universität wien

MASTER THESIS

Titel der Master Thesis/ Title of the Master's Thesis

"Using Alternative Dispute Resolution to resolve patent disputes"

Verfasst von/ Submitted by

Anouk Vancraeynest, LL.M

Angestrebter akademischer Grad / in partial fulfilment of the requirements for the degree of

Master of Laws (LL.M)

Wien, 2017/ Vienna, 2017

Studienkennzahl lt. Studienblatt/ Postgraduate programme code as it appears on the student record sheet:	A992 548
Universitätslehrgang lt. Studienblatt/ Postgraduate programme as it appears on the student record sheet:	Europäisches und Internationales Wirtschaftsrecht European and International Business Law
Betreut von/ Supervisor:	Univ.Prof. Dr. Dr. hc. Peter Fischer

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INTRODUCTION

PRACTICAL EXAMPLE

1. A small and medium-sized enterprise (SME) seated in the United States did an innovative invention. They believe to be the first company to invent something like this. Therefore, they invest a great deal of their resources in protecting their invention. They file for patent protection with the competent patent authority and pay all fees. But after a while, the company receives a cease and desist letter from a big competing company. They assert to be the first one who invented it and they ask to refrain from all activities related to this particular invention. The SME must now defend its invention against the big company. Therefore, they can expect excessive litigation costs, which can become even higher if one of the parties decides to lodge an appeal. The litigation will take a long time because the judge or jury will have a hard time trying to understand the technological particularities of the patent. Furthermore, the potential business relationship between the two companies could be harmed by the extensive court proceedings. If the legal procedure ends positively for the SME, they will have an exclusive patent right on their invention for a limited amount of time (usually 20 years). But if the SME loses the case, they will be left with an invalidated patent, which means that they lose all rights to use or produce the invention. Is there an alternative solution to solve this patent dispute?[1]

PREFACE

2. The aim of this master thesis is to answer the aforementioned question. There will be made an assessment of patent litigation nowadays and a proposal for a more effective dispute resolution mechanism in the form of Alternative Dispute Resolution (ADR). The objectives and the utility of patents will be explained. After that, an overview of different types of disputes that can arise under patent rights will be given. The deficiencies of ordinary patent litigation will be set forth, as well as the advantages of ADR of patent disputes. At the end, the existing initiatives for using ADR to solve intellectual property disputes will be clarified.

3. The patent portfolio of a company is often one of the most important assets of a company. Companies spend a large amount on patent litigation.[2] Furthermore, the higher the total risk of the patent dispute, the higher the litigation costs are. Disputes concerning patent rights are

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[1] Example based on: M.M. LIM, "ADR of Patent Disputes: A Costumized Prescription, not an over-the-counter remedy", *Cardozo Journal of Conflict Resolution* 2005, vol. 6, 155-190.

[2] J. ELLIS, "Arbitration, A cost-effective alternative for litigating patent disputes", *Biotechnology Law Report* 2013, vol. 5, 313-318.

usually very technical and complex. This results in long and expensive court proceedings, as judges are not technical experts. The excessiveness of the costs will be further set forth hereunder. Expensive and time-inefficient court proceedings could be avoided by having those disputes resolved by means of alternative dispute resolution proceedings. More efficient proceedings would also ensure that more innovation could be generated in the field of intellectual property.[3] Since patent disputes are often cross-border disputes, traditional litigation can be complicated because of multiple procedures in multiple jurisdictions. As a result, the outcomes can be inconsistent or very hard to enforce. In the light of the foregoing reasons, parties involved in patent disputes are seeking more effective methods, which cost less. ADR can be a useful solution for this problem.[4]

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[3] D. FOX and R. WEINSTEIN, "Arbitration and Intellectual Property Disputes", *Micronomics* 2012, 2-7; W. KINGSTON, "Reducing the cost of resolving intellectual property disputes", *European Journal of Law and Economics* 1995, vol. 2, 85.

[4] EUROPEAN COMMISSION, *Communication to the European Parliament and the Council: Enhancing the patent system in Europe*, Brussels, 3 april 2007, 14.

PART 1. PATENT RIGHTS

4. The TRIPS Agreement provides a non-exhaustive list of rights that fall under the definition of intellectual property rights.[5] This list includes copyright and related rights, sounds and broadcasting, trademarks, geographical indications, designs and patents.[6] Although they are called intellectual *property* rights, they lack some qualities of a property right. Intellectual property rights are negative rights. This means that the proprietor of such right only has the right to stop others from infringing this right. In this view, a patent is just a license to litigate.[7]

5. A patent is a temporary and exclusive right that is granted for the exploitation of an invention. It is an exclusive right because the owner of a patent is the only person who can forbid any other person to use or counterfeit his invention.[8] So, like all other intellectual property rights, a patent right is a negative right. It also has a temporary nature, because in most judicial systems it is only valid for 20 years. After the expiry date, everyone can use, apply or sell the invention.[9] Patents have, like all other intellectual property rights, a territorial nature. This has consequences for procedural aspects, meaning that litigations can take place in parallel jurisdictions.[10]

CHAPTER 1. CONDITIONS OF PATENTABILITY

SECTION 1. EUROPEAN PATENT SYSTEM

6. A patent can only be granted for an invention. Moreover, it must be an invention with a technical character, which means that it has to lead to a technical result. The conditions for the patentability of an invention are the following: the invention needs to be new; it must involve an inventive step and must be susceptible to industrial application.[11] An invention is new when it is not part of the current state of the art. The relevant date for assessment of these criteria is the

