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The EU reinvents the wheel

A study on the challenges of the Arbitration and Mediation
Centre in the Unified Patent System

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Summary

The Unitary Patent is a patent proposed by the EU that will make it possible for inventors to protect their inventions in all Member States by submitting a single patent application. This is intended to simplify the patent application procedure and mitigate the associated costs. The new patent is to be enforced under the exclusive jurisdiction of the Unified Patent Court. The Court is envisioned to provide swift decisions of high quality in disputes concerning the Unitary Patent. Together with the Court, an Arbitration and Mediation Centre is to be established, which is intended to complement the Court by offering a cost and time effective alternative to litigation. By introducing the Centre, the EU is for the first time sanctioning arbitration as a tool for solving IP disputes. Thus, the Centre will compete with established private arbitration and mediation institutes.

The purpose of this thesis is to analyse what legal challenges the Arbitration and Mediation Centre is facing and make suggestions to how they should handle these challenges. International commercial disputes are frequently resolved by means of arbitration and mediation. Patent disputes are also regularly arbitrated and mediated in non-governmental forums and concluded in private arrangement. This thesis analyses whether the procedural rules and institutional set up of the Centre is appealing to the needs of the parties.

The results of this thesis show that arbitration and mediation are chosen over court litigation due to among other things flexibility, autonomy and confidentiality. These advantages are especially appreciated in patent disputes. The Arbitration and Mediation Centre seems to be limiting the choice of law, thus restricting the flexibility and autonomy of the parties. In a similar way, the Centre seems to be bound by transparency rules, which may conflict with the confidentiality. The results of this thesis suggest that there is more work to be done by the EU to appeal to the needs of the parties and to be able to compete with the most popular private institutes.

Sammanfattning

Det enhetliga patentet är ett patent som föreslagits av EU som kommer att göra det möjligt för uppfinnare att skydda sina uppfinningar i samtliga medlemsstater genom att lämna in en enda patentansökan. Detta är avsett att förenkla patentansökan och minska de tillhörande kostnaderna. Det nya patentet kommer att kunna verkställas av den enhetliga patentdomstolen, som har exklusiv behörighet. Domstolen planeras att tillhandahålla snabba beslut av hög kvalitet i tvister som rör det enhetliga patentet. Vid sidan av domstolen kommer ett skiljedoms- och medlingsinstitut, *the Arbitration and Mediation Centre*, att inrättas som är avsett att komplettera domstolen genom att erbjuda ett kostnads- och tidseffektivt alternativ till rättegång. Genom att EU inför institutet sanktionerar EU för första gången skiljedom som ett verktyg för att lösa immaterialrättsliga tvister. Institutet kommer därför att konkurrera med redan etablerade, privata skiljedoms- och medlingsinstitut.

Syftet med denna uppsats är att analysera vilka rättsliga utmaningar som institutet står inför och komma med förslag på hur det ska lösa dessa utmaningar. Internationella kommersiella tvister avgörs regelbundet med hjälp av skiljeförfarande och medling. Även patenttvister avgörs genom skiljeförfarande och medling i icke-statliga forum med privata avtal som resultat. Denna uppsats analyserar huruvida institutets processuella regler och institutionella former tilltalar parterna.

Resultaten av denna uppsats visar att skiljeförfarande och medling väljs framför rättegång på grund av bland annat flexibilitet, autonomi och konfidentialitet. Dessa fördelar värdesätts särskilt i patenttvister. Det nya skiljedoms- och medlingsinstitutet verkar begränsa lagvalen och inskränker därmed parternas flexibilitet och autonomi. På liknande sätt verkar institutet vara bundet av regler om transparens, vilka riskerar att hamna i konflikt med konfidentialiteten. Resultatet av denna uppsats tyder på att det krävs mer arbete av EU för att appellera till parternas behov och kunna konkurrera med de populäraste privata instituten.

Preface

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Abbreviations

ADR	Alternative Dispute Resolution
CFR	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
ECHR	European Convention on Human Rights
EP	European patent
EPC	European Patent Convention
EPO	European Patent Office
EPUE	European patent with unitary effect
ICC	International Chamber of Commerce
OHIM	Office for Harmonization in the Internal Market
SCC	Stockholm Chamber of Commerce
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
UPC	Unified Patent Court
UPCA	Agreement on a Unified Patent Court
WIPO	World Intellectual Property Organization

1 Introduction

1.1 Background

The Unitary Patent, or the European patent with unitary effect (EPUE), is a patent proposed by the EU that will make it possible for inventors to protect their invention in all contracting Member States by submitting a single patent application. The current European patent (EP), administered by the European Patent Office (EPO), provides a single patent grant procedure, but not a single patent with regards to enforcement. The EP is therefore not a single Union-wide patent, but a bundle of national patents which has to be validated in each separate Member State to receive protection. Under the current system, inventors only patent their inventions in a handful of Member States, which means the inventions lack protection in some countries. The goal of the new patent system is to make the European system simpler and less expensive for inventors. It is intended to put a halt to separate validation procedures in each nation and radically mitigate the related translation costs. The system also aims to protect inventions better than the current system. The overall purpose of the new system is to stimulate research, development and investment in innovation, helping to boost economic growth in the EU.

To enforce the new system, the EU will establish the Unified Patent Court ('the Court') with exclusive jurisdiction over both the EP and the EPUE. The Court will consist of local and regional divisions of first instance, central divisions, and a court of appeal. The Court is envisioned to manage the patent disputes that inevitably will arise, including patent infringement and revocation of patents. The aim is to provide swift decisions of high quality and improve the enforcement of patents in the EU. This is intended to help especially small and medium-sized enterprises (SMEs) to enforce their patents and protect themselves against speculative claims.

In addition to the Court, an Arbitration and Mediation Centre ('the Centre') will be established. The role of the Centre is to complement the Court by offering the disputing parties to arbitrate or mediate their dispute, instead of litigating before the Court. The purpose of establishing the Centre is to promote a cost and time effective alternative to litigation and to meet the need for increased specialisation in patent dispute resolution. Through the introduction of the new system, it is the first time a legal product at the EU level sanctions arbitration as a tool for solving certain types of IP disputes.

1.2 Purpose and research questions

The purpose of this thesis is to analyse what legal challenges the proposed Arbitration and Mediation Centre is facing and make suggestions to how they should handle these challenges. Today, the resolution of international commercial disputes is frequently carried out by means of arbitration and mediation, also in the EU. Cross-border patent disputes are also resolved using arbitration and mediation. However, the inherent features of the patent limit the manners in which patent disputes can be arbitrated and mediated. Consequently, the possibilities of arbitration and mediation in patent disputes vary greatly between jurisdictions. International arbitration is usually executed by non-governmental forums and concluded in private arrangements under the recognition and enforcement of international conventions. These arrangements are thus binding in national courts. With the introduction of the Arbitration and Mediation Centre of the Unified Patent System, the EU is expanding its jurisdiction regarding European patent disputes. Thus, the Centre will compete with private arbitration and mediation institutes.

To be able to achieve the purpose stated above, the following primary research question had to be answered:

- What are the legal challenges facing the Arbitration and Mediation Centre and how should they be handled?

To be able to answer the primary research question of this thesis, the following secondary questions had to be answered:

1. What are the most important features of international commercial arbitration and mediation and why are these dispute resolution methods used?
2. How is arbitration and mediation used in patent disputes and why cannot all patent disputes be arbitrated or mediated?
3. Will the procedural rules and the institutional set up of the Unified Patent Court and the Arbitration and Mediation Centre appeal to the needs of the parties?

1.3 Delimitations

This thesis is limited to only focus on international commercial arbitration and mediation, its application on patent disputes and the Unified Patent System. It is neither intended to be a comprehensive guide to the procedural rules of different arbitral institutions, nor does it delve into national arbitration or mediation procedures. Moreover, the thesis only investigates arbitration and mediation and not any other alternative dispute resolution methods, such as expert determination or conciliation. Finally, it is important to point out that the conclusions drawn in this thesis are based on the information available at the time of writing. It may very well be that the legal problems presented in this thesis regarding the Unified Patent System are resolved by clarifications or reformations of the system.

1.4 Method

This thesis includes the use of legal dogmatic method, comparative method, economic analysis of law and empirical research. The secondary questions of the thesis are mainly based on *lex lata* argumentation, while the primary question is mainly focusing on *lex feranda* argumentation. *Lex lata* means that the argumentation is based on explaining ‘the law as it exists’ in a certain issue, while *lex feranda* means that the argumentation is based on explaining ‘what the law should be’ and entails trying to answer unresolved questions on a certain topic.¹ The *lex feranda* argumentation has been used mainly in the concluding Chapter 5, which in part is dealing with suggestions to improve or develop the Centre.

The legal dogmatic method aims to form a base which provides for an understanding and explanation of the existing law, while also providing for a further discovery and evaluation of the law.² The purpose is to try to investigate the meaning of a legal problem by using the generally accepted rules, legislation, preparatory work, case law and legal doctrine.³ The sources of law in the legal dogmatic method is seen as authoritative and used in accordance with the hierarchy of sources of law. The purpose is to interpret what the law states using acceptable legal argumentation.⁴ The legal dogmatic method has been criticised for being unscientific.⁵ However, the method should rather be described as a way to reconstruct the legal system, while at the same time not hindering or precluding the investigation of ideal solutions to the selected legal problem.⁶

The comparative method promotes a comparison between different legal systems to understand the similarities and differences.⁷ By doing so it lends perspective to the analysis and produces a more nuanced argumentation.

Using economic research in the analysis of law is a well-known practice dating back to the 1970s Chicago School of Law & Economics. The basic idea of the Chicago School, whose ideas have been spread globally, is that the law is (or should be) economically effective. This means that the law leads or should lead to economically effective allocation of goods. It is, however, difficult to extract the meaning of ‘effective’ in this sense. Furthermore, according to tradition, the legal system should first and foremost secure justice, not efficiency. The representatives of economics and law stresses that

¹ Jan Kleineman ‘Rättsdogmatisk metod’ in Maria Nääv and Mauro Zamboni (eds) *Juridisk metodlära* (2nd edn, Studentlitteratur 2018) 36.

² Jerzy Stelmach & Bartosz Brozek, *Methods of legal reasoning* (Springer Netherlands 2006) 17–19.

³ Kleineman (n 1) 21.

⁴ Claes Sandgren, ‘Är rättsdogmatiken dogmatisk?’ (2005) Vol. 118, No. 4–5, *Tidsskrift for Rettsvitenskap* 649–651.

⁵ Kleineman (n 1) 23.

⁶ Nils Jareborg, ‘Rättsdogmatik som vetenskap’ (2004) *SvJt* 4.

⁷ Filippo Valguarnera ‘Komparativ juridisk metod’ in Maria Nääv and Mauro Zamboni (eds) *Juridisk metodlära* (2nd edn, Studentlitteratur 2018) 143.

there exists no incongruity between justice and efficiency; efficiency is merely an extension of justice.⁸ When the concept of efficiency is used in this thesis it is to describe which method of dispute resolution is prone to be less costly and/or less time-consuming.

The economic analysis of law holds that patents are needed to promote creative initiatives. In a world with no patents, an inventor would risk being put out of business by an imitator copying the invention and selling it to consumers at a lower price. The inventor cannot compete with the low prices as the inventor needs to regain the initial investments in R&D. However, the patent excludes competitors from using the invention, which may result in higher costs for consumers. The economic analysis of law thus deals with the balancing of the promotion of innovation and the negative effects of monopolisation.⁹

The first survey included in this thesis is conducted by Christian Bühring-Uhle, author of *Arbitration and Mediation in International Business*, published by Kluwer Law International. The second survey is a survey conducted by UN agency WIPO. The third survey is conducted by White & Case, an international law firm specialising in business law. In using three sources with different angles of incidence, the risk of partisanship in the results is mitigated. However, the results of the surveys are not in any way treated as objective certainties in this thesis.

The thesis also includes research in the form of four in-depth interviews concluded with practising lawyers. The in-depth interview is a form of qualitative empirical research method that does not depend on statistics.¹⁰ Two of the interviewed lawyers are specialising in arbitration and/or patent law and working in major Swedish law firms, while the other two lawyers are working in large, international corporations based in Sweden dealing with patents. All four practitioners are based in Sweden and they are thus not representative in an international context. However, they are still relevant as they deal with international disputes. The purpose of conducting the interviews is to give the reader a practical perspective and highlight some of the theoretic assumptions made in the thesis. Many of the arguments displayed in the interviews are recurring and are in line with the other empirical findings. The opinions expressed in the interviews are not necessarily the official opinions of the respective companies. The interviewees have agreed to be published in this essay.

⁸ Stelmach and Brozek (n 2) 92–93.

⁹ Vladimir Bastidas Venegas 'Rättsekonomi' in Maria Nääv and Mauro Zamboni (eds) *Juridisk metodlära* (2nd edn, Studentlitteratur 2018) 203–204.

¹⁰ Lisa Webley, 'Qualitative Approaches to Empirical Legal Research' in Peter Cane & Herbert Kritzer (eds) *Oxford Handbook of Empirical Legal Research* (Oxford University Press 2010) 2.

1.5 Material and existing research

The legal sources on which this thesis is based are legislation and legal doctrine. The nature of arbitration and mediation entails that the decisions are confidential and thus not available to the public. Therefore, no case law is examined for this thesis. Furthermore, as the Unified Patent System is not yet implemented there exists no case law from the Court or the Centre. A considerable portion of this thesis is based on legal doctrine, which has been critically scrutinised and analysed. The legal doctrine is mostly comprised of literature and academic articles. There exists an extensive literature on international commercial arbitration and mediation. Arbitration and mediation in patents have also been written about, although there is very little written about the proposed Centre. In the comparative parts of this thesis, second-hand sources are used. This would normally not be optimal, as the preferred source would be the national legislations, but in this case the comparison is of subordinate importance. The author of this thesis is in any case not sufficiently skilled in the French, German or Italian languages.

1.6 Disposition

The thesis is separated into five chapters. Chapter 2 is answering the first of the secondary research questions regarding arbitration and mediation in commercial disputes. Chapter 3 is answering the second of the secondary research questions regarding arbitration and mediation in patent disputes. Chapter 4 is answering the third of the secondary research questions regarding arbitration and mediation in the Unified Patent System. Chapter 5 is summarising and expanding on the answer to the primary research question.

2 Arbitration and mediation in commercial disputes

2.1 Arbitration

2.1.1 Definition

Commercial arbitration is a private method of binding dispute resolution, by which the parties waive the right to a court procedure. The method is an ancient one, dating back to Plato's writings and Ancient Greece.¹¹ The arbitration procedure is initiated by the arbitrating parties, through a clause in their mutual contract, having agreed to resolve their disputes outside the judicial systems. Instead, the disputes are held in front of an independent court, a tribunal. The tribunal has no inherent jurisdiction or power, but their authority emerges from the parties' contract. The parties have agreed on the terms for the powers and duties of the tribunal, such as arbitrational rules and choice of applicable law. According to most legal systems, the arbitrators are obliged to rule according to the applicable law, unless the parties have agreed otherwise. For example, the tribunal is in most jurisdictions obliged to rule in accordance to what is considered a fair trial, including allowing both parties to present their case and defend themselves. Most national jurisdictions recognise arbitration as a legitimate and complete alternative to litigation in regular courts for resolving commercial disputes.

Typically, the arbitration entails a final and binding decision, which can be enforced in the nation states. The tribunal consists of one or three arbitrators, who correspond to the judges in a conventional court. The arbitrators are generally selected by the parties of the contract, but the parties can also agree that a third party, often an arbitration centre, select the arbitrators. This gives the parties some control over who is to resolve their dispute. The arbitrators are generally experts in the relevant fields or lawyers with great experience in the form of dispute in question. Sometimes arbitration is defined as an 'alternative dispute resolution' (ADR), but this is not an accurate description as ADR refers to non-binding resolutions that still need to be reinforced through litigation or arbitration, such as mediation.¹²

As was brushed upon above, the arbitration can either be administered by an arbitral institution or be administered ad hoc. Institutional arbitration has the advantage of being well-organised and pre-tested, with established prices and timetables. The parties do not have to spend time on negotiating fees and the

¹¹ Nicholas Geoffrey Lemprière Hammond, 'Arbitration in Ancient Greece' (1985) Vol. 1, No. 2, *Arbitration International* 188–190, 188.

