining the other party's technology or trade secrets.[39] Articles 73 through 76 protect confidentiality generally as it pertains to the existence of the arbitration, the disclosures in the proceedings, and the awards. In Art.52, the arbitrators are given authority to issue protective orders for trade secrets and other valuable information. The rules also suggest that an expert advisor can be appointed to oversee issues of confidentiality, not only between the parties, but also with the arbitrators.[40] Therefore, parties in patent disputes can be confident that WIPO and its rules will provide sufficient protection and confidentiality of the information disclosed in the arbitration.

Neutrality

One possible advantage is that WIPO arbitration provides a neutral forum in which parties from different countries can resolve their disputes. The WIPO Center emphasises neutrality in its applied law, the language it uses and its institutional culture.[41] It is designed to be a neutral international institution with over 180 member states and a diverse staff. This can be especially important when the disputing parties are from countries with different views of intellectual property protection.[42] Further, the parties may be worried about adjudicating the disputes in the other party's country due to partiality and corruptness in that country. In general, neither party wants to litigate a dispute in the other party's country, and a single neutral forum is better than several national court actions under different national laws.[43] The WIPO Center provides a single proceeding with simplified rules, lessening the need for the parties to obtain local counsel, and further reducing costs. WIPO is preferred by most developing countries and has a long-standing image of neutrality and expertise in matters of patent law.[44]

There are other options but competing institutions such as the American Arbitration Association (AAA) and London Court of International Arbitration (LCIA) are often viewed as being tied to the governing powers of their geographic location.[45] AAA is the largest

[37] Smit, "General Commentary on the WIPO Arbitration Rules" (1998) 9 *American Review of International Arbitration* 5, 13.

[38] C.A. Laturno, "Comment, International Arbitration of the Creative: A Look at the World Intellectual Property Organization's New Arbitration Rules" (1996) 9 *Transnational Lawyer* 380.

[39] Robert Coulson, "Arbitration and Other Forms of Alternative Dispute Resolution: General Overview" (1994) *Worldwide Forum on The Arbitration of Intellectual Property Disputes* WIPO Publication No.728(E), 24.

[40] Martin, 964.

[41] "WIPO Arbitration Center Opens" (January 1995) *Journal of Proprietary Rights* 33.

[42] Jennifer Mills, "Note, Alternative Dispute Resolution in International Intellectual Property Disputes" (1996) 11 *University of Baltimore Intellectual Property Law Journal* 229, 230.

[43] Smit, "General Commentary on the WIPO Arbitration Rules" (1998) 9 *American Review of International Arbitration* 5.

[44] Laturno, "Comment, International Arbitration of the Creative" (1996) 9 *Transnational Lawyer* 377.

[45] Martin, 965.

arbitral agency in the world, but foreign parties are less likely to choose the AAA rules because they view it as a US institution rather than an international body.[46]

Flexibility

In Art.1 of the WIPO Arbitration Rules, the arbitration agreement is defined as an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them.[47] This is broader than most arbitration rules and it allows parties in a post-contractual dispute outside the scope of their original agreement, or parties not bound by a contract prior to the dispute, to use the WIPO arbitration rules and Center to arbitrate the matter.[48] This ability to arbitrate a post-contractual dispute or an infringement dispute can be significant in infringement and piracy cases where there is no contract between the parties.

Interim relief

WIPO provides the opportunity to get prompt interim relief early in the arbitration proceedings. Article 46 of the WIPO rules gives the arbitrator broad power to order provisional or interim measures including injunctions and orders of security.[49] This allows parties to enforce their rights early in the arbitration process and stop infringement sooner. The arbitrator may make the granting of such interim measures subject to receiving some type of security furnished by the requesting party. Arbitrators are given broad discretion which allows them to assess the specific situation and tailor a form of interim relief to best protect the parties.

Quality of judgments

Experienced arbitrators who are knowledgeable in the relevant technical issues, language and law are more predictable and efficient than most judges. The WIPO Center can assist in selecting experienced arbitrators and ensure that the proceedings are governed by the parties and arbitrators. An experienced arbitrator not only saves costs and time but also improves the quality of the decision.[50] Patent owners value experienced factfinders and a survey of intellectual property firms showed that most prefer professionals from the relevant field and also may question appointments by general arbitration associations.[51]

Expedited arbitration

Expedited arbitration may be important in patent cases because of the time-limited nature of patent rights.[52] Some complex patent disputes may not be suitable for expedited arbitration, which is generally designed for disputes with simpler issues and smaller stakes.[53] Unlike the rules of other institutions, the WIPO expedited rules do not authorise arbitrators to skip the

[46] C.P. Hall and S.J. Newton, "International Arbitration Bodies: A Survey" (1992) *New York Law Journal* 1.

[47] WIPO Arbitration Rules 2002 Art.1.

[48] See Smit, "General Commentary on the WIPO Arbitration Rules" (1998) 9 *American Review of International Arbitration* 5, 17–18.

[49] WIPO Arbitration Rules 2002 Art.46.

[50] Martin, 933.

[51] Martin, 933–34.

[52] Smit, "General Commentary on the WIPO Arbitration Rules" (1998) 9 *American Review of International Arbitration* 5, 28.

[53] Smit, "General Commentary on the WIPO Arbitration Rules" (1998) 9 *American Review of International Arbitration* 5, 28, fn.95.

evidentiary hearing at the request of one of the parties. However, the rules place a time limit on convening the hearing, and the hearing is limited to three days, which forces the parties to focus on key evidence and issues.[54] The arbitrators can extend these time limits in exceptional circumstances. To help the process move along, the time limit for closing the proceedings is set at three months and the time limit for the final award after the proceedings is one month.[55] With such limiting expedited rules, parties entering complex licensing agreements involving less-than-strong patents may decide not to use expedited arbitration in order to avoid a situation where they could not effectively present their case. On the other hand, the WIPO Expedited Rules provide an opportunity for parties to save time and money.

8. CONCLUSION

Many of the problems with patent litigation can be eliminated, or at least diminished, by the use of arbitration. Arbitration is cheaper, faster, provides better decisions, and offers the parties more confidentiality. In international litigation, patent owners also face the problems of litigating in numerous countries with different court systems and non-confidential proceedings. The WIPO Center provides one alternative.

[54] Hans Smit, "Fast-Track Arbitration" (1991) 2 *American Review of International Arbitration* 140.

[55] WIPO Expedited Rules Art.63.