[5] Art. 1 § 2 of the Agreement on trade-related aspects of intellectual property rights.
[6] T. COOK and A.I. GARCIA, *International Intellectual Property Arbitration*, Alphen aan den Rijn, Kluwer Law International, 2010, 5.
[7] W. KINGSTON, "Reducing the cost of resolving intellectual property disputes", *European Journal of Law and Economics* 1995, vol. 2, 85-92.
[8] EUROPEAN COMMISSION, "Patent Protection in the EU", *https://ec.europa.eu/growth/industry/intellectual-property/patents_nl.*
[9] F. GOTZEN and M.C. JANSSENS, *Wegwijs in het intellectueel eigendomsrecht,* Bruges, Vanden Broele, 2014, 248; J.S. LARSON, "Alternative Dispute Resolution in Patent Law: Considering the Non- Practising Entity and Increased Availability of Declaratory Judgment", *Intellectual Property & Technology Law Journal* 2010, vol. 12, 15-20.
[10] T. COOK and A.I. GARCIA, *International Intellectual Property Arbitration*, Alphen aan den Rijn, Kluwer Law International, 2010, 9.
[11] Art. 27, § 1 of the Agreement on trade-related aspects of intellectual property rights; EUROPEAN COMMISSION, "Patent Protection in the EU", *https://ec.europa.eu/growth/industry/intellectual-property/patents_nl*; X, "Conditions of Patentability", Novagraaf Intellectual Property*,* 2017, *http://www.novagraaf.com/en/services/patents/conditions-of-patentability.*

filing date. Inventive step includes that the invention is not obvious to a person who is skilled in the relevant technical field.[12] Crucial to mention is that the patent owner can only obtain a patent right if he discloses the invention in the patent application. By disclosing sufficient technical details about the application of the invention, the owner contributes to technical progress in general. The idea behind this is that it consists of a bargain between the inventor and the state that grants the patent right. The inventor is given a monopoly on this invention for a limited period of time.[13] The disclosure of inventions fosters the diffusion of innovation.[14]

SECTION 2. US PATENT SYSTEM

7. The US has a unique system for granting patent rights. In the United States, patents are granted to the first person to invent. In almost all other judicial systems, the patent right is granted to the first to file.[15] This can cause some difficulties when there has been filed more than once for the same invention. In this case, parties must provide proof of the date of conception of the invention.[16] In exchange for public disclosure of the invention, the patent holder receives a monopoly right on the invention. Patent rights are granted for 20 years. The ratio of this system is comparable to the European system. Disclosure of invention should encourage innovation and promote progress in technology.[17]

8. In the past, patent disputes were not allowed to be resolved by means of arbitration. The argument for this formulated by the courts was that a patent is granted by the state, which implies that disputes concerning patents are only to be resolved by state courts. It should be a state prerogative.[18] This was however not the case for disputes concerning patent license agreements, because those exhibit characteristics of a normal contract and deal with questions of

[12] X, "Conditions of Patentability", Novagraaf Intellectual Property, 2017, *http://www.novagraaf.com/en/services/patents/conditions-of-patentability.*

[13] T. COOK and A.I. GARCIA, *International Intellectual Property Arbitration*, Alphen aan den Rijn, Kluwer Law International, 2010, 12.

[14] J. BESSEN and M.J. MEURER, *Patent Failure: How judges, bureaucrats an lawyers put innovators at risk,* Princeton, University Press, 2009, 14.

[15] A. POLTORAK, "First-to-file vs. First-to-invent", *Intellectual Property Today* 2008, 40-41; W. KINGSTON, "Reducing the cost of resolving intellectual property disputes", *European Journal of Law and Economics* 1995, vol. 2, 85-92.

[16] W. KINGSTON, "Reducing the cost of resolving intellectual property disputes", *European Journal of Law and Economics* 1995, vol. 2, 85-92.

[17] M.M. LIM, "ADR of Patent Disputes: A Costumized Prescription, not an over-the-counter remedy", *Cardozo Journal of Conflict Resolution* 2005, vol. 6, 155-190.

[18] A. NIXON, "Arbitration – A better way to resolve intellectual-property disputes?", *Tibtech* 1997, vol.15, 484-486; M.M. LIM, "ADR of Patent Disputes: A Costumized Prescription, not an over-the-counter remedy", *Cardozo Journal of Conflict Resolution* 2005, vol. 6, 155-190.

contract law. So, insofar the validity of the patent was concerned, arbitration was not allowed.[19] Another argument that was used by the Supreme Court was a public-policy argument. Patented inventions are ideas that are part of the public domain. Infringing them hinders free competition of these ideas. Therefore, disputes about patents should be publicly brought before court.[20] For example, in the seventies, a Court of Appeal stated in one of its judgment that "*questions of patent validity are inappropriate for arbitration proceedings and should be decided by a court of law, given the great public interest in challenging invalid patents.*"[21] In the 80's, the Supreme Court broadened the rules for patentability. This noticeably resulted in an increase of patent infringement cases. Subsequently, US legislation was adapted to the new reality and to the needs of arbitrability of patent disputes. Since then, arbitration of patent validity and infringement was governed in US legislation. In 1983, arbitration was finally accepted as a full alternative for patent litigation.[22] The relevant provision reads as follows: "*A contract involving a patent or any right under a patent may contain a provision requiring arbitration of any dispute relating to patent validity or infringement arising under the contract*".[23] The American courts followed this standpoint in their judgments.

CHAPTER 2. IMPORTANCE OF PATENT LAW

9. According to the European Commission '*patents are a key tool to encourage investment in innovation and encourage its dissemination.*[24] The European Commission clearly acknowledges the importance of patent rights in contemporary society. Accordingly, the Commission is constantly working on an efficient and uniform patent protection within the European Union. It is also taking measures to improve the exploitation of patents.[25] According to a Communication of the European Commission, there is a demonstrable correlation between innovation performance and the amount of patent rights. In countries where there is a high amount of patents and other intellectual property rights, the innovation level will be higher. Patent rights

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[19] K. PETRAKIS, "The role of Arbitration in the Field of Patent Law", *Dispute Resolution Journal* 1997, 24-31; *NV. Maatschappij voor Industriële Waarden v. A.O. Smith Corp.,* 532 F.2d 874 (2nd Cir. 1976).
[20] K. PETRAKIS, "The role of Arbitration in the Field of Patent Law", *Dispute Resolution Journal* 1997, 24-31.
[21] 7th Circuit Court of Appeals (US), *Beckman Instruments Inc v. Technical Development Corp*., 588 F.2d 834, 1978; K. PETRAKIS, "The role of Arbitration in the Field of Patent Law", *Dispute Resolution Journal* 1997, 24-31.
[22] 35 U.S.C. Section 294; K. PETRAKIS, "The role of Arbitration in the Field of Patent Law", *Dispute Resolution Journal* 1997, 24-31; M.M. LIM, "ADR of Patent Disputes: A Costumized Prescription, not an over-the-counter remedy", *Cardozo Journal of Conflict Resolution* 2005, vol. 6, 155-190; J.S. LARSON, "Alternative Dispute Resolution in Patent Law: Considering the Non-Practising Entity and Increased Availability of Declaratory Judgment", *Intellectual Property & Technology Law Journal* 2010, vol. 12, 15-20.
[23] 35 U.S.C. § 294(a).
[24] EUROPEAN COMMISSION, "Patent Protection in the EU", *https://ec.europa.eu/growth/industry/intellectual-property/patents_nl.*
[25] EUROPEAN COMMISSION, "Patent Protection in the EU", *https://ec.europa.eu/growth/industry/intellectual-property/patents_nl.*