¹² Latham & Watkins, 'Guide to International Arbitration' (2017) 3
<<https://www.lw.com/thoughtleadership/guide-to-international-arbitration-2017>> accessed 8 May 2020.

final decision of a credible institution is less likely to be debated and contested. In an ad hoc arbitration there is no administrative apparatus set up on beforehand. Instead, the parties will have to agree on how the procedure should unfold. There are two advantages to this. The first is that the parties can tailor their own procedure to fit their specific kind of dispute. The second is that the parties do not have to pay high fees to the arbitration institution for managing the procedure. In using the ad hoc arbitration there is always the looming risk of the parties not being able to agree on the procedural rules. This may in the end force the parties to turn to court litigation, which was precisely what the parties sought not to accomplish when they agreed on settling their disputes through arbitration.¹³

2.1.2 Purpose

The purpose of the arbitration is to give the parties autonomy and control over the process for the resolution of their disputes. This is particularly important in international commercial arbitration since the parties want to avoid being subject to the jurisdiction of the other party's court system. Arbitration therefore offers a more neutral ground, where the parties presume that they will receive a fair hearing. There is also a flexibility in arbitration, as the parties have the ability to customize the process to their needs, including selecting skilful arbitrators. Arbitration is today the most common form of dispute resolution in international business transactions.¹⁴ The extended use of arbitration for dispute resolution is a product of the expansion and globalisation of cross-border investment and trade. In industries such as shipping, construction, and insurance, arbitration is the standard method for resolving disputes, where special expertise is required to reach a reasonable decision. Over the last 50 years, arbitration has spread to other industry sectors, as their business has become ever more multifarious and international.¹⁵

2.1.3 Characteristics

2.1.3.1 Consensual

An elemental characteristic of arbitration is that it is consensual, which means that arbitration can only take place if both parties have agreed to it in advance. The consent is usually inscribed in the parties' mutual contract as an arbitration clause, which regulates potential future disputes between the parties. The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention') is a convention from 1958 adopted by the United Nations which requires courts of signatory states to give effect to private arrangements to arbitrate and to recognise and enforce

¹³ Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration* (3rd edn, Cambridge University Press 2019) 10–11.

¹⁴ Moses (n 13) 1–2.

¹⁵ Moses (n 13) Foreword.

arbitration awards made in other signatory states. The convention is a product of the United Nations Commission on International Trade Law, which aims to harmonize and unify international trade law. The convention is applicable to an ‘agreement’ between the parties to arbitrate.¹⁶ Therefore, it is not possible for one party to take the other party to arbitration without a mutual agreement. However, the parties can also choose to enter into arbitration after the dispute has arisen. Such an arrangement is called a submission agreement.¹⁷ These retrospective arrangements might be difficult to reach, since the parties usually only see to their own interest in a pressured situation such as this.¹⁸

2.1.3.2 Confidential

Litigation processes are often public, which means that the facts of the case can be disclosed to competitors. Publicity is the main rule and confidentiality is an exception. The reason for court proceedings being public is a product of fundamental legal principles such as the principle of public access and the principle of transparency. In turn, these principles have their roots in the principle of separation of powers and the idea that it should be possible for the public to scrutinise the power. However, these principles are not prioritised in arbitration, as the disclosing of the dispute to the public may impede the will of the parties to compromise and may solidify their stances, mitigating the risks of reaching a conclusion in the dispute.

A great advantage of using arbitration instead of a litigation procedure is that the parties can keep the arbitration confidential – arbitral hearings are practically always unavailable to the public and press.¹⁹ Even the fact that an arbitration is pending is often made confidential. The reason for this is that the involved companies do not want to disclose any business information that could be detrimental to them. The losing party rarely wants a negative outcome to become public.²⁰ The degree of confidentiality varies in the arbitration laws of different jurisdictions, so introducing a confidentiality clause in the arbitration agreement can be beneficial for the parties.²¹ In fact, many international companies actively seek and prefer the confidentiality that the arbitration procedure offers. Empirical research by Bühring-Uhle shows that confidentiality is the third most important factor for choosing arbitration over litigation.²² Other, more recent, surveys show that confidentiality is

¹⁶ United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958 (New York Convention), Article II.

¹⁷ Moses (n 13) 2.

¹⁸ Latham & Watkins (n 12) 8.

¹⁹ Gary B. Born, *International Arbitration: Law and Practice* (Kluwer Law International 2016) 13.

²⁰ Moses (n 13) 4.

²¹ Latham & Watkins (n 12) 5.

²² Christian Bühring-Uhle, ‘A Survey on Arbitration and Settlement in International Business Disputes’ in Christopher R. Drahozal and Richard W. Naimark (eds) *Towards a Science of International Arbitration: Collected Empirical Research*, Kluwer Law International 2005) 35.

ranked in sixth place²³ and fifth place²⁴. These surveys show that confidentiality is important for the parties, but it is not the most decisive factor for choosing arbitration over litigation.

2.1.3.3 Neutral

Arbitration seeks to be neutral. This means that the arbitrators are nongovernmental and that no party is given the advantage of arbitrating ‘at home’, as the parties are free to choose language, venue and applicable law. The primary object of the arbitrator is to settle the dispute to the liking of the parties, and he or she does not necessarily have to take into account issues of public interest or public policy. It is also in the interest of the arbitrator to be selected for duty by the parties in future disputes and therefore the arbitrator needs to be seen as rational, composed, and just.

Each party will often start business negotiations by advocating the local court where that party’s principal place of business is situated. This will be most convenient to them, and consequently most inconvenient for the counterpart. As negotiations progress, the parties will generally realise that it will not be possible to choose their home court, and they direct their attention to finding a neutral ground instead. A neutral forum is not the most favourable to either party, but most companies find that there are benefits to presenting their case before an objective and impartial judge. As Born puts it: ‘the party typically does not agree to arbitrate because arbitration is the *most favourable* possible forum, but because it is the *least unfavourable* forum that the party can obtain in arm’s length negotiations’²⁵. However, the parties seem to appreciate this characteristic of the arbitration procedure, as neutrality is ranked number one, according to empirical research by Bühring-Uhle.²⁶ In later surveys, neutrality is ranked fifth²⁷ and sixth²⁸.

2.1.3.4 Final and enforceable

The decision of the tribunal is final and enforceable. By agreeing to the arbitration, the parties also concur to executing the decision of the tribunal without delay. An additional characteristic of the international arbitral procedure is that the decision of an arbitration tribunal cannot be appealed in a higher court.²⁹ This is a distinct difference to most procedures of first instance national court decisions. This feature is greatly popular with the

²³ WIPO website, ‘Results of the International Survey on Dispute Resolution in Technology Transactions’ (March 2013) 5 <<https://www.wipo.int/amc/en/center/survey/results.html>> accessed 8 May 2020.

²⁴ Paul Friedland, ‘2018 International Arbitration Survey: The Evolution of International Arbitration’, 9 May 2018, White & Case Publications 7 <<https://www.whitecase.com/sites/whitecase/files/files/download/publications/2018-international-arbitration-survey.pdf>> accessed 8 May 2020.

²⁵ Born (n 19) 8.

²⁶ Bühring-Uhle (n 22) 35.

²⁷ WIPO (n 23) 5.

²⁸ Friedland (n 24) 7.

²⁹ Born (n 19) 11.

parties, as it saves both time and money (as presented in subsection 2.1.3.6). Empirical research by Bühring-Uhle shows that the absence of appeal possibilities is the fifth most popular characteristic of the arbitration procedure.³⁰

As presented above, international commercial arbitration awards are enforced by national courts under the New York Convention. According to this convention, the decision can be set aside only in very limited circumstances.³¹ A party can try to oppose the decision in the nation where the seat of the arbitration was, but most national arbitration rules are equally restrictive in nullifying an arbitration decision. If the losing party refuses to comply with the decision, the other party may try to enforce the decision in a jurisdiction where the losing party holds assets. However, the decision cannot be overturned on grounds of mistakes of law or mistakes of fact. Once the decision is enforced in a specific jurisdiction, the arbitration decision is to have the same effect as a court decision.³²

In summary, the New York Convention ensures that decisions of the tribunal are enforced and interpreted in a speedier fashion than forum selection clauses. In the EU, forum selection clauses are enforced through Brussels I Regulation³³, which points out which national court is the competent court, but the regulation does not provide the same powerful enforcement mechanism as the New York Convention.³⁴ Research shows that the guarantees that the decisions can be enforced internationally is a very popular characteristic of the arbitration procedure, ranked second³⁵, third³⁶ and first³⁷ in surveys comprising the most popular features.

2.1.3.5 Flexible and autonomous

Other important characteristics of the arbitration procedure are that it is generally more flexible and autonomous than court proceedings. The parties are not submitting their dispute to a governmental decision-maker, which means that they have the freedom to compile their own decision-maker. This entails that the parties can pick arbitrators that are experts in the relevant fields of the dispute. They even have the freedom to select different arbitrators for different categories of disputes. The decision of an expert with the appropriate experience in the field is more likely to be accepted by the parties than the decision of a common court judge. If the parties have not agreed on who is to

³⁰ Bühring-Uhle (n 22) 35.

³¹ New York Convention (n 16), Article V.

³² Moses (n 13) 3.

³³ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (Brussels I Regulation).

³⁴ Born (n 19) 9.

³⁵ Bühring-Uhle (n 22) 35.

³⁶ WIPO (n 23) 5.

³⁷ Friedland (n 24) 7.

arbitrate, the arbitration institution to which the dispute is submitted will choose arbitrators for them.³⁸

The parties are also free to choose which substantive laws and procedures to be applicable in their arbitrations. The procedure can thus be custom-made to fit their particular dispute and ignore the formalities of regular court proceedings.³⁹ In some disputes, when this is preferred, the parties can agree to use a shallower procedure in order to receive a swift resolution. In other disputes, the parties want a more thorough procedure, depending on the dignity of the dispute. The parties are free to choose whether or not to conduct an oral hearing, whether or not to call witnesses, and whether or not to allow appeals. Although all this flexibility and autonomy has undisputed benefits, it can also lead to the parties arguing over procedural rules, if they have not included these rules in their mutual contract on beforehand.⁴⁰

2.1.3.6 Time and cost saving

Arbitration is generally considerably shorter than litigation, although both may require substantial time.⁴¹ As we have seen, the decision of the tribunal often cannot be appealed, which saves time. The principal of arbitration is that the parties can choose themselves how encompassing the procedure should be. The parties decide if they would like a more detailed preparation process preceding the deliberation of the arbitrators, or if they want the arbitrators to make a swift decision based on the facts at hand. As was brought up earlier, the parties can even waive the right to an oral hearing, or they can empower the tribunal to decide according to principles of fairness rather than the according to the law. In practice, international commercial arbitration can be lengthy. The most popular arbitration institutions have many clients, and this could delay the arbitration. Excluding the specialised arbitration centres, a major commercial arbitration can take between 18 and 36 months. There is generally an option to fast-track the procedure, but it is still dependent on the pace of the arbitration institution.⁴²

As presented above, the arbitration procedure can be modified in accordance with the wishes of the parties, with the ultimate goal of saving time for the parties. A shorter procedure also generally means lower costs. This does not mean that arbitration is cheap – the international commercial arbitration procedure is subject to large fees for hiring both arbitrators and facilities. Furthermore, it is not always the case that arbitration is cheaper than litigation. This can be the case if the parties overlooked introducing a clause on exclusive forum selection in their mutual agreement. If they have not introduced such a clause, the arbitration may have to be processed in several, separate national courts, which may turn very expensive for the parties.⁴³

³⁸ Born (n 19) 3.

³⁹ Born (n 19) 11–12.

⁴⁰ Latham & Watkins (n 12) 6.

⁴¹ Born (n 19) 12.

⁴² Born (n 19) 13.

⁴³ Born (n 19) 12.

Commercial arbitration is by design intended to be faster and cheaper than national court proceedings, but the reality is that commercial arbitration can be both costly and lengthy for the parties. However, one crucial factor for cutting costs and saving time is the absence of the possibility to appeal the decision of the arbitration. This generally saves a lot of time and money for the parties.

The research of Bühring-Uhle shows that the cost aspect is one of the least popular factors for choosing arbitration, ranking number ten out of the eleven most popular factors.⁴⁴ These findings are duplicated in a survey from 2018, where cost is ranked nine out of the nine most popular characteristics.⁴⁵ These findings are however contrasted by a WIPO survey (2013), where cost was ranked the most popular feature of arbitration.⁴⁶ The surveys on the time aspect look similar. In the Bühring-Uhle research, time was ranked number seven, which makes it one of the least popular factors for choosing arbitration. Similarly, time was ranked low in the 2018 survey, ending up eight out of nine factors. However, in the WIPO survey time was ranked as the second most popular factor for arbitrating.

The answer to why the respondents of the WIPO survey ranked cost and time so high lies in the more detailed answers from the respondents. To understand these answers and make use of them some numbers will have to be presented. The respondents in the WIPO survey indicated that they spent on average three years on court litigation in their home jurisdiction, three and a half year in another jurisdiction, but only slightly more than one year on arbitration. Similar differences were found regarding the costs; the respondents spent on average 440,000 Euro on court litigation in their home jurisdiction, 785,000 Euro in another jurisdiction, but only 370,000 Euro on litigation. The survey strongly indicates that there is a lot of time to be saved in arbitration compared to litigation. When it comes to the costs there are seemingly small differences between litigation at in one's home jurisdiction and arbitration. However, litigation in another jurisdiction is on average considerably more expensive – 212 per cent more expensive – than arbitration.

Without an arbitration clause (or a forum selection clause) in their contract, parties bound by EU law will have to seek their answer in the Brussels I Regulation (recast) regarding which national court is competent to rule in their dispute. This uncertainty of having to litigate away from home is a risk that the parties do not want to take. In short, there seems to be a lot of time to save in choosing arbitration over litigation and this is something that the parties appreciate. Furthermore, there are no guarantees that arbitration is less expensive than litigation. This is reflected in the fact that participants of the 2018 survey ranked cost as the least popular characteristic of international arbitration.⁴⁷ In conclusion, arbitration is chosen over litigation due to the time saving aspect, and not necessarily the cost saving aspect.

⁴⁴ Bühring-Uhle (n 22) 35.

⁴⁵ Friedland (n 24) 7.

⁴⁶ WIPO (n 23) 5.

⁴⁷ Friedland (n 24) 8.

Practitioner's perspective

Who: Anna Juhlin, Lawyer and Senior Associate

Where: Advokatfirman Lindahl, Malmö

Anna Juhlin has experience in arbitration and is used to balancing between choosing arbitration or court proceedings. In her experience, it is common that the client has not even reflected on the dispute resolution alternatives before the dispute emerges. The larger amount that is disputed, the more likely that they will choose arbitration as their resolution mechanism. The more delicate matter it is, the more likely they will choose arbitration. If time is an issue, then arbitration is also preferred. However, arbitration is almost always more expensive than court proceedings, she concludes.

Her law firm often refers to SCC and their model clauses when drafting arbitration clauses. They often use combined clauses, which means that the parties first should resort to Expedited Arbitrations, which is a shorter procedure with limited costs, and if that do not resolve the dispute, then the parties will have to resort to a longer form of arbitration. If the client is a municipality, the municipality often wants to resolve their disputes in a court. Large private law disputes rarely are disputed in court.

If the parties have an ongoing collaboration and there are no other partners available on the market, then the parties are more likely to choose arbitration over court proceedings. Furthermore, if the counterpart is bankrupt, there is no need to dispute at all.

2.2 Mediation

2.2.1 Definition

Mediation is also an ancient form of dispute resolution. One of the early records of mediation is dated to the First Macedonian War (212–205 BCE). There, ambassadors from several Greek cities tried to intervene in the conflict between Aetolians and Macedonians in order to halt the battles, but also to save the commerce in the region. The Greek cities acted not only on behalf of the conflicting parties, but also aimed for preserving the vitality of trade. Modern international mediation still shares these driving forces to reduce violence, create peace, and guard the parties' own interests.⁴⁸

Mediation is defined as part of the broader notion of ADR, and hence contrasted to court litigation. However, recent developments in the area of dispute resolution has led to ADR gradually leaving its classification as 'alternative' and instead becoming included in the multitude of available dispute resolution instruments. Mediation was the most popular way of resolving international business disputes before the Second World War.⁴⁹ Since then, commercial arbitration has become the most popular method.

⁴⁸ Paul F. Diehl and J. Michael Greig, *International Mediation* (Polity Press 2013) 10.

⁴⁹ Eric A. Schwartz, 'International Conciliation and the ICC' (1995) Vol. 10, No. 1, Spring 2015, *ICSID Review – Foreign Investment Law Journal* 98–119, 99.

Following the recent determination of a number of industries to develop a swift and flexible dispute resolution tool, the interest for international commercial mediation has resurged. This has led to nations strengthening their capability for international dispute resolution with the goal of attracting corporations at a global level.⁵⁰ Eunice Chua, CEO of Singapore's Financial Industry Dispute Resolution Centre, even talks about emerging 'international dispute resolution tourist destinations'.⁵¹

2.2.2 Characteristics

Just like arbitration, mediation is voluntary for the parties. However, mediation differs from arbitration in a number of ways, being less formal and more flexible. In mediation, the parties are owners of the field, manage the procedure, and command the outcome.⁵² The mediator is, in cohesion with the parties, free to consider both past incongruities as well as future business relationships. In many cases, mediation even leads to the parties binding stronger business relations.⁵³ In mediation, the parties are free to leave the proceedings at any time without concluding any settlement, whereas in arbitration the parties cannot unilaterally withdraw from the proceedings if they have agreed to arbitrate.