are very important to establish an innovative climate. The risk of patent litigation has an influence on how much innovators or inventors invest in new technology. This implies that they are able to reduce or to increase the incentives to invest.[26] Furthermore, patents effectuate competitiveness.[27] Due to the increasing development in technology and other fields, nowadays there is a worldwide network of patent transactions and business relations.

10. Earlier in the United States, patent law was considered as unimportant. For this reason not many patent disputes came before the American Supreme Court. But recently, the Supreme Court accepted various patent cases.[28] They attract a lot of attention by the public and in the media. For example, there are the famous 'smartphone wars', which is a patent litigation battle between several smartphone producers. Recently, a dispute concerning the design of smartphones and tablets between Apple and Samsung was taken to the Supreme Court in America.[29] Most landmark patent suits are being settled. This means that their outcomes don't cause great differences or commotion in technology industry.

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[26] J. BESSEN and M.J. MEURER, *Patent Failure: How judges, bureaucrats an lawyers put innovators at risk,* Princeton, University Press, 2009, 120.

[27] EUROPEAN COMMISSION, *Communication to the European Parliament and the Council: Enhancing the patent system in Europe*, Brussels, 3 april 2007, 2.

[28] R. FELDMAN, *Rethinking Patent Law*, Massachusetts, Harvard University Press, 2012, 2; D. FOX and R. WEINSTEIN, "Arbitration and Intellectual Property Disputes", *Micronomics* 2012, 2-7.

[29] G. STOHR and S. DECKER, "Apple and Samsung take Design Dispute to Supreme Court", *https://www.bloomberg.com/politics/articles/2016-10-10/apple-fights-samsung-at-u-s-high-court-as-smartphone-wars-wane.*

PART 2. PATENT DISPUTES

11. Patent disputes can refer to an infringement or to the validity of a patent. They can also be about patent licenses.

CHAPTER 1. DISPUTES ABOUT VALIDITY

12. When a patent is granted, the owner can use his right to prevent third persons from using this technology, process or product. He can only prevent this within the scope of the patent claim.[30] Nevertheless, the owner of the patent cannot prevent third parties from attacking the validity of a patent. Disputes about the validity of a patent are common. A question of validity of a patent right may arise when one of the criteria for patentability is not fulfilled or in the event of fraud when filing for a patent right.[31] In practice, validity claims are often raised as counterclaim against infringement actions.[32]

13. In the US system, the question of interpretation of a patent right is a question of law, which is to be decided by a judge.[33]

CHAPTER 2. DISPUTES ABOUT INFRINGEMENTS

14. Patent infringement consists of unlicensed manufacture, use or sale of a patented product or process. The alleged infringer will argue that the infringed product or process was not protected by the claims of a valid patent.[34] When an infringement of a patent is proven, the infringer usually has to pay a damage fee that is comparable to a reasonable royalty.

15. In the USA, remedies for infringement consist of injunctions, damages for the loss of profits and lastly court and attorney's fees.[35] In the US judicial system, a dispute about infringement of patents is a question of fact and is to be decided by a jury.[36]

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[30] T. COOK and A.I. GARCIA, *International Intellectual Property Arbitration*, Alphen aan den Rijn, Kluwer Law International, 2010, 12.
[31] K. PETRAKIS, "The role of Arbitration in the Field of Patent Law", *Dispute Resolution Journal* 1997, 24-31.
[32] T. COOK and A.I. GARCIA, *International Intellectual Property Arbitration*, Alphen aan den Rijn, Kluwer Law International, 2010, 13.
[33] M.M. LIM, "ADR of Patent Disputes: A Costumized Prescription, not an over-the-counter remedy", *Cardozo Journal of Conflict Resolution* 2005, vol. 6, 155-190.
[34] K. PETRAKIS, "The role of Arbitration in the Field of Patent Law", *Dispute Resolution Journal* 1997, 24-31.
[35] K. PETRAKIS, "The role of Arbitration in the Field of Patent Law", *Dispute Resolution Journal* 1997, 24-31.
[36] M.M. LIM, "ADR of Patent Disputes: A Costumized Prescription, not an over-the-counter remedy", *Cardozo Journal of Conflict Resolution* 2005, vol. 6, 155-190.

CHAPTER 3. DISPUTES ABOUT PATENT LICENSES

16. Disputes can also arise under patent license contracts.[37] Licensing of patents is an enormous business nowadays, especially in software and other types of modern technology. In some sectors patent holders use global licenses or cross-license agreements in order to meet different industry standards, for example mobile phone standards.[38] A patent license is usually laid down in an agreement. In this agreement, the owner of the patent gives a right to the licensee to do things with the patent that would otherwise be forbidden because of the nature of the negative patent right. Next to the right to use this patent, there are certain obligations and conditions imposed on the licensee, which are generally associated to the obligation of fair competition.[39] These obligations and conditions can be clauses about territoriality, sub-licensing, exclusivity and so on. License contracts can give rise to different types of disputes. Mostly, disputes concern the scope of the licensed rights, the definitions of the licensed products and royalties.

CHAPTER 4. DOWNSIDES OF COURT LITIGATION

17. Some of the deficiencies of patent litigation are that it is expensive, time-consuming, extremely complex and publicly available.[40]

SECTION 1. EXCESSIVE COSTS

Firstly, patentable high technology has an immense value. Secondly, there's a strong competition on the market of modern technology. These two elements are strong incentives to start lawsuits in case of a patent disputes.[41] But this makes that litigation costs for resolving intellectual property disputes are excessively high. This results in the fact that innovation will take place to a lesser extent, since infringement trial is usually filed against companies that are exploiting new technologies. This is a risk that weighs against the profits that the company can

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[37] T. COOK and A.I. GARCIA, *International Intellectual Property Arbitration*, Alphen aan den Rijn, Kluwer Law International, 2010, 15.