Many lawyers are focused on 'winning' their dispute and therefore do not suggest mediation as a resolution tool to their clients. They consider mediation as being a compromise, in which neither party get what they deserve. It is therefore common that lawyers suggest litigation, as it has the potential of yielding better results for their client. However, as Müller puts it: 'mediation is not about finding a compromise; it is about finding a consensus.' This belief springs from the notion that lawyers often overestimate their chances of winning a litigation and underestimate the costs involved. They also underestimate the long-term benefits of mediation.⁵⁴

2.2.2.1 Non-binding

The first major difference between arbitration and mediation is that mediation does not create a binding decision for any party. The success of the mediation process relies on the parties' unending tolerance of the mediation. The goal

⁵⁰ Catharine Titi and Katia Fach Gómez, *Mediation in International Commercial and Investment Disputes* (Oxford University Press 2019) 3–4.

⁵¹ Eunice Chua, 'Feel the Earth Move – Shifts In The International Dispute Resolution Landscape' (2018), Kluwer Mediation Blog <<http://mediationblog.kluwerarbitration.com/2018/08/14/feel-earth-move-shifts-international-dispute-resolution-landscape/>> accessed 20 February 2020.

⁵² Titi and Fach Gómez (n 50) 21.

⁵³ Anna Carboni et al. 'Chapter 1: Mediation as a Resolution Method in IP Disputes' in Sophia Bonne et al. (eds) *Mediation: Creating Value in International Intellectual Property Disputes* (Kluwer Law International 2018) 47.

⁵⁴ Peter Müller, 'Mediation in the IP Area' in Sophia Bonne et al. (eds) *Mediation: Creating Value in International Intellectual Property Disputes* (Kluwer Law International 2018) 55.

of mediation is to reach a consensual settlement for the parties – not to decide the dispute. By discussing and negotiating the different possibilities for the parties, the mediator aims to reach a mutually agreeable resolution to the dispute.⁵⁵

2.2.2.2 Non-enforceable

The resolution that the parties reach through mediation is not enforceable in any jurisdiction. However, if the parties reach a settlement, that agreement may be considered a binding contract and may thus be enforced according to applicable private law. If any of the parties cease to uphold their side of the agreement, the parties will have to try to seek arbitration, either through an existing arbitral clause in their mutual agreement or by deciding to arbitrate post-dispute through a submission agreement. If that cannot be reached, the parties will have to resort to litigation procedures.

2.2.2.3 Time and cost saving

In choosing mediation over arbitration, there can be time to save for the parties. As we have seen, arbitration is a considerably faster procedure than litigation. On average, the parties concluded their arbitration procedure within slightly more than one year.⁵⁶ However, mediation is even faster. In the WIPO survey of 2013, respondents indicated that mediation took on average 8 months, and many respondents stated that they concluded their mediation procedure within 1 to 6 months.⁵⁷

Mediation also tends to be less expensive than arbitration, as the costs of arbitration has risen in recent years. Again, some numbers will highlight the differences. Surveys in the US indicate that the average arbitration costs have moved from 8 million US dollars per case in 2011⁵⁸ to 10 million US dollars per case in 2014⁵⁹ to 12 million US dollars in 2017.⁶⁰ These amounts include the costs for both parties and for reimbursing the tribunal for their services. These numbers are interesting even though the survey is conducted in the US, since the EU and US markets are intimately intertwined in trade relations. In the WIPO survey, which presented the costs individually, the respondents stated that their arbitration procedures cost a little over 400,000 US dollars.

⁵⁵ Born (n 19) 5.

⁵⁶ See subsection 2.1.3.6.

⁵⁷ WIPO (n 23) 32.

⁵⁸ David Gaukrodger and Kathryn Gordon, ‘Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community’ (2012) OECD Working Papers on International Investment 2012/03 19.

⁵⁹ Matthew Hodgson, ‘Counting the costs of investment treaty arbitration revisited’ (2017), Global Arbitration Review online news, 14 December 2017 3

<[https://www.allenoverly.com/global/-](https://www.allenoverly.com/global/-/media/sharepoint/news/news/sitecollectiondocuments/14-12-17_damages_and_costs_in_investment_treaty_arbitration_revisited_.pdf?la=en-gb&hash=D720EA099E8A7D2912FDA054E06350F5)

[/media/sharepoint/news/news/sitecollectiondocuments/14-12-](https://www.allenoverly.com/global/-/media/sharepoint/news/news/sitecollectiondocuments/14-12-17_damages_and_costs_in_investment_treaty_arbitration_revisited_.pdf?la=en-gb&hash=D720EA099E8A7D2912FDA054E06350F5)

[17_damages_and_costs_in_investment_treaty_arbitration_revisited_.pdf?la=en-](https://www.allenoverly.com/global/-/media/sharepoint/news/news/sitecollectiondocuments/14-12-17_damages_and_costs_in_investment_treaty_arbitration_revisited_.pdf?la=en-gb&hash=D720EA099E8A7D2912FDA054E06350F5)

[gb&hash=D720EA099E8A7D2912FDA054E06350F5](https://www.allenoverly.com/global/-/media/sharepoint/news/news/sitecollectiondocuments/14-12-17_damages_and_costs_in_investment_treaty_arbitration_revisited_.pdf?la=en-gb&hash=D720EA099E8A7D2912FDA054E06350F5)> accessed 21 February 2020.

⁶⁰ Joachim Pohl, ‘Societal benefits and costs of International Investments Agreements: A critical review of aspects and available empirical evidence’ (2018), OECD Working Papers on International Investment, 2018/01 46.

The same survey presented that the average mediation procedure cost the respondents just short of 100,000 US dollars.⁶¹ This amounts to a significant cost reduction for the party. In conclusion, the combination of time and cost saving seem to generate an attractive package for the disputing parties.

2.2.2.4 Confidential

The parties have the opportunity to keep the mediation procedure confidential. Commercial mediation shares this characteristic with arbitration. Confidentiality is often a necessary condition for the parties, as they might not want to reveal any details about the dispute to the public. Any expert witnesses taking part in the mediation need also observe the confidentiality agreement. Titi and Fach Gómez even state that the nature of mediation requires confidentiality.⁶² In reserving the mediation for the concerned parties, the parties can be as outspoken as needed, without affecting external relations. The outspokenness is necessary for both the parties and the mediator for the mediation to be successful; they have to reach the gist of the dispute and reveal their true standpoints to reach a settlement that both parties can accept. By removing the risk of disclosure, it is more likely that the mediation is fruitful.⁶³

Confidentiality in mediation is protected by several safeguarding elements. Firstly, the agreement between the parties usually contains a non-disclosure clause. This hinders the parties to reveal any information about the business or the mediation. Secondly, the mediator or the mediating institution is usually bound by ethical rules or codes that is facilitated for the parties by the mediator through the acceptance of the mediation. Finally, there may be national legislation regulating the contractual nature of the confidentiality obligation.⁶⁴ In conclusion, confidentiality seems to be an important factor for choosing mediation.

2.2.2.5 Neutral

To fulfil the purpose of the mediation, which is to produce a resolution to the parties' dispute in a manner where no party is left discontent, it is paramount that the mediator is perceived as neutral and impartial by the parties. Mediating in a neutral fashion is easier said than done, but there are some common rules that the mediator can follow. Firstly, the mediator should have no conflict of interests entering the mediation. This means that the mediator should have no prior relationship to either party, as this could shatter the other party's confidence in the mediator. Secondly, the mediator should take neither party's side during the mediation. The mediator should treat the parties with similar due respect and grant them equal opportunities during the procedure.⁶⁵

⁶¹ WIPO (n 23) 32.

⁶² Titi and Fach Gómez (n 50) 328.

⁶³ Titi and Fach Gómez (n 50) 329.

⁶⁴ Titi and Fach Gómez (n 50) 330.

⁶⁵ Carboni et al. (n 53) 49.

2.3 Conclusions

This chapter has pointed out that commercial arbitration and mediation have some characteristics in common and differ in certain decisive areas. Arbitration is a dispute resolution tool that is concluded outside the judicial court system. The arbitration procedure is consensual in that it can only be executed if all parties are on board. The agreement to arbitrate can be concluded either before or after the dispute has arisen. Arbitration is also confidential in that the parties can keep the procedure unavailable to the public and the press. This protects the parties from any negative publicity. Arbitration is neutral in that neither party is given the advantage of arbitrating in their home jurisdiction. As neither party would want to grant the opponent the benefit of litigating at home, negotiations usually result in the *least unfavourable* forum. The decision of the tribunal is final and binding, and it can be enforced in national courts. The parties agree to execute the decision immediately and there is no option to appeal the decision. Arbitration is also flexible and autonomous. The parties can choose their own decision-makers, form their own procedure and pick their own substantive law. Finally, arbitration is time and cost saving. One of the most attractive features of arbitration is that the parties themselves can choose the length and scope of the procedure. This generally makes arbitration shorter than litigation, but not necessarily cheaper.

Mediation is also concluded outside the judicial court system. For the better part of the 20th century, arbitration was the most popular alternative to litigation. However, mediation has grown in popularity and international dispute resolution centres now seek to become leading in the field. Mediation is more flexible and less formal than arbitration, and the parties are in complete control of the proceedings. In contrast to arbitration, mediation is non-binding. The goal of mediation is to reach an agreement that is tolerated by both parties, which does not require any binding. Also in contrast to arbitration, mediation is not enforceable in any jurisdiction. If the parties breach the mediation settlement, they will have to resort to arbitration or litigation. When it comes to time and cost saving, mediation is more efficient than arbitration; mediation is generally shorter than arbitration, and it is usually considerably cheaper. Confidentiality is another feature that mediation has in common with arbitration and that is essential for mediation. This is because the parties need to be as outspoken as possible in order to reveal their true standpoints in the dispute, which is necessary in order to reach a settlement. In addition to being confidential, it is paramount that the mediator is perceived as neutral by the parties. Otherwise, they may be reluctant to uphold a non-binding agreement.

3 Arbitration and mediation in patent disputes

3.1 What is a patent?

A patent is an intellectual property that grants the patentee commercial protection of an invention. An innovation is the result of any form of modification of an existing system, consisting of multiple interrelating components with the ambition of attaining a particular result by introducing new components which simplify and improve the result. The joining of these new components and their interaction spawns new knowledge which forms the basis for further modifications, evolving innovation even further. The companies are both the main driver and the main beneficiary of this process, as they are the root of the innovation and at the same time benefiting from its results. Innovation is a fundamental incentive of economic growth as it has the ability to inspire competitors on the market, resulting in growth in the economy as a whole.⁶⁶ Research suggests a correlation between patents and increased innovation⁶⁷, knowledge sharing⁶⁸, and economic growth⁶⁹. There is research problematising this interpretation, stating that a strong patent system does not promote the mentioned factors to the presumed extent.⁷⁰ Others state that it is increased productivity that spurs increased patenting, and not the other way around.⁷¹

In Ancient Greece, scholars recognised that not all tools and materials were the creations of the gods, but rather a product of human ingenuity. The ability to improve tools and materials were greatly appreciated and thus, the resources of the intellect were highly valued. Some philosophers even claimed that invention was the feature that distinguished humans from other animals.⁷² A more modern perception of patents emerged during the High Middle Ages, when complex craftsmanship evolved in the cities, leading the craftsmen to form professional associations – guilds. The guilds regulated

⁶⁶ Alfredo Ilardi, *The New European Patent* (Hart Publishing 2015) 1–2.

⁶⁷ See for example Ashish Arora et al. ‘R&D and the patent premium’ (2008) Vol. 26, No. 5 *International Journal of Industrial Organization* 1153–1179, 1153.

⁶⁸ See for example Daron Acemoglu et al. ‘Experimentation, Patents, and Innovation’ (2011) Vol. 3, No. 1 *American Economic Journal: Microeconomic* 33–77, 37–39.

⁶⁹ See for example Corinne Langinier and GianCarlo Moschini, ‘The Economics of Patents: An Overview’ (2002), CARD Working Papers 335 2–20, 19–20.

⁷⁰ See for example Josh Lerner, ‘The Empirical Impact of Intellectual Property Rights on Innovation: Puzzles and Clues’ (2009) Vol. 99, No. 2, *The American Economic Review* 343–348, 347–348.

⁷¹ See for example Michele Boldring and David K. Levine ‘The Case Against Patents’ (2013) Vol. 27, No. 1, *Journal of Economic Perspectives* 3–22, 3.

⁷² Pamela O. Long, ‘Invention, Authorship, Intellectual Property,’ and the Origin of Patents: Notes toward a Conceptual History’ (1991), Vol. 32, No. 4. Special Issue: Patents and Invention, *The John Hopkins University Press and the Society for the History of Technology, Technology and Culture* 846–884, 848–850.

who had the right to craft the tools and materials, and thus an early form of legal protection of inventions was formed.⁷³

For an invention to be patentable according to the European Patent Convention (EPC), the invention has to be novel⁷⁴, inventive⁷⁵ and industrially applicable⁷⁶. If the inventor is granted the patent, the inventor receives a time-limited right to prevent all other actors from manufacturing, sharing, using, developing, and importing the invention within the protected jurisdiction. In most nations, the patent protection lasts for 20 years counted from the filing date. The patent does not confer any positive rights to the holder, but rather confers negative rights on all other actors. For example: even if a biotech company acquires the patent to an invention, it does not mean that the company has the right to commercialise the specific treatment, as this also requires separate regulatory approval.⁷⁷

Patents are sought from authorized patent granting offices. Their task is to examine the patent application to make sure the patent involves an invention and to make sure it meets the requirements. If the inventor is granted the patent, the office obliges the inventor to disclose the details of his or her invention, in exchange for the time-limited commercial monopoly in that jurisdiction. Thus, the grant of a patent is a form of trade between the individual inventor and society – with the latter, at best, obtaining new and inventive technical knowledge from the former.⁷⁸ The importance of patent protection for world trade is demonstrated by the fact that the World Trade Organization (WTO) in its TRIPS Agreement⁷⁹ requires their Member states to make patents available for any inventions in all fields of technology.⁸⁰ The TRIPS Agreement is to date the most comprehensive multilateral agreement on intellectual property in the world. In the preamble of the TRIPS Agreement, WTO develops the purpose of the agreement and declares the need for IP protection in order to ‘reduce distortions and impediments to international trade’.⁸¹

⁷³ Long (n 72) 870–872.

⁷⁴ Convention on the Grant of European Patents of 5 October 1973 (EPC), Article 54.

⁷⁵ EPC (n 74), Article 56.

⁷⁶ EPC (n 74), Article 57.

⁷⁷ Justine Pila and Paul Torremans, *European Intellectual Property Law* (2nd edn, Oxford University Press 2019) 100.

⁷⁸ Pila and Torremans (n 77) 101.

⁷⁹ Agreement on Trade-Related Aspects of Intellectual Property Rights, 1 January 1995 (TRIPS Agreement).

⁸⁰ TRIPS Agreement (n 79), Article 27.

⁸¹ TRIPS Agreement (n 79), Preamble.

3.2 Current framework

3.2.1 Legislation

3.2.1.1 The New York Convention

The New York Convention is the oldest and most influential international commercial legislation. The convention was first proposed by the ICC to the UN, which adopted the proposal with slight modifications. The main purpose of the New York Convention is to establish that arbitration awards can be universally enforceable. As of May 2020, 161 jurisdictions are part of the convention. The convention is the most influential statutory instrument concerning international commercial arbitration and is close to a universal charter for arbitration procedures. The convention has driven arbitral tribunals and national courts to develop efficient mechanisms for enforcing arbitration agreements and awards. These mechanisms were developed as a response to needs of the international business community and were intended to encourage the use of arbitration as a means of resolving international commercial disputes.⁸²

The convention established for the first time a complete international legal framework for international arbitration agreements, arbitral proceedings and arbitral awards. The convention was made effective in 1959 and has since then seen the great rise in world trade and investments during the 1960s and 1970s. It is likely that the convention has facilitated this expansion of the global markets.⁸³ Furthermore, the convention has received praise from lawyers and experts in the field of arbitration, and it has even been dubbed the ‘most effective instance of international legislation in the entire history of commercial law’.⁸⁴

Similar to other international treaties, the convention is constructed with uniformity in mind. According to the convention, national courts shall recognise any mutually signed, written agreement stating that the parties shall arbitrate.⁸⁵ In such an event, the convention requires the national courts to dismiss the case and refer the parties to arbitration.⁸⁶ The national courts are also bound to recognise and enforce foreign arbitral awards.⁸⁷ The broad formulation of the articles is deliberate, as the plan for the convention was to be interpreted and applied in a variety of nations. This process was (and is) slow, but it has adapted well to the needs of international trade and to the different jurisdictions. In whichever way the convention is used in the different nations, it has to be interpreted in accordance with principles of good

⁸² Gary B. Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International 2014) 99–102.

⁸³ Born (n 82) 105.

⁸⁴ Michael John Mustill, ‘Arbitration: History and Background’ (1989) Vol. 6, No. 2, *Journal of International Arbitration* 43–56, 49.

⁸⁵ New York Convention (n 16), Article II(1).

⁸⁶ New York Convention (n 16), Article II(3).

⁸⁷ New York Convention (n 16), Article III.

faith, including Article 31 of the Vienna Convention on the Law of Treaties, which 116 nations are party to as of May 2020.

3.2.1.2 UNCITRAL Model Law

Another UN instrument is the UNCITRAL Model Law⁸⁸, which is a series of example laws published by the UN Commission on International Trade Law to assist the nations in reforming and modernising their laws on arbitral procedures. The Model Law builds on the New York Convention and works together with it. The purpose of the Model Law is to encourage nations to appreciate the particular features and needs of international commercial arbitration. Together with the New York Convention, the Model Law urges to uniform the handling of international commercial arbitration in national courts. It is also a reflection of the global consensus on fundamental aspects of international arbitration practice. The Model Law is not binding, but it was devised to be implemented by national governments, with the ambition of further harmonising the dealings with international commercial arbitration in various nations. In total, 80 nations have adopted the Model Law and incorporated it into their national legal system, and even more nations have taken inspiration from it.⁸⁹

The Model Law presumes that written international arbitration agreements are valid and enforceable, and that the parties are free in choosing their own jurisdiction⁹⁰. Apart from this, the law includes rules for appointment of arbitrators⁹¹, applicable law⁹², and place of arbitration⁹³. Furthermore, the parties are free to agree on their own procedural rules, regardless of the provisions of the Model Law.⁹⁴ The purpose of the Model Law is to present a number of procedural rules that the parties are free to modify by agreement. In summary, it is clear that the Model Law is conveying a principle of autonomy for the parties. There are, however, some fundamental principles which cannot be modified, such as equality of treatment⁹⁵ and principles of fairness⁹⁶.

⁸⁸ United Nations Commission on International Trade Law Model Law on International Arbitration (1985), with amendments as adopted in 2006 (UNCITRAL Model Law).

⁸⁹ United Nations Commission on International Trade Law website, 'Status: UNCITRAL Model Law on International Arbitration'

<https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status> accessed 8 May 2020.

⁹⁰ UNCITRAL Model Law (n 88), Article 16.

⁹¹ UNCITRAL Model Law (n 88), Article 11.

⁹² UNCITRAL Model Law (n 88), Article 28.

⁹³ UNCITRAL Model Law (n 88), Article 20.

⁹⁴ UNCITRAL Model Law (n 88), Article 19(1).

⁹⁵ UNCITRAL Model Law (n 88), Article 18.

⁹⁶ UNCITRAL Model Law (n 88), Articles 24(2) and 24(3).

3.2.1.3 The EU Mediation Directive

The EU Mediation Directive⁹⁷ is a legal instrument that regulates aspects of mediation in civil and commercial matters.⁹⁸ More specifically, the Directive is designed to promote settlement in cross-border disputes by encouraging the choice of mediation in the Member States and to ensuring balance between mediation and judicial proceedings.⁹⁹ Mediation is defined as ‘a structured process ... whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement on their dispute with the assistance of a mediator’.¹⁰⁰ The objective of the Directive is to establish extrajudicial procedures for settlement of disputes in order to simplify and improve access to justice.¹⁰¹ Mediation is seen as a cost-effective and quick method of resolving disputes which can be tailored to the needs of the parties.¹⁰²

The Directive provides that agreements reached through mediation can be enforced by the request of both parties by approval by a court.¹⁰³ The Directive also includes provisions on the need for confidentiality in mediation proceedings, stating that the Member States shall ensure that the parties or the mediator do not disclose any information regarding the mediation.¹⁰⁴ There is, however, an exception for overriding the confidentiality due to public policy.¹⁰⁵ Furthermore, the Directive stipulates that a mediation settlement does not bar the parties from initiating judicial proceedings or arbitration relating to that dispute.¹⁰⁶

3.2.2 Non-state institutions

Even though the UNCITRAL Model Law has influenced the international arbitration community, the leading non-state institutions have chosen not to adopt it. They have debated the possibility of adopting the Model Law but chosen to proceed with other solutions. Some experts consider the Model Law to be a compromise, which was unavoidable considering the ambition of the legislator was to create a universal model law.¹⁰⁷ This has led the most renowned international arbitration centres to conclude their own rules.

⁹⁷ Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 (EU Mediation Directive).

⁹⁸ EU Mediation Directive (n 97), Article 1(2).

⁹⁹ EU Mediation Directive (n 97), Article 1(1).

¹⁰⁰ EU Mediation Directive (n 97), Article 3(a).

¹⁰¹ EU Mediation Directive (n 97), Recital 3.

¹⁰² EU Mediation Directive (n 97), Recital 6.

¹⁰³ EU Mediation Directive (n 97), Article 6.

¹⁰⁴ EU Mediation Directive (n 97), Article 7.

¹⁰⁵ EU Mediation Directive (n 97), Article 7(1)(a).

¹⁰⁶ EU Mediation Directive (n 97), Article 8.

¹⁰⁷ Emmanuel Gaillard and John Savage (eds) *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International 1999) 108.

3.2.2.1 The ICC Court

The International Court of Arbitration of the International Chamber of Commerce ('ICC Court') is an administrative body handling international commercial arbitration cases. The ICC Court administers a large number of arbitration proceedings in intellectual property disputes each year.¹⁰⁸ Despite its name, it is not a court in the original sense of the word, as it is not part of any judicial system, but is described as perhaps the leading international commercial arbitration institution in the world.¹⁰⁹ In 2019, the ICC Court registered a total of 869 new cases of arbitration, making it the most preferred arbitration institution available.¹¹⁰ According to the ICC Arbitration Rules, the court does not itself resolve disputes¹¹¹, but is responsible for handling the initial request for arbitration¹¹², fixing the costs¹¹³ and confirming the parties' choice of arbitrators¹¹⁴. The objective of the ICC Arbitration Rules is to offer the parties a procedural framework which they can tailor for their own purposes. In this, the ICC Arbitration Rules are similar to the UNCITRAL Rules.

3.2.2.2 The SCC Arbitration Institute

The Arbitration Institute of Stockholm Chamber of Commerce ('SCC Arbitration Institute') is one of the world's leading forums for dispute resolution. The SCC Arbitration Institute is internationally known for handling arbitrations between the USSR and the Western world, and China and the Western world.¹¹⁵ In 2018, the SCC Arbitration Institute registered 152 new cases, of which 76 were international disputes with parties from 43 countries. The majority of the cases applied Swedish substantive law and the arbitrations are usually seated in Sweden, although other places of arbitration can be chosen.¹¹⁶ According to the SCC Rules, most aspects of arbitral procedure can be decided by the tribunal. The SCC usually hires members of the Swedish bar association or former Swedish court judges as arbitrators.¹¹⁷

¹⁰⁸ International Chamber of Commerce website, 'The ICC Intellectual Property Roadmap – Current and emerging issues for business and policymakers' (13th edn, 2017) 65 <<https://iccwbo.org/publication/icc-intellectual-property-roadmap-current-emerging-issues-business-policymakers/>> accessed 8 May 2020.

¹⁰⁹ Born (n 82) 176.

¹¹⁰ International Chamber of Commerce website, 'ICC Celebrates case milestone, announces record figures for 2019', ICC News, 9 January 2020 <<https://iccwbo.org/media-wall/news-speeches/icc-celebrates-25000th-case-milestone-and-announces-record-figures-for-2019/>> accessed 20 March 2020.

¹¹¹ International Chamber of Commerce (ICC) Arbitration Rules, Article 1(2) <<https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/>> accessed 8 May 2020.

¹¹² ICC Arbitration Rules (n 111), Article 4.

¹¹³ ICC Arbitration Rules (n 111), Article 36.

¹¹⁴ ICC Arbitration Rules (n 111), Article 13.

¹¹⁵ Moses (n 13) 14.

¹¹⁶ Stockholm Chamber of Commerce Arbitration Institute website, *SCC Statistics 2018* <<https://sccinstitute.com/statistics/>> accessed 23 March 2020.

¹¹⁷ Born (n 82) 191.

3.2.2.3 The WIPO Arbitration and Mediation Centre

The World Intellectual Property Organization (WIPO) is an international dispute resolution provider, created ‘in order to encourage creative activity, to promote the projection of intellectual property throughout the world’.¹¹⁸ WIPO is since 1974 one of 15 specialised agencies within the UN.¹¹⁹ Today, WIPO has 193 Member States¹²⁰ and is described as an international forum for IP information, policy, cooperation and services.¹²¹ In 1994, the Arbitration and Mediation Centre of the World Intellectual Property Organization (‘WIPO Centre’) was established. The WIPO Centre was created to promote the resolution of IP and related disputes through ADR. The centre aimed to become a neutral, non-profit provider of dispute resolution. The WIPO Centre is the only international supplier focusing on entertainment, technology and IP disputes, but also administers other commercial disputes. The WIPO Centre maintains a database of over 1,500 IP and ADR specialists to act as neutral arbitrators.¹²² These specialists are either experts in general dispute resolution or experts in the legal and technical field of IP.

The WIPO Centre administers disputes under the WIPO Arbitration and Mediation Rules (‘WIPO Rules’), which are detailed provisions dealing with issues that are of particular importance in IP disputes. The WIPO Rules states that a party in danger of being harmed by another party’s actions may apply at the arbitration tribunal for interim relief.¹²³ It will thus take the tribunal some time to be established and to grant the relief. In the world of patents, time is of the essence, as a patent is only valid for a limited period. To solve this, the WIPO Centre has developed an emergency arbitration procedure for those cases where there is imminent relief needed.¹²⁴ The WIPO Rules also include provisions relating to evidence¹²⁵, which is necessary relating to the technical sides of IP disputes – especially in patent disputes. Experiments¹²⁶ and site visits¹²⁷ are often also undertaken in the arbitration procedures, as they often are fundamental to gain understanding in these technical cases. Furthermore, the rules include other provisions of importance in IP disputes, such as those relating to confidentiality. Firstly, it is possible for the parties

¹¹⁸ Convention Establishing the World Intellectual Property Organization (WIPO), signed in Stockholm on 14 July 1967, and as amended on 29 September 1979, Preamble.

¹¹⁹ Agreement between the United Nations and the World Intellectual Property Organization, entered into effect on 17 December 1974, Article 1.

¹²⁰ WIPO website, ‘Member States’ <<https://www.wipo.int/members/en/>> accessed 24 March 2020.

¹²¹ WIPO website, ‘About WIPO’ <<https://www.wipo.int/about-wipo/en/>> accessed 24 March 2020.

¹²² WIPO website, ‘Guide to WIPO Arbitration’ (2004) 2 <<https://www.wipo.int/publications/en/details.jsp?id=124&plang=EN>> accessed 24 March 2020.

¹²³ World Intellectual Property Organization (WIPO) Arbitration Rules, Article 48 <<https://www.wipo.int/amc/en/arbitration/rules/>> accessed 8 May 2020.

¹²⁴ WIPO Arbitration Rules (n 123), Article 49.

¹²⁵ WIPO Arbitration Rules (n 123), Article 50.

¹²⁶ WIPO Arbitration Rules (n 123), Article 51.

¹²⁷ WIPO Arbitration Rules (n 123), Article 52.

to protect the existence of the arbitration.¹²⁸ Secondly, it is also possible to protect any evidence used in the arbitration.¹²⁹ Finally, it is also possible to protect the existence of the arbitral award.¹³⁰ These rules of confidentiality are applied both to the parties and the WIPO Centre.¹³¹

As of 2019, the WIPO Centre had administered over 650 cases using arbitration or mediation. During the period 2010–2019, a total of 884 requests were filed to the WIPO Centre, of which three quarters were filed 2015–2019. This indicates that the demand for arbitration and mediation in IP disputes is growing rapidly. One quarter of the disputes administered by the WIPO Centre were related to patents, including disputes over licensing, infringements, ownership, and royalties. Most of the cases were initiated on the basis of arbitration or mediation clauses in the parties' contract, but some cases were a result of submission agreements concluded after the dispute had arisen. A third of the agreements included an escalation clause, stating that if no settlement was reached through mediation, arbitration followed.¹³²

3.3 Patent arbitration

3.3.1 In general

Most patent disputes are handled in litigation, since most patent disputes concern parties with no contractual relationship. Patent rights are typically granted and registered in public patent registry offices, either governmental or government sanctioned. This means that only the government, within the capacity of the law, can revoke, amend or grant the rights and establish their scope. Therefore, the arbitrability of patents has been debated, with claims that disputes regarding patents should be resolved by a public body within the national system.¹³³ The involvement of governmental bodies in administering patent rights undeniably entails that the rights are not freely disposed by the parties. This has implications on the possibility of arbitrating patent rights – some issues can be arbitrated, and others cannot.

When drafting commercial agreements regarding licenses, technology transfers and R&D collaborations involving patents, it is common to include an arbitration clause. It is also common that these arbitration proceedings are held in practice. However, arbitration related to validity of patents and patent infringements are more rarely arbitrated. In fact, arbitration of patent validity and infringements is not supported in most jurisdictions. For example, Italy and France do not allow patent validity issues on the ground of public

¹²⁸ WIPO Arbitration Rules (n 123), Article 75.

¹²⁹ WIPO Arbitration Rules (n 123), Article 76.

¹³⁰ WIPO Arbitration Rules (n 123), Article 77.

¹³¹ WIPO Arbitration Rules (n 123), Article 78.

¹³² WIPO website, 'WIPO Caseload Summary'

<<https://www.wipo.int/amc/en/center/caseload.html>> accessed 24 March 2020.

¹³³ For a concise review of this debate, see Therese Jansson, 'Arbitrability Regarding Patent Law – An International Study', Juridisk Publikation 1/2011.

policy.¹³⁴ The United States and Switzerland are the only nations that are explicitly allowing patent arbitration in these matters (in fact, they allow arbitration in almost all IP disputes).¹³⁵

The major patenting nations can be divided into two categories. The first, smaller group of nations have laws that allow enforcement of arbitral awards on patent validity *inter partes*, but do not grant the enforcement *erga omnes*. This means that the parties can approach an arbitrator to hand them an arbitration award that is enforceable only between the parties, as this is within the scope of the general contractual freedom of the parties. However, that award will not be enforceable against the patent registry office.¹³⁶ The second, larger group are the nations in which patent validity is not arbitrable, not even between the parties. Arbitral awards between the parties regarding patent validity will gain no effect and the agreement will not be enforceable. Agreement from awards regarding issues of licensing and ownership of patents is however enforceable in these jurisdictions, but only rarely issues of infringement.¹³⁷ In the EU, disputes directly affecting the existence or validity of a registered IP right are still not considered to be arbitrable.¹³⁸

3.3.2 Benefits

Solving IP disputes using arbitration has increased over the past years.¹³⁹ This includes patent disputes. Disputes arising from technology-related agreements can be complicated, requiring flexible procedures and expert knowledge. Both arbitration and mediation offer these instruments. The disputing parties often engage in court litigation in parallel jurisdictions simultaneously, which often results in a different result in each country. There are a number of features common to many patent disputes that influences how the disputes are preferably resolved.

3.3.2.1 Single forum

Patent disputes are often international. Court litigation can result in multiple proceedings under different laws with the risk of one party gaining home court advantage, making the proceedings seemingly unbalanced. Arbitration,

¹³⁴ Robert Briner, 'The Arbitrability of Intellectual Property Disputes with Particular Emphasis on the Situation in Switzerland', Worldwide Forum on the Arbitration of Intellectual Property Disputes, 3–4 March 1994, Geneva, Switzerland <<https://www.wipo.int/amc/en/events/conferences/1994/briner.html>> accessed 28 April 2020.

¹³⁵ Julian Lew et al. *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 209.

¹³⁶ Wei-hua Wu, 'International Arbitration of Patent Disputes' (2011) Vol. 10, No. 2, The John Marshall Review of Intellectual Property Law 384–409, 392.

¹³⁷ M A Smith, 'Arbitration of Patent Infringement and Validity Issues Worldwide' (2006), Vol. 19, No. 2, Harvard Journal of Law & Technology 299–357, 305.

¹³⁸ Lew et al. (n 135) 209.

¹³⁹ Peter Chrocziel et al. *International Arbitration of Intellectual Property Disputes – A Practitioner's Guide* (Beck/Hart Publishing 2017) 1.

on the other hand, only requires one single proceeding under the law determined by the parties. The parties can choose law, language and institutional culture which both parties perceive to be neutral. A single forum will decrease delay, cost and inconsistency of judgements.¹⁴⁰

3.3.2.2 Technical expertise

Patent disputes are often technically complicated. This poses a problem for court judges, who commonly do not have the relevant expertise in patents. In arbitration, the parties can choose arbitrators with specialist knowledge and experience in the specific technical area.¹⁴¹

3.3.2.3 Speed

Patent disputes often need to be resolved urgently. This is because patents are protected only during a limited period. In court litigation, procedures are often drawn-out, even though some jurisdictions offer injunctive relief. In arbitration, the parties themselves can choose to shorten the procedure or conclude provisional measures. However, finding and selecting an arbitrator with appropriate knowledge and experience might take some time.¹⁴²

3.3.2.4 Finality

International arbitral awards are final and patent disputes often require finality. The finality entails that the arbitral awards usually cannot be appealed in national courts, which court decisions can. The absence of appeal possibilities is a representation of the autonomy connected with arbitration. Patents are often the most valuable asset of a company and it is therefore often in the interest of the company to reach a final decision in the dispute as fast as possible so they can continue to use their patent, without any further proceedings. However, it might in fact on occasions be in the interest of the company to prolong the proceedings. As patents are valuable assets it might feel risky for the company to not be able to appeal the arbitration decision.¹⁴³

3.3.2.5 Confidentiality

Patent disputes frequently contain discussions of delicate technical and business information. Therefore, patent disputes require confidentiality. Court proceedings are almost always public, while arbitration proceedings and the arbitration awards can be kept confidential. By introducing a non-disclosure clause, the parties can choose themselves what information regarding the invention is to be made available to the public.¹⁴⁴

¹⁴⁰ Carboni et al. (n 53) 24.