[38] J. ELLIS, "Arbitration, A cost-effective alternative for litigating patent disputes", *Biotechnology Law Report* 2013, vol. 5, 313-318; sT. COOK and A.I. GARCIA, *International Intellectual Property Arbitration*, Alphen aan den Rijn, Kluwer Law International, 2010, 45.

[39] T. COOK and A.I. GARCIA, *International Intellectual Property Arbitration*, Alphen aan den Rijn, Kluwer Law International, 2010, 15.

[40] K. PETRAKIS, "The role of Arbitration in the Field of Patent Law", *Dispute Resolution Journal* 1997, 24-31; J.F. ROBB, "Arbitration Procedure compared with Court Litigation in Patent Controversies", *Law and Contemporary Problems,* vol. 17, 679-697.

[41] J.P. ZAMMIT and J. HU, "Arbitrating Intellectual Property Disputes", *Dispute Resolution Journal* 2009, 2-4; K. PETRAKIS, "The role of Arbitration in the Field of Patent Law", *Dispute Resolution Journal* 1997, 24-31.

make due to the innovation.[42] So the risk of litigation constitutes a threat to investment in innovation.[43] Most disputes arise out of new technology. It is rare that infringement disputes arise out of old technology.[44]

18. The innovator is recommended to weigh the risk of litigated infringement disputes against the expected profits. He can do this by estimating the costs that entail patent disputes. Then he needs to multiply these costs with the probability that a dispute will arise. The result of this is the cost of insurance against infringement disputes. This formula is a way for the innovator in new technology to calculate the cost of insuring himself.[45] We can divide the dispute costs in two categories, namely legal costs and business costs. The amount of the legal costs depends on the length of the litigation proceedings. When a settlement is reached early on, the legal costs will be less than when the proceedings have progressed way further.[46] Business costs, on the other hand, are more difficult to define. They can take many forms. Examples of business costs are; the time invested in preparing the proceedings, damage of business relations with the counterparty, the threat of not being able to further develop the patented technology. Another important example of a business cost is the decrease of the sales volume because customers do not buy the technology that is involved in litigation proceedings anymore. Usually patented inventions are to be used complementary to other technology, because it is compatible with that other technology. Customers are not intended to buy a technology that involves the risk to be withdrawn from the market. An example of a situation like this is the Cyrix case.[47] This was a start-up firm that manufactured microprocessors, which were compatible with Intel-computers. Because of the risk of infringement, customers were unwilling to buy these microprocessors. For the same reasons, Cyrix had a hard time finding manufacturers, who were willing to produce their product. Due to these elements, Cyrix lost a lot of money and lost their

[42] J. ELLIS, "Arbitration, A cost-effective alternative for litigating patent disputes", *Biotechnology Law Report* 2013, vol. 5, 313-318; J. BESSEN and M.J. MEURER, *Patent Failure: How judges, bureaucrats an lawyers put innovators at risk,* Princeton, University Press, 2009, 14.

[43] SCHIMMEL, D. and KAPOOR, I., "Resolving International Intellectual Property Disputes in Arbitration", *Intellectual Property & Technology Law Journal* 2009, vol. 21, 5-9; FOX, D. and WEINSTEIN, R., "Arbitration and Intellectual Property Disputes", *Micronomics* 2012, 2-7; BESSEN, J. and MEURER, M.J., *Patent Failure: How judges, bureaucrats an lawyers put innovators at risk,* Princeton, University Press, 2009, 128.

[44] J. BESSEN and M.J. MEURER, *Patent Failure: How judges, bureaucrats an lawyers put innovators at risk,* Princeton, University Press, 2009, 130.

[45] J. BESSEN and M.J. MEURER, *Patent Failure: How judges, bureaucrats an lawyers put innovators at risk,* Princeton, University Press, 2009, 130.

[46] W. KINGSTON, "Reducing the cost of resolving intellectual property disputes", *European Journal of Law and Economics* 1995, vol. 2, 85-92.; J. BESSEN and M.J. MEURER, *Patent Failure: How judges, bureaucrats an lawyers put innovators at risk,* Princeton, University Press, 2009, 131.

[47] B. CROTHERS, "Digital, Cyrix sue Intel over patents", *https://www.cnet.com/news/digital-cyrix-sue-intel-over-patents;* J. BESSEN and M.J. MEURER, *Patent Failure: How judges, bureaucrats an lawyers put innovators at risk,* Princeton, University Press, 2009, 133.

competitive position in the market, even though they won the lawsuit in the end.[48] These factors result in a weak financial position and can even create a bankruptcy risk.[49]

19. In The United States the high costs of patent litigation are due to the costs of discovery, expert testimonies and because the legal fees.[50] Patent litigation costs on average two to three million dollars in the United States.[51]

SECTION 2. TIME-CONSUMING PROCEEDINGS

20. Patent litigation proceedings can sometimes take years before a final decision is reached. This is very inconvenient, considering the fact that the duration of a patent is only 20 years.[52] Patents usually enjoy protection in different countries. This means that in case of a dispute, parties will be involved in cross-border litigation. This implicates parallel proceedings in different jurisdictions. This automatically makes the proceedings longer.[53] It is hard to define the average duration of a patent suit, but it often takes years.[54] Some cases take even more time than the duration of the patent right itself.[55] Especially in modern times, new types of technology are rapidly out-dated, for example software. It follows that lengthy litigation proceedings are very impractical.[56]

21. Sometimes parties use certain actions in court to postpone the decision on infringement of a patent. A common technique is to postpone the decision until a dominant market position is