¹⁴¹ Carboni et al. (n 53) 24.

¹⁴² Trevor Cook and Alejandro I. Garcia, *International Intellectual Property Arbitration* (Kluwer Law International 2010) 40–41.

¹⁴³ Cook and Garcia (n 142) 38–39.

¹⁴⁴ Carboni et al. (n 53) 24.

3.3.3 Limitations

3.3.3.1 Non-comprehensive

As previous sections have concluded, arbitration in patent disputes is not an option in certain cases, especially in disputes over validity. This means that arbitration cannot be used to settle all disputes between the parties and might force the parties to enter litigation proceedings, nonetheless.

3.3.3.2 Less structured

In choosing arbitration, the parties often have to decide on how the procedure should advance. In court litigation, a detailed procedural framework is already in place and the parties can therefore instead concentrate on the subject matter of the dispute. If the parties do not know how the procedure will advance, it might be difficult to prepare for the dispute. However, many arbitration institutions offer set procedural rules to relieve the parties of this burden.¹⁴⁵

3.3.3.3 Short-sighted

Similar to litigation, arbitration is focused on delivering a decision regarding the dispute at hand. As expanded on in subsection 2.2.2, mediation on the other hand seeks to create value for the parties in the future. This is not the case for arbitration. The decision of the arbitrators might lead to hostility between the parties and the commercial relationship between the two might be terminated or badly damaged. Arbitration therefore should not be used as a way of strengthening commercial relationships. Instead, it should be categorised as a means for parties who already has decided not to continue their relationship to make the separation quick and private.¹⁴⁶

¹⁴⁵ Cook and Garcia (n 142) 36–37.

¹⁴⁶ Carboni et al. (n 53) 25–26.

Practitioner's perspective

Who: Martin Levinsohn, Lawyer and Partner

Where: Setterwalls Advokatbyrå

Martin Levinsohn often disputes patents in the pharmaceutical and biotechnology industries. He has endured a total of thirty disputes that have been brought through all the way to the Patent and Market Court of Appeal at Svea Court of Appeal, which is the highest instance for patents in Sweden. These disputes have been very long.

For Martin, arbitration never comes up, as patent disputes do not emerge from agreements but through infringements. The parties are often more interested in public sanctions, but you can arbitrate over the question of patent validity – the parties can agree that the patentee shall withdraw its patent from the patent office. However, they do deal with arbitration clauses when it comes to license or cooperation agreements.

They sometimes send letters of warning stating that they will oppose the patent in court. Trying to reach a settlement before going into court has worked one time, Martin concludes.

3.4 Patent mediation

3.4.1 In general

In similarity with the debate regarding arbitration in patent disputes, it has been argued that matters of patent rights could not be mediated. Today, mediation is becoming a popular method of choice for resolving IP disputes as well as patent disputes. As mediation is highly flexible and adaptive to shifting legal cultures it is especially relevant for the international characteristics of IP disputes in general, and patent disputes in particular.¹⁴⁷ Patent disputes are often very complex, frequently involving multiple legal and jurisdictional issues, parallel proceedings and trained technical experts. These disputes involve substantial costs, resources and effort to be concluded. The stakes are high and the risks are considerable. This pushes parties to search for alternative, less risky and less expensive resolution mechanisms, like mediation.¹⁴⁸

Mediation has developed into a significant instrument of international dispute resolution in cross-border commercial cases. It has also become frequent in disputes involving patents and other IP rights, in which it is often difficult to determine the competent court. Mediation offers the parties to resolve all their disputes in one stroke. It can also lay a foundation for maintaining or building new business relationships, even between parties with no prior association.

¹⁴⁷ Jane Player and Claire Morel de Westgaver, 'Chapter 11: IP Mediation', in Trevor Cook and Alejandro I. Garcia (eds) *International Intellectual Property Arbitration* (Kluwer Law International 2010) 331.

¹⁴⁸ Carboni et al. (n 53) 1.

Through mediation, two competitors in the same specific market segment could strengthen their businesses by assessing their respective roles on the market. Perhaps the mediation could lead to collaborations and greater efficiency for both parties. Patent disputes often involve sensitive information which they do not want to reach the public.¹⁴⁹

In disputes over patents where there exists deliberate infringement, bad faith, extortion or counterfeiting, it is harder to recommend mediation. This is because mediation requires cooperation of both parties, and neither party is usually interested in this when the atmosphere has turned hostile. Still, there are examples where an infringer of a patent has been offered and accepted to license the patent after a mediation procedure.¹⁵⁰

Mediation is suitable for disputes concerning patent ownership, validity and infringement. However, mediation in patent disputes shares the same limitations as arbitration in that the resulting settlements, in most jurisdictions, only have effect *inter partes*. The most common form of *inter partes* proceedings involve ownership disputes. These disputes are suitable for mediation. This is partly because there is no public interest in the outcome of the dispute. This kind of dispute can also be very expensive to litigate, as a great deal of preparation is needed. Mediation offers the possibility of reaching a settlement of all the problems between the parties, in several jurisdictions, in one day.

Mediation is also suitable for infringement issues. Just as with ownership issues, there is little public interest in the outcome and the costs for litigation are often high. The resolution of mediation in infringement issues can often be direct reimbursements or establishment of license agreements. In this way, mediation can be the start of a cooperation between the disputing parties.

Opposition against a patent that has been granted by a patent office can also be handled in mediation. This is usually done by the opposing party filing a claim at the patent office, but there is nothing preventing the parties from mediating such an issue and settling the issue privately. The patent office will surely not encourage the parties to mediate such a matter, as the patent office has the duty to protect the public from invalid patents continuing to be registered.¹⁵¹

¹⁴⁹ Carboni et al. (n 53) 46–47.

¹⁵⁰ Carboni et al. (n 53) 55.

¹⁵¹ Carboni et al. (n 53) 75–78.

3.4.2 Benefits

3.4.2.1 Confidentiality

Patenting is dependent on not disclosing information to the public or to competitors for its protection. Therefore, confidentiality is vital in the mediation of patents. Even after a patent is published it might be supported by other methods and processes that should not be disclosed to others. The rules of the mediation institute often include non-disclosure clauses binding the parties to confidentiality.

Patents are especially dependent on secrecy. If information regarding an invention is disclosed prior to the filing of the patent, it may be considered public information and thus 'prior art', which will prevent the invention from being patented. This is why companies often include non-disclosure agreements when discussing their inventions with potential business partners or inventors. As mediators are used to offering this strict form of confidentiality, mediation is a suitable resolution tool for patent disputes. The parties involved in the mediation are often reluctant to present the true essence of the dispute to the mediator. One of the most important goals of the mediator is therefore to have the parties expose their inner most desires and worries. In doing so, the parties often have to reveal sensitive information about their company, its methods and its inventions. It is therefore crucial that the parties trust the mediator. A trustworthy and well-known mediator often has greater chance of reaching a settlement than a newly established colleague.¹⁵²

3.4.2.2 Flexibility

Patent disputes often involve parties from different jurisdictions, of different legal cultures and with different languages. It can even be stated that it lies in the nature of patents to be cross-cultural. This can make it complicated for a national court to handle the dispute. The language barriers can be overcome with translators and interpreters, but the legal cultures are often deeply rooted. The culture influences the parties to act in certain ways during the resolution of the dispute, which can hamper the outcome. As mediators are often trained in cross-cultural disputes, mediation can be useful in these types of situations. However, it is still essential that experienced mediators prepare for the mediation by acquiring knowledge about the parties' respective legal culture. It is important that the mediator is flexible in dealing with different types of parties; mediation offers this flexibility.¹⁵³

¹⁵² Gordon Humphreys et al. 'Chapter 2: Settling IP Disputes Through Mediation', in Sophia Bonne et al. (eds) *Mediation: Creating Value in International Intellectual Property Disputes* (Kluwer Law International 2018) 172–177.

¹⁵³ Humphreys (n 151) 179–182.

3.4.2.3 Cost

Patent litigation is extremely expensive, and an ordinary patent litigation costs several million Euros. This is due to that the complex nature of patents often requires intensive research into technical details by the lawyers and the judges.¹⁵⁴ Mediation can therefore serve as a far less expensive option. This does not mean that mediation is cheap, but it generally costs about 10 to 20 per cent of litigation. This is due to the less formalistic procedure (see subsection 2.2.2.3). However, there is always the risk of a party not performing their part of the agreement, which might lead to the other party taking action against that party. Nevertheless, the experience amongst mediators is that the parties usually return to mediation in those cases.¹⁵⁵

3.4.2.4 Speed

Patents are naturally time limited. Therefore, time is an important factor in resolving disputes involving patents. Litigating a patent case in court can take over two years, from start to finish – and that does not include any appeal processes, which can add a few more years to the process. During this period, the patents are functioning, but as technology quickly progresses the patent may become outdated before a decision has been reached.¹⁵⁶ As concluded in subsection 2.2.2.3, litigation (and arbitration) is considerably more time-consuming than mediation. Mediation can thus offer a realistic time frame for the parties, without wasting valuable time of patent validity.¹⁵⁷

3.4.3 Limitations

3.4.3.1 Non-comprehensive

As the previous subsections have detected, mediation can be useful for a number of reasons in resolving patent disputes. However, mediation is not a reasonable option in some cases. If a potential infringer is not willing to reach a realistic agreement, the mediation procedure will only cause delay and may be detrimental to the patentee. If the patentee instead files for litigation in court, this may persuade the infringer to settle rather than to litigate. Furthermore, in some cases it might be necessary for the patentee to litigate in order to receive a ban for the infringer on a specific market. As a mediation settlement is not enforceable, the settlement itself cannot prevent an infringer from continuing to market or use their product.¹⁵⁸

¹⁵⁴ Yongo Ding, 'Patent Mediation: A Robust Choice for Resolving Patent Disputes' (2013) Vol. 13, No. 4, *Dispute Resolution Journal* 97–99, 90–91.

¹⁵⁵ Player and Morel de Westgaver (n 147) 363.

¹⁵⁶ Ding (n 154) 92.

¹⁵⁷ Player and Morel de Westgaver (n 147) 362.

¹⁵⁸ Ding (n 154) 95.

3.4.3.2 Non-transparent

As this thesis has previously pointed out, the parties in a dispute resolution procedure generally prefer the concept of confidentiality. However, confidentiality is contrasted to the increasingly verbal demands for improved transparency in the EU. This non-transparency may be beneficial to the companies but are not in the interest of society. If the parties reach a settlement agreement that conceals an invalid patent this will hamper competition, as third-party actors on the market then will refrain from competing in that area. As concluded in section 3.1, the purpose of the patent protection is to incentivise companies and individuals to innovate and thereby promote economic growth. The patent protection is an exception to the general rule prohibiting monopolies and it is therefore important that this exception is properly functional – otherwise, society will not reap the benefits of competition and innovation. This is not, however, a reason for making mediation transparent for society, as this probably would refrain parties from using the method.¹⁵⁹

3.5 Conclusions

Patents are granted by public registry offices and thus, all aspects of patents cannot be arbitrated. Disputes regarding patent licenses, technology transfers and R&D collaborations are arbitrable in many jurisdictions, but issues of patent validity are only rarely arbitrable. The benefits of using arbitration in patent disputes are that it can offer a single forum and technical expertise, that it is speedy and gives finality, and that it is confidential. The limitations of arbitration in patent disputes seem to be that it is non-comprehensive in that it cannot solve all patent disputes, that the procedure can be unstructured compared to litigation, and that the decision is short-sighted compared to mediation. Mediation is especially suitable for patent ownership disputes and infringement issues, but not deliberate infringements. This is because mediation requires full cooperation from both parties. The benefits of using mediation in patent disputes are that it is confidential, culturally flexible, and relatively cheap and fast. The limitations of mediation in patent disputes seem to be that it is non-comprehensive and non-transparent.

These results suggest that arbitration and mediation in patent disputes is special; the pros and cons of patent arbitration and mediation differ from those of other commercial disputes. This is only partly true – many of the characteristics of arbitration and mediation are suitable for patent disputes as well as for other commercial disputes. However, a few of these characteristics are even more important for patent disputes than other commercial disputes. Confidentiality, for example, is an important feature of commercial arbitration and mediation, but for patent disputes confidentiality is indispensable. The same goes for the need of fast procedures, which generally is great in commercial dispute resolution, but is imperative in patent disputes.

¹⁵⁹ Ding (n 154) 96–97.

4 Arbitration and mediation in the Unified Patent System

4.1 Background

The European Patent Office (EPO) was established in 1973 by the Convention of the Grant of European Patents (EPC) with the task of granting European patents. The EPC operates side by side with the national patent systems and permits an inventor to file a single application at the EPO to secure the grant of a European patent (EP) in each of the selected territories. Securing a bundle of patents through a single application is a great advantage compared to the separate national application systems. The cost efficiency of the filing has been a huge success and the demand for European patents has increased gradually since 2012. In 2019, the number of patent applications filed at the EPO was 181,000, an increase by 4.0 per cent compared to 2018.¹⁶⁰ In spite of the success of the European patent there are complications. If a patent is granted, the inventor is passed a series of national patents which only can be enforced in the national courts of each Member State. Enforcing the patents in several jurisdictions can become expensive and result in varying judgements. In addition, the patent offices in the Member States may charge a fee for the patent and a translation of the application.

The demand for a unitary patent combined with a unitary court was therefore most awaited. The first recorded plans for a European Patent Office was put forward by French Senator Longchambon before the newly established Council of Europe in 1949. The proposal was called the ‘Longchambon plan’ and marked the start of what later became a European Patent.¹⁶¹ The Community Patent Convention¹⁶² was signed in 1975, but the proposal to create the Community patent from the European Commission was not made until 2000. After some negotiation breakdowns, talks were restored in 2007 leading to 12 Member States manifesting the need for increased cooperation by petitioning the Commission to make a proposal to the Council. An additional 13 Member States joined the cooperation, and the demands of the 25 Member States were fulfilled by the Council, which in 2011 led to the enhanced cooperation – ‘the Unitary Patent Package’. The 25 Member States signed the Agreement on a Unified Patent Court (UPCA)¹⁶³ in 2013. The instrument established a new patent under the exclusive jurisdiction of the Unified Patent Court (‘the Court’). As of May 2020, all EU Member States

¹⁶⁰ EPO website, ‘EPO Patent Index 2019, Statistics at a glance’ <<https://www.epo.org/about-us/annual-reports-statistics/statistics/2019.html>> accessed 12 March 2020.

¹⁶¹ Pieter Callens and Sam Granata, *The Unitary Patent and the Unified Patent System* (Kluwer Law International 2017) 4.

¹⁶² Convention for the European Patent for the Common Market, OJ L17/1 (76/76/EEC).

¹⁶³ Agreement on a Unified Patent Court, Official Journal of the European Union, C 175, 20 June 2013 (UPCA).

except Poland, Spain, and Croatia have signed the agreement.¹⁶⁴ The Unitary Patent, or the European Patent with Unitary Effect (EPUE), will grant the applicants patent protection in a single application in combination with enforcement in a single forum, the Court. This will make the procedure simpler and more cost effective for the applicants.

The patentees will have the option of opting out of the UPC system, which means that they can choose not to utilise the new system.¹⁶⁵ This is of course a general weakness in the system. Another potential weakness of the system is that it will employ a transitional period of seven years, during which parties still can bring infringement and revocation proceedings of an EP before any national court bound by the EP.¹⁶⁶ This transitional period can be extended for another seven years.¹⁶⁷ Another deficiency is that the system only has jurisdiction in the EU Member States, and not in extra-EU countries such as Norway and Switzerland.¹⁶⁸ Furthermore, there is likely to exist a period of uncertainty before the new court has managed to gain balance regarding the granting of patent applications. There is also the risk that the parties will partake in forum shopping, as there are several local and regional courts to choose from. The proceedings may take place where the infringement has occurred¹⁶⁹, where the defendant has its principal place of business¹⁷⁰, or if the defendant is based outside the EU – at one of the Central Divisions.¹⁷¹ Finally, there remains the question whether the swift procedure is appropriate for complex, high-tech international patent disputes.

4.2 Legal framework

As indicated above, a few Member States chose not to participate in the project with the Unitary Patent. This pushed the Council to implement an enhanced cooperation regarding the patent system by means of Article 20 of the Treaty on European Union (TEU).¹⁷² The provision states that the aim of the cooperation is to further the objectives of the European Union, protect its interests and reinforce its integrations process. It also states that the cooperation is voluntary and that it shall only be binding for the participating Member States. The provision is subject to the limits and in accordance with Article 326 of the Treaty on the Functioning of the European Union

¹⁶⁴ Ratification Details, Agreement on a Unified Patent Court, OJ C175, 20 June 2013 <<https://www.consilium.europa.eu/en/documents-publications/treaties-agreements/agreement/?id=2013001>> accessed 19 February 2020.

¹⁶⁵ UPCA (n 163), Article 83(3).

¹⁶⁶ UPCA (n 163), Article 83(1).

¹⁶⁷ UPCA (n 163), Article 83(5).

¹⁶⁸ UPCA (n 163), Article 2(b).

¹⁶⁹ UPCA (n 163), Article 33(1)(a).

¹⁷⁰ UPCA (n 163), Article 33(1)(b), para 1.

¹⁷¹ UPCA (n 163), Article 33(1)(b), para 2.

¹⁷² Consolidated version of the Treaty on European Union, 26 October 2012, 2012/C 326/01.

(TFEU).¹⁷³ According to this provision, the cooperation ‘shall not undermine the internal market or economic, social and territorial cohesion’.

The Unitary Patent Package contains three components. The first component is Regulation 1257/2012¹⁷⁴, which creates the Unitary Patent, stating that a European patent with unitary effect shall be treated with the same effect as a national patent.¹⁷⁵ The second component is Regulation 1260/2012¹⁷⁶, which establishes the language rules for the new patent, stating that a patent does not have to be translated into any other language than that used in the patent application.¹⁷⁷ The third component is the UPCA, the instrument establishing the Court. The two EU regulations will not apply before the UPCA is entered into force, and the agreement cannot enter into force until the three Member States in which the highest number of European patents are in effect have ratified the agreement.¹⁷⁸ When the agreement was signed in 2013, the three Member States with the most patents in effect the preceding year were Germany, France, and the United Kingdom. Remarkably, two of these three Member States have faced monumental concerns with the implementation of the Unified Patent System.

4.3 Concerns for implementation

Since the initiation of the Unified Patent project the dynamics in the EU has shifted dramatically. On the 23 June 2016, a majority of the voters in the Brexit referendum voted to leave the EU. On the 29 March 2017, the UK notified the European Council of its intentions to withdraw from the Union and thus triggering Article 50 TEU. On the 31 January 2020, the UK formally left the EU.¹⁷⁹ Just weeks after, on the 27 February 2020, the UK government confirmed that they also will be leaving the cooperation regarding the Unified Patent Court system.¹⁸⁰ The decision is likely to trigger great disturbances in the implementation of the new system. One practical example of this is that the central division planned to be established in London will undoubtedly be moved to another location.

¹⁷³ Consolidated version of the Treaty on the Functioning of the European Union, 13 December 2007, 2008/C 115/01.

¹⁷⁴ Regulation (EU) No 1257/2012 of the European Parliament and of the Council of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection, OJ L361/1 (31 December 2012) (Regulation 1257/2012).

¹⁷⁵ Regulation 1257/2012 (n 174), Article 7.

¹⁷⁶ Regulation (EU) No 1260/2012 of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements, OJ L361/89 (31 December 2012) (Regulation 1260/2012).

¹⁷⁷ Regulation 1260/2012 (n 176), Article 3.

¹⁷⁸ UPCA (n 163), Article 89.

¹⁷⁹ EUR-Lex, *Brexit – UK’s withdrawal from the EU* <<https://eur-lex.europa.eu/content/news/Brexit-UK-withdrawal-from-the-eu.html>> accessed 8 May 2020.

¹⁸⁰ Jeff Wild, ‘The UK will not be part of the UPC, government confirms to IAM’, IAM Magazine, 27 February 2020 <<https://www.iam-media.com/law-policy/uk-no-upc>> accessed 9 March 2020.

Not long after the communication from the UK, even greater obstacles emerged as the Federal Constitutional Court of Germany announced its decision on the complaint against the ratification of the UPCA. On the 20 March 2020, the German court found that the parliamentary act to approve the UPCA with the purpose of conferring sovereign power on the UPC is void.¹⁸¹ The reason for this is that the agreement amends the German constitution in substantive terms and therefore requires a two-thirds majority in the German Parliament, which the Parliament could not deliver. The Parliament could try to pass the act again with the required two-thirds majority, but it is unsure whether the Government would want to bring forward another act. The decision will of course endanger the entire unified patent cooperation and might lead to a complete revision of the system, or even grind it to a halt. The Preparatory Committee of the UPC declared that the preparatory work will continue, but that the situation will be monitored closely.¹⁸² In a press release shortly after the judgement, the German government declared that they will continue to work to ensure that they can provide a Unitary Patent Court and try to work around the formalities of the Federal Constitutional Court of Germany.¹⁸³

Article 89(1) of the UPCA states that the agreement does not enter into force until the three Member States have ratified the agreement which has the highest number of patents having effect in the year preceding the year of the signature of the agreement or the year preceding the entry into force of the amendments of the Brussel I Regulation (recast), whichever is the latest. Since the signature of the UPCA in 2013, the amendments of the Brussels I Regulation (recast) entered into force in 2014. This means that it is the Member States with the highest number of patents in 2013 that would have to ratify the agreement for it to enter into force. With the UK leaving both the EU and the Unified Patent Court, the question is whether the UK will still be considered one of the three Member States that were needed to ratify the UPCA. After all, the UK was a Member State when the agreement was signed. If the UK is not considered to be one of these three Member State, within the meaning of Article 89, the Member State next in line will most likely take its place (probably the Netherlands or Sweden). In that case, no modifications would have to made to Article 89 due to Brexit.

¹⁸¹ Federal Constitutional Court of Germany website, 'Act of Approval to the Agreement on a Unified Patent Court is void', Order of 13 February 2020, 2 BvR 739/17, Press Release No. 20/2020, 20 March 2020
<<https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2020/bvg20-020.html>> accessed 23 March 2020.

¹⁸² Unified Patent Court website, 'Federal Constitutional Court - Decision', 20 March 2020
<<https://www.unified-patent-court.org/news/federal-constitutional-court-decision>> accessed 23 March 2020.

¹⁸³ Federal Ministry of Justice and Consumer Protection of Germany, 'Europäische Patentreform soll fortgesetzt werden', Press release, 26 March 2020
<https://www.bmjv.de/SharedDocs/Pressemitteilungen/DE/2020/032620_Patentreform.htm> accessed 1 April 2020.

The issue with Germany is more problematic for the Unified Patent Court with regards to the implementation of the UPCA and Article 89. As the nation with the most patents in effect in the EU, Germany is a crucial member of the whole enterprise. Of course, Germany is still a Member State in all senses of the term, including the definition in Article 2(b) in the UPCA. With the current wording of Article 89(1), Germany is one of the three Member States having to ratify the agreement for the agreement to enter into force. Without Germany's ratification, stalemate will prevail in the implementation of the Court. This stalemate could, however, be remedied by a modification of the wording of Article 89(1). Perhaps the wording could change from 'the three Member States in which the highest number ...' to 'the three out of the four Member States in which the highest number ...'. In that way, the Unified Patent Court could move forward without Germany. However, it is highly unlikely that any of the parties, including the EU and the Preparatory Committee of the Unified Patent Court, would want to leave Germany behind in this common enterprise. With other important Member States such as Spain and Poland already choosing not to part-take in the cooperation, in combination with the two heavy blows of early 2020 from the UK and Germany, the future of the Unified Patent Court is indisputably uncertain.

4.4 The Unified Patent Court

4.4.1 In general

The implementation of the Unitary Patent System required a judicial body to be in charge of solving disputes that relate to these patents – the Unified Patent Court. The Court is the new international court for all EU Member States regarding patent disputes. The Court will have exclusive jurisdiction over patent disputes within the EU relating to EP and EPUE, but no competence with regard to national patents.¹⁸⁴ The rulings of the Court will have effect in those Member States having ratified the UPCA.¹⁸⁵ The goal is to provide simplified, quicker and more efficient judicial procedures with high-quality decisions issued by panels composed of both legally and technically qualified judges. The Court will consist of Local and Regional Courts of First Instance located in the contracting Member States, with Central Divisions in Paris, London and Munich. The Local and Regional courts will handle infringement actions, actions for damages and compensation and actions for provisional and protective measure and injunctions, as well as counterclaims for revocation of the patent. The Central Divisions will handle actions for revocation of a patent and for a declaration of non-infringement. The Court of Appeal will be seated in Luxembourg, to which all final decisions of the Courts of First Instance can be appealed. As with the national courts, the Court will have to refer requests for preliminary ruling regarding the interpretation and application of EU law to the CJEU, in accordance with Article 267 TFEU.

¹⁸⁴ UPCA (n 163), Article 32(1).

¹⁸⁵ UPCA (n 163), Article 1.

4.4.2 The competence of the Court

For the EU to be able to introduce a new court for the Member States, and for the Court to gain jurisdiction, the Brussels I Regulation (recast) had to be amended. This prerequisite was included in the UPCA, whose Article 89(1) states that the agreement shall not enter into force until the amendments of the Brussel I Regulation (recast) enter into force. On 26 July 2013, the European Commission presented a proposal to the European Parliament and the Council of the European Parliament.¹⁸⁶ The Parliament approved the amended version after voting 523 for and 98 against the proposal on the 15 April 2014.¹⁸⁷ The Council approved the amended version in a meeting on 6 May 2014 and the amendments entered into force on 30 May 2014 by the adaptation of Regulation No 542/2014¹⁸⁸. The main purpose of this new regulation was to ensure compliance between the Brussels I Regulation (recast) and the UPCA. The amendments addressed two issues, which will be explained below.

The first issue concerned the definition of a court in the Brussels I Regulation (recast). Three changes were needed. Firstly, the EU had to clarify that ‘courts common to several Member States’ within the meaning of Brussels I Regulation (recast) encompassed the Unified Patent Court. This was done by adding Article 71(a) to the Regulation, stating that ‘2. For the purposes of this Regulation, each of the following courts shall be a common court: (a) the Unified Patent Court established by the Agreement on a Unified Patent Court signed on 19 February 2013 (the ‘UPCA’)’. Secondly, the EU had to create *lis pendens* rules for cases brought before the Court, barring parallel litigations. This was done by adding Article 71(c), which states that the same rules for *lis pendens* found in Articles 29–32 of the Brussels I Regulation (recast) shall apply to the Court. Thirdly, the EU had to establish the recognition and enforcement of the Court decisions. This was done by adding Article 71(d), which states that the amended Regulation shall apply to ‘the recognition and enforcement of: (a) judgments given by a common court’.

The second issue concerned the particular issue of jurisdiction rules for defendants in non-EU states. Courts common to several Member States, such as the Court, cannot unlike a national court exercise jurisdiction based on national law on defendants that do not have a Member State as their domicile. This is expressed in Recital 6 of Regulation No 542/2014. The problem was addressed by introducing Article 71(b)(2), which removes the condition of defendant’s domicile as a basis for jurisdiction. Instead, it states that Chapter

¹⁸⁶ Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters. 2013/0268 (COD), 26 July 2013.

¹⁸⁷ Results of vote in Parliament, Statistics - 2013/0268(COD), A7-0052/2014 <<https://oeil.secure.europarl.europa.eu/oeil/popups/sda.do?id=24065&l=en>> accessed 2 March 2020.

¹⁸⁸ Regulation (EU) No 542/2014 of the European Parliament and of the Council of 15 May 2014 amending Regulation (EU) No 1215/2012 as regards the rules to be applied with respect to the Unified Patent Court and the Benelux Court of Justice, OJ L 163/1 (Regulation 541/2014).

II (named ‘Jurisdiction’) of the Brussels I Regulation (recast) shall apply regardless of the defendant’s domicile. In practice, this does not change much as litigation may already be brought before a court in the place of infringement, according to Article 7(2) of the Brussels I Regulation (recast). However, by introducing Article 71(b)(3) the EU seems to be extending the jurisdiction of the Court. The article gives the Court jurisdiction to decide also in damage arising outside the EU from a patent infringement occurring inside the EU. A prerequisite for the jurisdiction is that the defendant’s property is located in a Member State that is party to the UPCA. The dispute also has to have ‘sufficient connection’ with any such Member State. It has yet to be determined in case law what ‘sufficient connection’ implies.

Practitioner’s perspective

Who: Tim Bast, Vice President Intellectual Property Rights
Anders Hellström, Vice President Legal Affairs

Where: Tetra Pak, Lund

Tim Bast says patent issues are technical issues, not legal issues. It is very difficult for judges to deal with these issues – they require experts. Therefore, specialisation is needed for the courts and, he says, the Unified Patent Court is a step in the right direction. He also states that the Arbitration and Mediation Centre is good because litigation is uncertain and expensive. Mediation is very helpful in patent disputes, as publicity is an aspect that is often considered.

Anders Hellström says that arbitration in IP cases is most likely the quicker solution, but institutions such as ICC are very costly, and they therefore rarely generate an economically viable outcome. When Tetra Pak litigates in the US, they often switch to local institutes where they can choose experts of their liking. Tetra Pak always uses external counsel in patent disputes, as patent laws differ amongst nations. A challenge with external counsel is that they will often want to continue litigating and prolong the proceedings, since they are getting paid by the hour.

Patents are special in that they are time-limited, making time of the essence. The Arbitration and Mediation Centre can be a viable way, but it is important that the parties can come to an agreement at any time and that the judges are competent. This is valid also for the Unified Patent Court; it is extremely important that the technical experts are competent.

4.5 The Arbitration and Mediation Centre

4.5.1 Background

With the introduction of the Court, an Arbitration and Mediation Centre (‘the Centre’) in Lisbon and Ljubljana will also be established.¹⁸⁹ The outlines of such a centre were first drafted by Portugal during their EU Presidency in the second half of 2007. The Presidency suggested that there should be an arbitration and mediation centre for patent disputes, as this would be time and cost effective. The alternative would also ensure better proximity and accessibility for SMEs, and the centre would be especially fit for dealing with patent license fees. They also stated that the system should be voluntary and not mandatory for the parties, and that the legal effect of the decision of the centre should be similar to decisions of the first instance divisions.¹⁹⁰ This proposal served as a basis for the drafting of the UPCA, and the suggestions were later, to great extent, incorporated into the agreement.

The objective of the Centre is to facilitate the arbitration and mediation of patent disputes falling within the scope of the UPCA. The scope is defined as any (a) European patent with unitary effect, (b) supplementary protection certificate issued for a product protected by a patent, (c) European patent which has not yet lapsed at the date of entry into force of the UPCA or was granted after that date, without prejudice to Article 81, and (d) European patent application which is pending at the date of entry into force of the UPCA or which is filed after that date, without prejudice to Article 83.

The UPCA states that the Centre has been passed the authority to create rules for the arbitration and mediation procedures.¹⁹¹ The Centre has also been awarded the task to assemble arbitrators and mediators to rule in the disputes.¹⁹² These articles in the UPCA are noteworthy in that they are the first time a legal product at the EU level sanctions arbitration as a tool for solving certain types of IP disputes.¹⁹³ The only comparable tool before Article 35 of the UPCA was the mediation service accessible for certain types of trademark and design disputes by the Office for Harmonization in the Internal Market (OHIM), which is the body that oversees the registrations of European trademarks and designs.¹⁹⁴

¹⁸⁹ UPCA (n 163), Article 35(1).

¹⁹⁰ Working document No. 14492/07 of the Council of the European Union of 30 October 2007, Point 16.

¹⁹¹ UPCA (n 163), Article 35(3).

¹⁹² UPCA (n 163), Article 35(4).

¹⁹³ Jacques de Werra, ‘New Developments of IP Arbitration and Mediation in Europe: The Patent Mediation and Arbitration Center Instituted by the Agreement on a Unified Patent Court’ (2014) *Revista Brasileira de Arbitragem* 17–35, 22.

¹⁹⁴ Sven Stürmann, ‘Mediation and Community trade marks: new gimmick or real benefit?’ (2013) Vol. 8, No. 9, *Journal of Intellectual Property Law & Practice* 708–715, 709–710.

4.5.2 The rules of the Centre

According to the UPCA, the judge of the Court is obliged to arrange an interim hearing for the parties in the dispute. This hearing includes the investigation of the possibilities of reaching a settlement, including through mediation and/or arbitration, by using the facilities of the Centre referred to in Article 35.¹⁹⁵ All operating costs for the Centre are borne by the budget of the Court.¹⁹⁶ If the parties cannot reach a settlement before entering proceedings in the Court, the parties may at any time conclude their case by settlement. According to Article 79, the settlement shall be confirmed by a decision of the Court.¹⁹⁷ However, according to Article 35(2), a settlement is on the same level as a decision of the Court.¹⁹⁸ The settlement will hence be enforceable in any Contracting Member State, according to Article 82(1). This raises the question whether a pending confirmation at the Court, in accordance with Article 79, is to be considered enforceable already. If it is already enforceable, in accordance with Article 35(2), is there really a need for confirmation by the Court?