[48] J. BESSEN and M.J. MEURER, *Patent Failure: How judges, bureaucrats an lawyers put innovators at risk,* Princeton, University Press, 2009, 133.
[49] J. BESSEN and M.J. MEURER, *Patent Failure: How judges, bureaucrats an lawyers put innovators at risk,* Princeton, University Press, 2009, 132.
[50] C. METCALF, “Resolution of technology and patent disputes by arbitration and mediation: A view from the United States”, *Arbitration* 2008, 385-394; M.M. LIM, “ADR of Patent Disputes: A Costumized Prescription, not an over-the-counter remedy”, *Cardozo Journal of Conflict Resolution* 2005, vol. 6, 155-190.
[51] B. ROBINSON, “IP Litigation Strategies: Patents: Markman Hearings”, *http://corporate.findlaw.com/intellectual-property/ip-patent-litigation-strategies-markman-hearings-ii.html;* M.M. LIM, “ADR of Patent Disputes: A Costumized Prescription, not an over-the-counter remedy”, *Cardozo Journal of Conflict Resolution* 2005, vol. 6, 155-190; J.S. LARSON, “Alternative Dispute Resolution in Patent Law: Considering the Non- Practising Entity and Increased Availability of Declaratory Judgment”, *Intellectual Property & Technology Law Journal* 2010, vol. 12, 15-20.
[52] K. PETRAKIS, “The role of Arbitration in the Field of Patent Law”, *Dispute Resolution Journal* 1997, 24-31; T. ARNOLD, *Patent Alternative Dispute Resolution,* Eagan, Clark Boardman Callaghan, 1991, 31; J.S. LARSON, “Alternative Dispute Resolution in Patent Law: Considering the Non- Practising Entity and Increased Availability of Declaratory Judgment”, *Intellectual Property & Technology Law Journal* 2010, vol. 12, 15-20.
[53] G. BOM, *International Commercial Arbitration,* The Hague, Kluwer Law International, 2009, 85; T. COOK and A.I. GARCIA, *International Intellectual Property Arbitration*, Alphen aan den Rijn, Kluwer Law International, 2010, 41.
[54] M.M. LIM, “ADR of Patent Disputes: A Costumized Prescription, not an over-the-counter remedy”, *Cardozo Journal of Conflict Resolution* 2005, vol. 6, 155-190; S. VERMONT, *Risk & Reward: The Economics of Patent Litigation, Part 1,* London, Hunton & Williams LLP, 2001.
[55] M.M. LIM, “ADR of Patent Disputes: A Costumized Prescription, not an over-the-counter remedy”, *Cardozo Journal of Conflict Resolution* 2005, vol. 6, 155-190.
[56] J.S. LARSON, “Alternative Dispute Resolution in Patent Law: Considering the Non- Practising Entity and Increased Availability of Declaratory Judgment”, *Intellectual Property & Technology Law Journal* 2010, vol. 12, 15-20.

built. Large firms make full use of dilatory actions[57], with the purpose of imposing a burden on the opponent party.[58] But even if the parties cooperate, the court proceedings entail delay.[59] Sometimes, companies knowingly infringe patents in order to be able to enter the market. They see it as the cost to enter the lucrative market.[60] An example of this is Kodak, who deliberately infringed Polaroids' patent in order to enter the instant camera market.[61] This is detrimental to the patent owner because even if they win the infringement procedure, the royalties that they earn from the infringers will not compensate for having been driven out of their pioneers position on the market. It follows that the intellectual property laws do not have deterrent effect on infringements.[62]

22. Another reason why court proceedings are so time-consuming is that there are more opportunities to lodge an appeal against a judicial decision. During an appeal procedure, the interpretation of the patent claim is often re-argued. The problem that judges are not educated to interpret technical patent issues arises again, but this time for the appeal judge. Appeal is a widely used technique to reform court decisions, which prolongs the duration of the proceedings even more. In patent disputes, this is not convenient at all as patents are time-sensitive rights.[63]

23. Due to all these aforementioned factors, patent litigation has become more and more inefficient and ineffective to resolve patent disputes. Moreover, patent litigation is partly the reason for obstruction of innovation in technology.[64] The cost of lost opportunities due to lengthy court proceedings can reduce or even dispel the value of the patent.[65] We can conclude that due to the

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[57] Actions to delay the procedure.

[58] W. KINGSTON, "Reducing the cost of resolving intellectual property disputes", *European Journal of Law and Economics* 1995, vol. 2, 85-92.

[59] K. PETRAKIS, "The role of Arbitration in the Field of Patent Law", *Dispute Resolution Journal* 1997, 24-31.

[60] B. CHOPARD, T. CORTADE and E. LANGLAIS, "On patent strength, litigation costs, and patent disputes under alternative damage rules", *Economix* 2014, vol. 41, 1-31.

[61] W. KINGSTON, "Reducing the cost of resolving intellectual property disputes", *European Journal of Law and Economics* 1995, vol. 2, 85-92.

[62] B. CHOPARD, T. CORTADE and E. LANGLAIS, "On patent strength, litigation costs, and patent disputes under alternative damage rules", *Economix* 2014, vol. 41, 1-31.

[63] C. METCALF, "Resolution of technology and patent disputes by arbitration and mediation: A view from the United States", *Arbitration* 2008, 385-394; M.M. LIM, "ADR of Patent Disputes: A Costumized Prescription, not an over-the-counter remedy", *Cardozo Journal of Conflict Resolution* 2005, vol. 6, 155-190.

[64] R. LEVIN et al., "Yale Study of R&D Appropriability Methods", *Brookings Economic Papers* 1984, 12; W. KINGSTON, "Reducing the cost of resolving intellectual property disputes", *European Journal of Law and Economics* 1995, vol. 2, 85-92; J. BESSEN and M.J. MEURER, *Patent Failure: How judges, bureaucrats an lawyers put innovators at risk,* Princeton, University Press, 2009, 121.

[65] M.M. LIM, "ADR of Patent Disputes: A Costumized Prescription, not an over-the-counter remedy", *Cardozo Journal of Conflict Resolution* 2005, vol. 6, 155-190; S.J. ELLEMAN, "Problems in patent litigation: Mandatory Mediation May provide Settlement and Solutions", *Ohio State Journal on Dispute Resolution* 1997, 759.

foregoing elements patent rights can burden research and development, which happens to be the complete opposite of their original aim.[66]

SECTION 3. COMPLEXITY

24. Patent issues are essentially technical disputes. However, ordinary court proceedings are used to settle these technical issues. Judges are not scientists or engineers so actually they don't have the necessary know-how to reach a proper reasoned decision.[67] In the United States, patent infringement disputes are even solved by a jury trial. It follows that judges and the jury need a certain level of expertise in order to rule on technical patent disputes. They need to be educated about the specific technicalities of each case.[68] Even after having undergone a profound education, judges can almost never reach the same level of knowledge as an expert witness with long-time experience. The judge's assessment will therefore be of a lower quality, because they are under-informed. This holds the risk of uneducated and therefore unfair verdicts.[69] Time and money is being wasted to educate judges and/or the jury. The risk of giving an under-informed ruling is even higher in jury trial. Another result of the complexity of the cases is that the outcome of the litigation proceedings will usually be unpredictable. From this it follows that companies with more recources have an advantage because they can afford more expert (and thus expensive) witnesses.[70]

25. In the United States, patent disputes can be solved by a jury trial, when it concerns an infringement of a patent right. The risk of giving an under-informed ruling is even higher in this case. Time and money is being wasted to educate judges and the jury, considering that decisions are still of a lower quality.