The guidelines for settlements are further developed in the Rules of Procedure for the Unified Patent Court ('UPC Rules')¹⁹⁹. They state that if the Court finds that settlement may be suitable for the dispute, the Court may suggest this to the parties.²⁰⁰ It is the responsibility of the judge during the interim conference to investigate this option.²⁰¹ The rules also state that parties who choose to mediate in an attempt to settle a dispute are not barred from commencing legal proceedings before the Court concerning the same dispute. Furthermore, the Court has the authority to confirm the terms of any settlement, if the parties agree to this.²⁰² The parties have to report any concluded settlement to the judge of the Court, who has the authority to enforce the settlement as a final decision of the Court.²⁰³ The parties can choose to divide the costs of the mediation themselves or request the Court to decide on the costs for them.²⁰⁴ The costs could include compensation for any representation of the applicant, compensation for experts, compensation for witnesses, compensation for interpreters and translators, and costs for any appeal procedure to the Court of Appeal.²⁰⁵ Finally, any terms of the settlement agreement may not be used as evidence by the Court in proceedings before the Court or any other Court, unless the parties has expressly agreed to keep this possibility open.²⁰⁶

¹⁹⁵ UPCA (n 163), Article 52(2).

¹⁹⁶ UPCA (n 163), Article 39.

¹⁹⁷ UPCA (n 163), Article 79.

¹⁹⁸ UPCA (n 163), Article 35(2).

¹⁹⁹ Preliminary set of provisions for the Rules of Procedure for the Unified Patent Court, 18th draft of 19 October 2015, as amended on 15 March 2017 (UPC Rules).

²⁰⁰ UPC Rules (n 199), Rule 11(1).

²⁰¹ UPC Rules (n 199), Rule 104(d).

²⁰² UPC Rules (n 199), Rule 11(2).

²⁰³ UPC Rules (n 199), Rule 365(1).

²⁰⁴ UPC Rules (n 199), Rule 11(2).

²⁰⁵ UPC Rules (n 199), Rules 150–157.

²⁰⁶ UPC Rules (n 199), Rule 11(3).

According to Article 79 Sentence 1 of the UPCA, the parties may at any time conclude their dispute by way of settlement. However, a limitation to this rule can be found in Article 79 Sentence 2, stating that a patent may not be revoked or limited by way of settlement. A related provision is found in Article 35(2), which states that a patent may not be revoked or limited in mediation or arbitration proceedings. These provisions are in line with most EU Member States practice regarding arbitration and mediation of patents (see sections 3.2 and 3.3). The relevant question here is if the limitation refers to revoking or limiting a patent with *inter partes* or *erga omnes* effect. If the limitation refers to that the validity of a patent may not be tried at all, not even *inter partes*, then very few parties would choose arbitration proceedings at the Centre. If a party has in an agreement concluded to license their patent to another party, and that second party suspects that the patent is invalid, then that party would want to contest the license agreement on basis that the patent is invalid. However, according to the UPCA, that would not be possible. The Court has exclusive jurisdiction over decisions on validity of patents; if the Court decides to revoke a patent, the patent is immediately removed from the patent registry, according to Article 65 of the UPCA. It is therefore more likely that the limitation is intended to be interpreted as prohibiting decisions with *erga omnes* effect. Subsequently, if an arbitration proceeding only concerns the validity of a patent with *inter partes* effect, then the exclusive jurisdictional power of the Court does not encompass that arbitration.

However, according to Rule 11(2) of the UPC Rules the Court shall by request of the parties confirm the terms of any settlement or award, including ‘a term which obliges the patent owner to limit, surrender or agree to the revocation of a patent or not to assert it against the other party and/or third parties’. This rule will thus have to be regarded as an exception to the limitations in Article 35(2) and Article 79 Sentence 2 stating that a patent may not be revoked or limited in mediation or arbitration proceedings by way of settlement. The UPC Rules and the UPCA are in fact stating that it is possible for the parties to freely conclude between themselves a settlement agreement to revoke or limit a patent and have this agreement confirmed by the Court. The patentee is then obliged by the settlement to request revocation or limitation of the patent at the EPO if it is a European patent or at the national patent registry office if it is a national patent.²⁰⁷

4.5.3 The competence of the Centre

According to Article 32(1) of the UPCA, it is apparent that the Court will have exclusive competence over the listed patent disputes regarding European patents in the Contracting Member States. However, it is unclear whether the Centre will have exclusive competence over patent arbitration and mediation in the Contracting Member States. Conventionally, if the parties enter into an arbitration agreement the national courts will be barred from having

²⁰⁷ Pieter Callens and Sam Granata, *Introduction to Unitary Patent and the Unified Patent Court* (Kluwer Law International 2013) 134.

jurisdiction over the dispute. This is according to the New York Convention, which all Contracting Member States are party to.²⁰⁸ This raises the question if an arbitration agreement will be treated as a bar to proceedings before the Court, even though the Court has exclusive competence. As settlements through mediation usually are non-enforceable and do not bar court proceedings (see subsection 2.2.2.2), it is reasonable to assume that these settlements may be brought before the Court without conflicting with the rules of the Centre.

Article 32(1) of the UPCA suggests that the parties are not allowed to decide to handle their dispute in arbitration or mediation, at least in any other institution than the Centre. If one party would initiate proceedings before the Court, the Court may consider itself to be competent to try the dispute, despite any arbitration or mediation agreement that the other party invokes. There are seemingly no articles in the UPCA or the UPC Rules that would persuade the Court to dismiss such case. In an agreement where the parties have agreed to appoint a specific national court to handle their dispute, the Court has to dismiss the case with reference to Article 25 of the Brussels I Regulation (recast). The provision states that the parties may conclude a prorogation agreement declaring that a court of an EU Member State is to have exclusive jurisdiction over the dispute. There is however an exception to this rule in Article 24(4) of the Brussels I Regulation (recast) that has primacy over the prorogation agreement, concerning proceedings concerned with the registration or validity of patent, irrespective of whether the issue is raised by way of an action or as a defence. According to the exception, the court of the Member State in which the registration (of the patent) has been applied for shall have exclusive jurisdiction.

A potential deadlock here concerns the situation where the parties have concluded an agreement regarding the registration or validity of a European patent that includes an arbitration clause. On the one hand, the Court will consider itself competent with reference to the UPCA and Brussels I Regulation (recast). On the other hand, the chosen arbitration institution will consider itself competent with reference to the New York Convention. However, this deadlock is resolved by an exclusion in the Brussels I Regulation (recast). Article 1(2)(d) states that the regulation does not apply to arbitration. This exclusion is further explained in Recital 12 of the same regulation with the following: ‘Nothing in this Regulation should prevent the courts of a Member State, when seised of an action in a matter in respect of which the parties have entered into an arbitration agreement, from referring the parties to arbitration, from staying or dismissing the proceedings’.

Furthermore, the exclusion determines that it is national law and international instruments, not the Brussels I Regulation (recast), that should apply to both (1) questions of the existence and validity of an arbitration agreement, and (2) the recognition and enforcements of judgments of courts in Member States. The Brussels I Regulation (recast) is only applicable to the recognition and

²⁰⁸ New York Convention (n 16), Article II.

enforcement of judgements of courts of a Member State in which these courts have ruled that there exists no valid arbitration agreement. However, this recognition or enforcement does not exclude that a court in another Member State recognises or enforces an arbitration award according to the New York Convention.

In conclusion, the exclusion in Article 1(2)(d) means that arbitration institutions in the EU are freely allowed to assess their jurisdiction without intervention from decisions of a national court of a Member State where the arbitration was not settled.

4.5.4 Enforcement of awards and settlements

A decision of the Court shall be enforceable in any Contracting Member State, according to Article 82 of the UPCA. When it comes to the enforcement of settlements reached through the Centre the rules are not as straightforward. Article 35(2) states that Article 82 should be applied *mutatis mutandis* to any settlement reached through the use of the facilities of the Centre, including through mediation. Traditionally, a settlement is a decision concluding a successful mediation between parties. This common definition of ‘settlement’ is confirmed in the way the term is used in the WIPO Mediation Rules.²⁰⁹ In contrast, the term being used to conclude an arbitration in the WIPO Arbitration Rules is an ‘award’.²¹⁰ An award is the final decision of the arbitrator, by which the parties are bound. Therefore, the term ‘settlement’ in the UPCA must refer to the termination of mediation, rather than to arbitration. Using a literal interpretation, this leads to the impression that the legislator did not want Articles 35(2) and 79 of the UPCA to encompass arbitration. This is however not a problem in practice, since arbitration awards are close to universally enforceable, in alignment with the New York Convention (see subsection 3.2.1.1).

4.6 Choice of law

4.6.1 In the Court

The UPCA contains rules for the choice of law upon which the Court should base its decisions. The applicable rules for the Court can be found in different legislations. The UPCA lists the five sources of law on which the Court shall base its decisions: (a) Union law, (b) the UPCA, (c) the EPC, (d) other international agreements applicable to patents and binding on all the Contracting Member States, and (e) national law.²¹¹ Neither the UPCA nor

²⁰⁹ World Intellectual Property (WIPO) Mediation Rules, Article 19
<<https://www.wipo.int/amc/en/mediation/rules/>> accessed 8 May 2020.

²¹⁰ WIPO Arbitration Rules (n 123), Article 66.

²¹¹ UPCA (n 163), Article 24.

any other legislation has defined these five sources. The following sections is an attempt to define them.

4.6.1.1 Union law

The Court has to base its decisions according to Union law, including Regulation 1257/2012 and Regulation 1260/2012 ('the Unitary Patent Regulations'). According to the UPCA, the Court shall apply Union law in its entirety and shall respect its primacy.²¹² Decisions from the Court of Justice of the European Union (CJEU) will therefore also be binding to the Court. The Unitary Patent Regulations define the Unitary Patent and the substantive rights of the patent owner. Here, the principle of uniform protection²¹³, patent exhaustion²¹⁴ and licenses²¹⁵ are found. Regulation 1257/2012 states that a Unitary Patent can only be limited, transferred or revoked 'in respect of all the participating Member States'.²¹⁶ This suggests that if a Member State invalidates a Unitary Patent in one nation, then the Unitary Patent will become invalid in all nations. The Regulation also defines the scope of the Unitary Patent, stating that the patent prevents others from carrying out 'acts against which that patent provides protection throughout the territories of the participating Member States'.²¹⁷ The Regulation thus does not define the positive rights for the patent holder. Instead, it refers to other sources of law binding for the Member States. In doing so, the Regulation invites to the possibility of conflicting meanings of the Unitary Patent rights.

4.6.1.2 The UPCA

The Court also has to base its decisions on the UPCA. As the previous section explained, the UPCA contains a provision stating that Union law should be respected in its entirety and that it has primacy. This gives the judges of the Court a wide range of legal sources to apply when deciding a case. The UPCA contains rules of substantive law itself and is therefore also a source of law for the Court. It will thus be used to decide in patent disputes. Rules regarding direct and indirect infringement²¹⁸, limitations²¹⁹ and rights of prior use²²⁰ are to be found in UPCA. In Member States where both the Unitary Patent Regulations and the UPCA are in force, two separate courts will be used to resolve patent disputes. Disputes over national patents will be resolved in the national courts and European patents and unified patents will be resolved in the Court.

²¹² UPCA (n 163), Article 20.

²¹³ Regulation 1257/2012 (n 174), Article 5

²¹⁴ Regulation 1257/2012 (n 174), Article 6

²¹⁵ Regulation 1257/2012 (n 174), Article 8.

²¹⁶ Regulation 1257/2012 (n 174), Article 3(2), para 2.

²¹⁷ Regulation 1257/2012 (n 174), Article 5(1).

²¹⁸ UPCA (n 163), Articles 25 and 26.

²¹⁹ UPCA (n 163), Article 27.

²²⁰ UPCA (n 163), Article 28.

4.6.1.3 The EPC

The Court also has to base its decisions on the EPC. The EPC will be a central piece of legislation for the Court, as the EPC defines the patentable inventions²²¹, the exceptions to patentability²²², and the basic requirements for patentability (novelty²²³, inventive step²²⁴ and industrial application²²⁵).

4.6.1.4 Other international agreements

The Court shall also base its decision on ‘other international agreements applicable to patents and binding on all the Contracting Member States’²²⁶. One example of an applicable international agreement is most likely the New York Convention.

4.6.1.5 National law

In the last phase, the Court will resort to the national law of the Member State. The law of which Member State is determined by conflict of law rules, in particular the Rome I Regulation²²⁷ (for contractual obligations) and the Rome II Regulation²²⁸ (for non-contractual obligations). As the UPCA and the EPC form a part of national law through the constitutional provisions of the Member States, the reference to national law is really an indirect reference to these two international treaties.²²⁹ Rules regarding compulsory licenses and the Unitary Patent as property can be found in national law.²³⁰

4.6.2 In the Centre

It is unclear whether the above sources are also to be applied by the Centre. On the one hand, no provision in the Unitary Patent Package explicitly suggests that they should. On the other hand, as the Centre is a product of the UPCA (arbitration or mediation is not mentioned in the Unified Patent Regulations), it is not too far-fetched to assume that they would.

In international commercial arbitration and mediation, the parties may freely choose the laws that the tribunal shall apply in the resolution of the parties’ dispute. This flexibility and autonomy are some of the most valued characteristics of arbitration and mediation (see for example subsection

²²¹ EPC (n 74), Article 52.

²²² EPC (n 74), Article 53.

²²³ EPC (n 74), Article 54.

²²⁴ EPC (n 74), Article 56.

²²⁵ EPC (n 74), Article 57.

²²⁶ UPCA (n 163), Article 24(1)(d).

²²⁷ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I Regulation).

²²⁸ Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II Regulation).

²²⁹ Jan Brinkhof and Ansgar Ohly, *Towards a Unified Patent Court in Europe* (Oxford University Press 2013) 212.

²³⁰ Callens and Granata (n 207) 98.

2.1.3.5). If the parties cannot agree on the choice of law, they can agree that the tribunal may choose for them. In institutional arbitration and mediation, there are usually procedural rules in place to determine the applicable law. On the one hand, if the idea is that the Centre shall apply all of the same sources of law as the Court, this is a large step away from the normal practice of arbitration institutions. The Centre would then lose a lot of that much appreciated flexibility and autonomy offered by other arbitration and mediation institutes. On the other hand, if the idea is that the parties may choose the sources of law applicable to their dispute, this raises the question of to what extent the chosen law has to respect the fundamental principles of the EU, on which the Unified Patent System is founded.

4.7 Conclusions

The Court will have exclusive jurisdiction over patent disputes within the EU regarding European and Unified patents. The Court is intended to provide more efficient decisions regarding these patents. The objective of the Centre is to facilitate the arbitration and mediation of these patents. The Court is obliged to arrange interim hearings to conclude if the parties can settle their dispute through arbitration or mediation. The settlement is to be treated as a decision by the Court and is instantly enforceable. The parties may at any time conclude their dispute through settlement, although a limitation states that a patent may not be revoked or limited through settlement. This limitation is likely intended to apply to *erga omnes* settlements, not *inter partes*. The UPC Rules include an exception to the limitation, stating that the Court shall confirm any settlement or award which limits, surrenders or revokes a patent. This gives the parties the freedom to reach settlements regarding limitation and revocation of patents.

An arbitration clause would bar any excluded national court to address the dispute, but the UPCA is ambivalent regarding this. The Centre does not have exclusive jurisdiction over patent arbitration. The Court may consider itself competent in any applicable dispute, and thus disregard any arbitration clause. The parties may conclude a prorogation agreement, in which a specific national court is selected. However, validity of patents is explicitly excluded. Instead, the court of the Member State in which the registration was made shall have exclusive jurisdiction. If two parties conclude an agreement regarding the validity of a European patent that includes an arbitration clause, both the Court and the chosen arbitration institution would consider themselves competent. However, the regulation is not applicable to arbitration. This means that arbitration institutes in the EU are free to assess their jurisdiction without interference of decisions from national courts. The UPCA includes rules for the choice of law for the Court, but no provisions explicitly apply to the Centre. However, it is not unreasonable to assume that the rules of the Court would also apply to the Centre. If this is the case, it would contravene the flexibility and autonomy for which arbitration is regularly chosen. The Centre would then be noticeably deviating from other arbitration institutions.

Practitioner's perspective

Who: Filip von Friesendorff, Vice President Group Patent

Where: Alfa Laval, Lund

Alfa Laval has a patent, a legal and a R&D department, but they use external legal representatives in patent disputes. This is because these disputes are highly resource intensive. Filip von Friesendorff points out that you do not need any formal education or competence to be a legal representative. In the unified patent system, the representatives will need some kind of certificate. Due to this, the industry will continue to hire external legal advice.

Their patent disputes usually start with the detection of some form of infringement; disputes arising from contracts are fairly rare. However, they can arise after the expiry of a cooperation agreement. If a patent is part of a larger commercial deal, they use arbitration clauses to counter potential problems with the patent. The purpose is in part to send a message to the parties that the lawyers are thinking ahead. Keeping the commercial perspective is about assessing risks, Filip maintains.

Alfa Laval sometimes sends letters to warn the infringing party that Alfa Laval will sue them in court if the infringement does not cease. 90 per cent of the cases brought before the court are concluded through settlements. Alfa Laval does not make use of any arbitration institute. But if the parties reach a settlement agreement, that agreement usually includes an arbitration clause.

Alfa Laval are taking precautionary measures regarding the unified patent system, as there still remains uncertainties. They will probably not make any great savings in using the system. With the new system, suddenly a lot of patents that were previously not applicable in Sweden, are overnight going to be applicable. It will probably affect the small and medium-sized companies, but not Alfa Laval. With the unified system, it will become easier to dispute across borders, he predicts.