SECTION 4. OPEN TO THE PUBLIC

26. Another important downside of litigation of patent disputes is that legal proceedings are usually open to the public. Thus, parties do not have the chance to keep certain sensitive information confidential. This is especially detrimental to patent case for reasons such as adverse publicity or the risk of losing the consumer's confidence. Companies want to protect their reputations

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[66] J. BESSEN and M.J. MEURER, *Patent Failure: How judges, bureaucrats an lawyers put innovators at risk,* Princeton, University Press, 2009, 144.
[67] J.P. ZAMMIT and J. HU, "Arbitrating Intellectual Property Disputes", *Dispute Resolution Journal* 2009, 2-4.
[68] W. KINGSTON, "Reducing the cost of resolving intellectual property disputes", *European Journal of Law and Economics* 1995, vol. 2, 85-92.
[69] M.M. LIM, "ADR of Patent Disputes: A Costumized Prescription, not an over-the-counter remedy", *Cardozo Journal of Conflict Resolution* 2005, vol. 6, 155-190.
[70] W. KINGSTON, "Reducing the cost of resolving intellectual property disputes", *European Journal of Law and Economics* 1995, vol. 2, 85-92.

when they risk to be accused of infringement of patent rights or other unfair business practices.[71] Companies involved in patent disputes generally want to avoid publicity at all costs. Court litigation does not allow parties to control confidentiality of commercially sensitive information.

SECTION 5. OTHER IMPEDIMENTS

27. There are also other impediments on innovation such as distraction from the core business activity because of court proceedings, diversion of energy and misdirected creativity.[72] Reason for these impediments is that the focus is on the fear for litigation, rather than on creativity and development. This is especially a burden for smaller innovatory firms with relatively little capital. This is definitely a loss for innovation in general, but the burden falls most heavily on small firms. According to research done in the past, it is proven that small firms are more productive than larger ones.[73] This means that they could achieve much more when they could have access to reasonably priced protection for research and development.[74] Costs and delay in patent litigation can seriously obstruct the development and commercialization of new technology. They can appear as a threat to the existence of the patent system.[75] As mentioned before, a patent right is just a license to litigate. This means that its value depends on how many resources the owner possesses to go to court to defend his patent. This is an obstacle to innovation for smaller firms with fewer resources.[76]

28. Especially for smaller firms, there's a need for swift and efficient means to resolve patent disputes. Besides, there is a need for a solution that eliminates the big differences in resources between the parties when it comes to dispute resolution.[77]

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[71] J. PLAYER and C. MOREL DE WESTGAVER, "Chapter 11: IP Mediation" in T. COOK and A.I. GARCIA, *International Intellectual Property Arbitration*, Alphen aan den Rijn, Kluwer Law International, 2010, 368.

[72] W. KINGSTON, "Reducing the cost of resolving intellectual property disputes", *European Journal of Law and Economics* 1995, vol. 2, 85-92.

[73] W. KINGSTON, "Reducing the cost of resolving intellectual property disputes", *European Journal of Law and Economics* 1995, vol. 2, 85-92; K.L EDWARDS and J.L. GORDON, *Characteristics of Innovations Introduced into the United States Market*, Washington, Small Business Administration, 1984; J.A. HANSEN, J.I. STERN and T.S. Moore, *Industrial Innovation in the United State: A Study of Three Hundred Companies,* Washington, Small Business Administration, 1984.

[74] W. KINGSTON, "Reducing the cost of resolving intellectual property disputes", *European Journal of Law and Economics* 1995, vol. 2, 85-92.

[75] W. KINGSTON, "Reducing the cost of resolving intellectual property disputes", *European Journal of Law and Economics* 1995, vol. 2, 85-92.

[76] J. BESSEN and M.J. MEURER, *Patent Failure: How judges, bureaucrats an lawyers put innovators at risk,* Princeton, University Press, 2009, 14; W. KINGSTON, "Reducing the cost of resolving intellectual property disputes", *European Journal of Law and Economics* 1995, vol. 2, 85-92.

[77] W. KINGSTON, "Reducing the cost of resolving intellectual property disputes", *European Journal of Law and Economics* 1995, vol. 2, 85-92.

PART 3. ALTERNATIVE DISPUTE RESOLUTION (ADR)

29. Alternative dispute resolution (ADR) is a way to resolve a dispute or a complaint without going to court.[78] ADR is an organised system of dispute resolution, which means that it is regulated by legal framework. The fact that a dispute is solved without the judicial intervention of a court judge does not mean that a court judge can never play a role in this kind of dispute resolution. For example, a court judge can confirm the arbitral decision.[79] Some of the assets of ADR are that it is simpler, faster and less expensive than court litigation. Some examples of ADR mechanisms are arbitration, mediation, expert determination and conciliation.[80] The first three types will be set forth in this master thesis. ADR mechanisms are very flexible, so the proceedings can be adjusted to the specific circumstances of the case.[81] Moreover, ADR gives business decision-makers the feeling that they can have a say in the proceedings because the arbitrators are to be chosen by the disputants. Hence, parties are not subject to a completely unpredictable judicial review. Also, the outcome of ADR is less dependent on neutral third parties. The forgoing arguments result in the fact that parties have a less passive role than when they submit a dispute to a judge.[82] This implies that there is less uncertainty for the parties as ADR methods allow them to determine a procedure according to their exact specifications. In that way, ADR proceedings distract innovators less from their core business than a lawsuit would do.[83]

30. Alternative dispute resolution can vary from adjudicative to consensual.[84] Arbitration and mediation are the most important forms of ADR. Arbitration is an adjudicative form of ADR. It is the most well known form of ADR. An independent third person, the arbitrator, will settle the dispute by means of an arbitral award, which is binding for the involved parties. It is an adversarial proceeding.[85] Mediation, on the other hand also involves a neutral third person.[86] It

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[78] N. BROADBENT, "Alternative Dispute Resolution", *Legal Information Management* 2009, vol. 9, 195-198.