5 Conclusions and discussion

5.1 Arbitration and mediation in commercial disputes

5.1.1 Arbitration

Arbitration can only be proceeded if the parties want to participate in the arrangement. The will of the parties to arbitrate is expressed by means of a valid arbitration agreement concluded either before or after the dispute has arisen. This agreement is binding through the New York Convention. As arbitration is concluded outside the judicial system, the parties can choose to keep the procedure confidential, away from the eyes of the public and the press. This confidentiality is an exception to the main rule of publicity in legal proceedings. This main rule is the product of fundamental legal principles, such as the principle of public access and the principle of transparency. These principles are in turn sprung from the principle of separation of powers and the idea that both the public and the press should be able to scrutinise the court rulings. However, this transparency is not prioritised by the parties of a commercial dispute. Instead, they want to communicate as little as possible to the public and to competitors in order not to disclose any vital business information.

Arbitration is also neutral, which means that the parties are free to choose venue, language and applicable law as they see fit. As the main objective of the arbitrator is to settle the dispute to the liking of the parties, the arbitrator does not have to take into account issues of public interest or public policy. The arbitrator is really only present to lead the proceedings in a manner that the parties *perceive* to be neutral, not to pass judgement on whether it really is neutral. The arbitral award can be appealed only in very limited circumstances, which in practice makes the decision of the arbitrator final. The awards are also internationally enforced by national courts under to the New York Convention.

The parties in an arbitration procedure are also free to choose their own arbitrator and their own procedural rules. This gives the parties the flexibility and autonomy to adjust the procedure according to their particular dispute – sometimes a shallow and swift procedure is preferred and sometimes there is a need to go deeper and be more thorough. The parties can even empower the arbitrator to rule according to fairness, instead of according to the law. However, if the parties have not included the rules of procedure in their arbitration agreement, there is an imminent risk that the parties will not reach an agreement regarding this post-dispute.

Arbitration is generally considerably shorter than litigation in court. This is due to the possibility to strip down the procedure. However, the most popular arbitration institutions serve many clients and delays may therefore arise. A shorter procedure would reasonably also entail a cheaper procedure, but this does not seem to be the case. The absence of appeal possibilities usually reduces the cost, but evidently not enough, as arbitrating costs only slightly less than litigating in your home court.

5.1.2 Mediation

Mediation is voluntary and the parties are free to leave the proceedings at any time. The mediator is free to take into consideration both past incongruities and future business relationships, trying to find common ground and reaching a settlement. For the parties to succeed in mediation, they should not be focused on ‘winning’ the dispute, as this attitude may hinder them from reaching a settlement. Mediation is not about compromising but reaching consensus. The settlement is not binding for the parties, but rather relies on the parties unending tolerance of the same. Furthermore, the settlement of a mediation is not enforceable in any jurisdiction, although the settlement agreement may be considered a binding contract according to private law. If one party stops adhering to the settlement, arbitration or litigation may follow.

Mediation is considerably faster and cheaper than arbitration. Considering the increased costs of both arbitration and litigation, mediation is an appealing alternative. Moreover, confidentiality is essential for mediation, as it is imperative that the parties speak their true minds – otherwise they will never be able to reach a consensus. If there is a risk of any information being revealed to the public, the parties may not be as outspoken as is required. The confidentiality is usually safeguarded by non-disclosure agreements and ethical codes of the mediator. Furthermore, it is important the mediator is perceived by the parties to be impartial. Therefore, the mediator should have no conflicts of interests or take any parties’ side. To be perceived as impartial, the mediator needs to grant the parties equal opportunities to present their intentions.

5.2 Arbitration and mediation in patent disputes

5.2.1 Patent arbitration

Patents are registered in public registry offices and it is only these offices that can revoke, amend or grant patent rights. Consequently, the rights are not freely disposed. A debate has therefore arisen about whether or not patent disputes should be resolved entirely by a public body within the national system – not through any other dispute resolution mechanism. Disputes arising from contractual relationships, for example through agreements regarding licenses, technology transfers and R&D collaborations involving patents, are commonly arbitrated. However, non-contractual disputes regarding validity of patents and patent infringement are more rarely arbitrated. Most jurisdictions do not allow any arbitration of validity. A few nations allow arbitration *inter partes*, but not *erga omnes*.

Patent disputes are often international. Yet, patents are registered nationally and therefore have to be litigated in separate national courts. These parallel procedures may often result in deviating results, as each court may apply their own laws. As arbitration can be held in a single forum, this unpredictability can be alleviated. Patent disputes are also technically complicated and therefore require expert knowledge. In arbitration, the parties are free to appoint expert judges and select applicable laws of their choice. Furthermore, the limited validity of patents also requires the procedure to be concluded swiftly. As the parties are free to shorten the proceedings at any time, arbitration can save them time. Another mechanism that may save the parties time is the fact that the arbitral award is final. The lack of possibility to appeal considerably shortens the legal dispute. However, not being able to appeal might be risky, as patents usually are highly valuable. Moreover, patent disputes often contain delicate technical and business information. In arbitration, it is possible to agree to keep this information confidential. In court litigation, principles of transparency might require the parties to reveal this information.

Arbitration cannot be used to settle all disputes between parties disputing a patent, for example regarding validity. This might force the parties to litigate some issues in court anyhow. Furthermore, arbitration does not necessarily offer the organisation of court litigation. If no procedural framework is established pre-dispute, agreeing on the procedural rules may develop into a dispute of its own. Moreover, arbitration does not offer any long-term solution to the dispute. The arbitral award might lead to hostility and end the commercial relationship of the parties, just like a court decision. Arbitration should thus be regarded as a controlled commercial divorce and not be used to strengthen the relationship of the parties.

5.2.2 Patent mediation

The use of mediation in patent disputes has been debated. However, the use is growing. Mediation is highly flexible, which suits the international character of patent disputes. As concluded, patent disputes are technically complex and multi-jurisdictional, which entail high costs and risks for the parties. Mediation can offer a less risky and less expensive resolution. In choosing mediation, the parties may even strengthen their commercial relationships and extend their collaborations, leading to efficiency gains for everyone. Mediation is suitable for disputes regarding patent ownership, validity and infringement. In disputes of ownership, there is no public interest in the outcome of the dispute and the parties are therefore free to mediate. In infringement disputes, there is also little public interest and the mediation often results in reimbursements or the establishment of license agreements. Mediation would however not be suitable in disputes with deliberate patent infringements or extortion, as mediation requires cooperation from both parties.

As touched upon previously, patents require secrecy. If information regarding an invention is disclosed before the filing of the patent application, the invention cannot be patented. Even after the patent is granted, there might be need for protecting associated information from the public. Mediators are used to providing this commercial confidentiality and therefore mediation is suitable for patent disputes. Furthermore, mediation is flexible. As patent disputes often involve multiple jurisdictions and therefore multiple legal cultures and languages, the need for cultural knowledge is great. Mediators trained in cross-cultural disputes are therefore useful. As patent disputes often require extensive research, the costs for litigation might increase. However, mediation costs only a fraction of the cost of court litigation. This is in thanks to the less formalistic procedure, which does not result in a binding agreement. For the same reasons, the time to conclude court litigation may also increase. Mediation is considerably faster than court litigation and as patents are time-limited, speed is of the essence.

Mediation is not suitable in situations where an infringer is not willing to discuss a reasonable agreement. In that case, mediation may only contribute to prolonging the dispute. Instead, the threat of court litigation may persuade the infringer to stop the infringement. In some cases, if the infringer does not adhere to the threat, the patentee might need to apply for a ban on the infringer. This cannot be done in mediation. Furthermore, as mediation is confidential it is inescapably also non-transparent. Confidentiality is a great advantage for the parties of mediation, but it is arguably not beneficial for society. The purpose of the patent from the public's perspective is to incentivise innovation and promote economic growth. Since the patent is an exception to the prohibition on monopolies, it is important that this exception is well-functioning – otherwise, competition and in turn, the economy may be harmed. However, removing confidentiality from mediation would most likely repel disputing parties.

5.3 Arbitration and Mediation in the Unified Patent System

5.3.1 The Court

The EP had steadily grown into a huge success. However, the EP needed to be enforced in separate national courts. Therefore, the demand for a unitary patent combined with a unitary patent court was emerging. The solution was the EPUE, which granted protection in a single application with enforcement in a single forum, the Court. The EPUE was introduced using the provisions on enhanced cooperation in TEU. However, the cooperation cannot be implemented until the three most frequent patenting Member States ratify the UPCA, and as of May 2020, the UK and Germany will not or cannot ratify the UPCA.

The Court is proposed to be a judicial body with exclusive competence over patent disputes within the EU relating to EP and EPUE. The vision is to develop a faster and simpler procedure with technically and legally skilled judges concluding high-quality decisions. A new regulation was adopted to ensure compliance between the Brussels I Regulation (recast) and the UPCA. An amendment was made to the Brussels I Regulation (recast) to clarify that the Court was to be considered a court within the definition of the regulation. Furthermore, the jurisdiction of the Court was extended to also encompass damages arising from outside the EU from an infringement occurring inside the EU.

5.3.2 The Centre

The Centre is intended to become an institution for the arbitration and mediation of disputes relating to EP and EPUE. This is the first time a legal product at the EU level sanctions arbitration a tool for solving any IP dispute. The availability to arbitrate and mediate is intended to help especially SMEs solve patent disputes. The Centre is to create its own rules and to assemble its own arbitrators and mediators. The judges of the Court have the responsibility to investigate whether the parties can reach a settlement through arbitration or mediation. In the UPCA, the use of the term ‘settlement’ is most likely referring to an arbitral award, although the general legal use of the term is referring to the conclusion of a mediation. A settlement is considered to be on the same level as a decision of the Court and is therefore enforceable in any Contracting Member State. However, a patent may not be revoked or limited by way of settlement. It is likely that this limitation refers to *erga omnes* effect, not *inter partes*. This is nevertheless confusing, as there exists an exception to this limitation which states that the Court shall confirm settlements which include the revocation or limitation of patents. Following such a settlement the patentee is then obliged to request a revocation or limitation of the patent at the EPO.

Although the Court will have exclusive competence over the EPUE it is unclear whether the Centre will have the same power over the arbitration and mediation of the EPUE. In a conventional arbitration, an arbitral award would bar any further court proceedings, according to the New York Convention. The question was thus whether an arbitration agreement would bar proceedings before the Court, even though the Court has exclusive competence. In a situation where the parties have concluded an agreement on the validity of an EP which includes an arbitration clause, both the Court and the chosen arbitration institute will consider themselves competent. The Court will make reference to the UPCA and the Brussel I Regulation (recast) and the arbitrator will make reference to the New York Convention. However, an exception in Brussels I Regulation (recast) states that the regulation does not apply to arbitration. This exclusion means that arbitration institutes in the EU are free to assess their jurisdiction without intervention from national courts of the Member States. In conclusion, it is therefore reasonable to assume that parties wishing to arbitrate may pick their arbitrator freely and are not bound to arbitrate at the Centre or to litigate at the Court.

According to the UPCA, the Court shall base its decisions on five sources: Union law, the UPCA, the EPC, other international agreements, and national law. There exist no guidelines for how these sources should be used, apart from the UPCA stating that Union law shall be applied in its entirety and have primacy. Many rules of substantive law are contained in the UPCA and it is therefore an important source of law for the Court. The UPCA does not explicitly state that the same sources of law should be used by the Centre, but as the Centre is a product of the UPCA it is likely that they would apply. As discussed in this thesis, arbitration and mediation are partly chosen for their flexibility and autonomy. If the idea is that the Centre shall apply the same sources of law as the Court, the freedom for the parties to choose the applicable law in their arbitration is removed.

5.4 Concluding analysis

Despite the arduous obstacles that lie ahead for the Unified Patent System, the demand for a unitary patent court is likely to make the implementation of such a court inevitable. The Court might very well become a great adjudicator for most patent disputes in the EU – if it can meet the set forth expectations of swiftness and efficiency. Removing parallel national court litigations will most probably save time and money for patentees. Furthermore, the union-wide enforcement might even increase competition in the Internal market. Once the smoke clears around the Court, it might very well become a contributor to economic growth in the EU, which in part was the vision of the legislators.

Leaving aside the potential circumstance that the guidelines and rules for the Centre are incomplete and the Preparatory Committee intends to finalise them, there still exists fundamental issues with the function of the Centre. As this thesis has presented, the essence of arbitration is the flexibility and autonomy that it offers the parties. In arbitration, the parties compile their own decision-maker by selecting judges, substantive law and procedural rules. This customisation of the proceedings is a great advantage for the parties, and it is also highly appreciated by the parties. Patent disputes are especially in need of flexible and autonomous proceedings, as they are normally both highly technical and multi-jurisdictional. If the selection of judges is strictly limited, the sources of substantive law are already established and the procedural rules are set beforehand, there is little flexibility and autonomy left for the parties. It is therefore essential that the Centre makes some clarifications regarding their arbitration procedure and make sure the parties have the freedoms requested.

Another essential feature of arbitration and mediation that this thesis has investigated is confidentiality. The disputing parties need to be sure that no delicate information is disclosed to the public or to competitors. In conventional private arbitration and mediation procedures this is routinely accomplished by non-disclosure agreements binding all parties, including the arbitrator or mediator. The confidentiality is especially important in patent disputes, as details about innovations or related technologies should not be disclosed to competitors.

According to Rule 262(1) of the UPC Rules, decisions made at the Court shall be made public, unless a party has requested certain information to be confidential. Furthermore, Article 58 of the UPCA states that the Court may order that certain confidential information is restricted to specific persons. However, it is unclear whether these rules would also apply to arbitration and mediation in the Centre. Some indications are given in Article 15 of the UPC Mediation Rules²³¹, which state that all parties shall respect the confidentiality of the mediation, unless otherwise requested by applicable

²³¹ Mediation Rules of the Unified Patent Court, Version 5, 27 November 2015 (UPC Mediation Rules).

law. Similar provisions are included in the EU Mediation Directive (see subsection 3.2.1.3). No information regarding confidentiality in arbitration is provided.

However, all institutions of the EU are bound to conduct their work openly to ensure the participation of civil society, according to Article 15(1) TFEU. Any citizen of the EU also has the right to access documents from the EU institutions, according to Article 15(3) TFEU and Article 42 CFR. It is the responsibility of the institutions to ensure that these rights are fulfilled. This openness and transparency can only be limited by the European Parliament and the Council by means of regulations. As the Court and the Centre are institutions established by the EU, it is reasonable to assume that these rules of transparency and openness will apply to the Centre. In any case, the UPCA clearly states that the Court shall apply Union law in its entirety and respect its primacy (see section 4.6.1). Confidentiality in arbitration and mediation procedures conducted in an EU institution thus becomes a balancing act between transparency and secrecy of harmful business information. For the disputing parties to be interested in the arbitration offered by the Centre, the Centre therefore has to clarify in what form they will offer the requested confidentiality. The lack of customary arbitration essentials in the proceedings of the Centre might lead to many disputing parties opting out. Parties wishing to arbitrate a dispute involving an EP or EPUE may very well turn to established arbitration institutes, such as the WIPO Arbitration and Mediation Centre or the ICC Court.

The conclusions of this thesis regarding the issues of the Centre does not warrant any recommendation not to implement the Centre. On the contrary, the increased volume and length of litigation procedures have put pressure on courts in general, leading to incurred costs for both the parties and the public. Even though governments spend more and more on the justice system, the workload for the courts keeps increasing.²³² If the judicial system cannot manage the disputes swiftly enough, the fundamental judicial principle of access to justice for citizens could be endangered. As a remedy to this, ADR methods such as arbitration and mediation are playing an increasingly important role. ADR has even come to the point where these methods are starting to shed their label as alternative.²³³ Access to justice in form of effective remedy and a fair trial according to Article 6 ECHR²³⁴ and Article 47 CFR²³⁵ has traditionally been understood as access to court justice, but in the future that interpretation might also encompass ADR mechanisms.²³⁶

²³² Carlos Esplugues, 'Civil and Commercial Mediation and National Courts: Towards a New Concept of Justice for the XXI Century?' in Martin Schauer and Bea Verschaegen (eds) *General Reports of the XIXth Congress of the International Academy of Comparative Law* (Springer Netherlands 2017) 214.

²³³ Esplugues (n 232) 215.

²³⁴ European Convention on Human Rights, as amended by Protocols No 11 and 14, 4 November 1950, Rome (ECHR).

²³⁵ Charter of Fundamental Rights of the European Union, OJ C 326, 26 October 2012 (CFR).

²³⁶ Esplugues (n 232) 218.

The results of this thesis mean that there is still work to be done by the EU and the Preparatory Committee to transform the Centre into an appealing alternative for disputing parties. The respective issues of flexibility and confidentiality will have to be handled and developed so that they to a greater extent resemble the private arbitration and mediation institutes. Whether this is possible or not is a complex matter and could easily form the topic of another thesis. These results matter because they suggest that the EU might have overlooked some of the core features of the arbitration and mediation in their creation of the Centre. However, it could also be that the solution to these issues are in the pipeline of the Preparatory Committee and have not yet been published. Until then, the future of the Centre appears somewhat uncertain.

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