[79] N. BROADBENT, "Alternative Dispute Resolution", *Legal Information Management* 2009, vol. 9, 195-198.

[80] X, "Resolving Disputes: Alternative Dispute Resolution", *Your Europe* 2017, *http://europa.eu/youreurope/business/sell-abroad/resolving-disputes/index_en.htm*.

[81] R.E. LEVINE and M.V. TOPIC, "Using alternative dispute resolution mechanisms to resolve patent disputes", *Journal of Intellectual Property Law & Practice* 2012, vol. 7, 199-125.

[82] S.L. HAYFORD, "Alternative Dispute Resolution", *Business Horizons* 2000, 2-4; M.M. LIM, "ADR of Patent Disputes: A Costumized Prescription, not an over-the-counter remedy", *Cardozo Journal of Conflict Resolution* 2005, vol. 6, 155-190.

[83] S.L. HAYFORD, "Alternative Dispute Resolution", *Business Horizons* 2000, 2-4.

[84] M.M. LIM, "ADR of Patent Disputes: A Costumized Prescription, not an over-the-counter remedy", *Cardozo Journal of Conflict Resolution* 2005, vol. 6, 155-190.

[85] J. ELLIS, "Arbitration, A cost-effective alternative for litigating patent disputes", *Biotechnology Law Report* 2013, vol. 5, 313-318.

is a consensual form of ADR. The difference with arbitration is that the mediator does not settle the dispute, but seeks to let the parties reach a consensus that is a partial or an entire solution for their dispute. The mediator actually helps the parties to find a business solution.[87] There are many other variants on these two types of ADR.[88]

31. An effective system of enforcement is needed to promote the use of patent rights. Therefore, businesses need to be able to enforce their rights against infringers of their patents adequately. Also, when SMEs are accused of infringement, litigation proceedings can be too expensive for them. For this reason, SMEs need to have the possibility to defend themselves against these unduly actions in an easy and low-cost way.[89]

CHAPTER 1. ARBITRATION

32. *"Arbitration is a procedure in which a dispute is submitted, by agreement or by the parties, to one or more arbitrators who make a binding decision on the dispute"*.[90] This is the definition of arbitration given by the World Intellectual Property Arbitration and Meditation Center. This means that parties agree to comply with the decision that the arbitrator will make, relating to the dispute they submitted to it.[91] Although it is an alternative for court litigation, they also share some similarities. They are both systems to resolve disputes. They both involve a third party who makes a final decision to solve the dispute. In arbitration procedures, this third party is an arbitrator and in court litigation this is a judge. They both result in enforceable decisions. They both respect the principle against bias and the right to a fair hearing.[92] One could say that arbitration is a lower-cost, less expensive and more efficient alternative to litigation.[93]

33. In what follows the most important differences between court litigation and arbitration will be discussed. The first major difference is that arbitration requires an arbitration agreement, whereas court proceedings can be initiated without any agreement between the parties about the

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[86] M.M. LIM, "ADR of Patent Disputes: A Costumized Prescription, not an over-the-counter remedy", *Cardozo Journal of Conflict Resolution* 2005, vol. 6, 155-190.

[87] J. ELLIS, "Arbitration, A cost-effective alternative for litigating patent disputes", *Biotechnology Law Report* 2013, vol. 5, 313-318.

[88] B. ALLEMEERSCH and T. KRUGER, *Handboek Europees Burgerlijk Procesrecht,* Antwerp, Intersentia, 2015.

[89] EUROPEAN COMMISSION, *Communication to the European Parliament and the Council: Enhancing the patent system in Europe*, Brussels, 3 april 2007, 14.

[90] WIPO, "What is arbitration?", *http://www.wipo.int/amc/en/arbitration/what-is-arb.html*.

[91] T. COOK and A.I. GARCIA, *International Intellectual Property Arbitration*, Alphen aan den Rijn, Kluwer Law International, 2010, 23.

[92] A. NIXON, "Arbitration – A better way to resolve intellectual-property disputes?", *Tibtech* 1997, vol.15, 484-486; N. BROADBENT, "Alternative Dispute Resolution", *Legal Information Management* 2009, vol. 9, 195-198.

[93] K. PETRAKIS, "The role of Arbitration in the Field of Patent Law", *Dispute Resolution Journal* 1997, 24-31; S.L. HAYFORD, "Alternative Dispute Resolution", *Business Horizons* 2000, 2-4.

resolution of a dispute.[94] This means that when a contract contains an arbitration clause, the parties must go to an arbitral tribunal to solve their dispute.[95] Because the arbitration can only be set up by means of an agreement, the parties have the autonomy to decide on a lot of aspects regarding the arbitration procedure.[96] This is the second difference. They can appoint one or more arbitrators. So they can choose who will be deciding on the case and on the number of arbitrators. The parties must agree on the applicable law. They can also decide more freely on the rules to be followed during the procedure. For example, how much weight they attach to certain means of evidence. They can also choose the language of the proceedings. Furthermore, the parties can decide on whether they have a hearing or not. Hence it is possible to have a completely written procedure. When parties agree on having a hearing, they can choose where the hearing will take place, regardless of the chosen governing law.[97] Besides any national law, they can also choose to make principles of fairness applicable on the dispute. Parties are bound by the terms they agreed upon in the arbitration agreement.[98] The third difference is particularly relevant for intellectual property disputes. While court proceedings usually take place in public, arbitration proceedings take place in a private environment. Arbitration is a better alternative than court proceedings when a party attaches a great deal of importance to confidentiality.[99] This is for example the case when trade secrets are at stake. The last difference is the finality of the arbitral awards. In comparison to a court decision, there are far less circumstances in which arbitral awards can be appealed.[100]

CHAPTER 2. MEDIATION

34. Mediation is a consensual and non-binding way of solving disputes. It is one of the most widely used ADR procedures because it is so informal and flexible. Mediation is a very commonly used in civil and commercial legal cases. In the case of mediation, the parties appoint a neutral third person that will facilitate negotiations between the parties. The mediator will be appointed in case the parties themselves are not able to agree on selecting one.[101] About 80 per cent of cases

[94] A. NIXON, "Arbitration – A better way to resolve intellectual-property disputes?", *Tibtech* 1997, vol.15, 484-486.
[95] N. BROADBENT, "Alternative Dispute Resolution", *Legal Information Management* 2009, vol. 9, 195-198.
[96] R.E. LEVINE and M.V. TOPIC, "Using alternative dispute resolution mechanisms to resolve patent disputes", *Journal of Intellectual Property Law & Practice* 2012, vol. 7, 199-125; S.L. HAYFORD, "Alternative Dispute Resolution", *Business Horizons* 2000, 2-4.
[97] A. NIXON, "Arbitration – A better way to resolve intellectual-property disputes?", *Tibtech* 1997, vol.15, 484-486.
[98] N. BROADBENT, "Alternative Dispute Resolution", *Legal Information Management* 2009, vol. 9, 195-198.
[99] X, "What is arbitration", *World International Property Organization* 2017, *http://www.wipo.int/amc/en/arbitration/what-is-arb.html;* A. NIXON, "Arbitration – A better way to resolve intellectual-property disputes?", *Tibtech* 1997, vol.15, 484-486.
[100] A. NIXON, "Arbitration – A better way to resolve intellectual-property disputes?", *Tibtech* 1997, vol.15, 484-486.
[101] S.L. HAYFORD, "Alternative Dispute Resolution", *Business Horizons* 2000, 2-4.

that are subjected to mediation process, results in a settlement. Mediation is very flexible because there are almost no restrictions on how the procedure will be conducted. There aren't any criteria to enter in such proceedings either.[102]

35. The parties agree on appointing a neutral mediator who assists the parties in their negotiations.[103] He merely takes on a role as a legal advisor, rather than the role of a judge. For this reason, the majority of mediators are lawyers. Usually, there will be an informal preliminary discussion with the mediator and each party separately. After that, an initial joint session with both parties and the mediator takes place. Further discussions take place in separate rooms. These discussions are usually strictly confidential. The mediator only passes information through to the other party when he is authorised to do so.[104] The advantage of this is that the parties can decide autonomously on what information they want to keep confidential. The mediator tries to make communication between the parties more easy. As said before, there are no fixed rules for the mediation procedure. So, the described situation is the way it usually goes, but it is not obligatory. Different from a judge, the mediator is not allowed to impose a settlement on the parties. This implies that the ultimate solution will be assured to be acceptable for both parties.[105] The foregoing is also the biggest difference with arbitration, namely that there is a lack of a binding solution taken by the third person. When the mediation was successful, this results in a compromise that ends the dispute, created by the parties themselves. If not, they can agree on continuing the dispute resolution by means of arbitration or traditional litigation.[106]

CHAPTER 3. EXPERT DETERMINATION

36. Expert determination is also a contractual mechanism. It is a consensual mechanism, so parties have the autonomy to define the rules and the course of the procedure. The parties submit their dispute to an expert in the form of a submission agreement. The parties select the expert together. The expert then makes a determination of the issue. Expert determination is often used for disputes concerning the sale and purchase of businesses. The independent third person will act as an expert, rather than as a judge. The third person will use his expertise to determine the

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[102] LIM, M., "ADR of patent disputes: a customized prescription, not an Over-The-Counter Remedy", *Cardozo Journal of Conflict Resolution* 2005, vol. 6, 155-190.
N. BROADBENT, "Alternative Dispute Resolution", *Legal Information Management* 2009, vol. 9, 195-198.
[103] S.L. HAYFORD, "Alternative Dispute Resolution", *Business Horizons* 2000, 2-4.
[104] N. BROADBENT, "Alternative Dispute Resolution", *Legal Information Management* 2009, vol. 9, 195-198.
[105] S.L. HAYFORD, "Alternative Dispute Resolution", *Business Horizons* 2000, 2-4.
[106] LIM, M., "ADR of patent disputes: a customized prescription, not an Over-The-Counter Remedy", *Cardozo Journal of Conflict Resolution* 2005, vol. 6, 155-190; S.L. HAYFORD, "Alternative Dispute Resolution", *Business Horizons* 2000, 2-4

problem and to find a solution to it.[107] The determination is usually binding, but parties can agree to derogate from this. The fact that parties can choose if the outcome will be binding or non-binding forms the difference with mediation or arbitration. Expert determination is neutral and flexible.[108]

[107] N. BROADBENT, "Alternative Dispute Resolution", *Legal Information Management* 2009, vol. 9, 195-198.
[108] WIPO, "What is Expert Determination?" *http://www.wipo.int/amc/en/expert-determination/what-is-exp.html.*

PART 4. ADR IN PATENT DISPUTES

37. Patents are territorial rights. All types of corporations obtain and license patents in the country where they are seated in but also in other countries. This means that there must be cross-border protection against infringements because patent holders wish to enforce their rights on a global basis. When a patent owner wants to protect its patent rights in court, he must bring actions in each country where the patent was infringed.[109] Due to the international nature of patent rights, cross-border patent litigation has increased. Also the need for a more flexible system, which provides solutions for the difficulties that occur with patent litigation, has increased.

CHAPTER 1. ADVANTAGES OF ARBITRATION FOR PATENT DISPUTES

38. Of all ADR procedures, arbitration is the most assuring because it replaces a regular court judge by an expert in the technology of the dispute. Nevertheless, arbitration proceedings can be used to resolve different patent issues, such as infringement, issues about license agreements, inventorship and validity.[110] There are many advantages to using arbitration to resolve patent disputes.

SECTION 1. LOWER COSTS

39. High costs of prosecuting or defending a patent case through court proceedings can be a burden for parties to go to court. Arbitration on the other hand, leads to a faster solution in a mutually agreed-upon location and at a far less expense. Arbitration is in general less expensive than court litigation. Expert costs can be avoided, because parties can appoint arbitrators with expertise and experience in the technical field at stake.[111] Parties generally have more control over their dispute.[112] Arbitration proceedings are less formal. Consequently, the procedure can be conformed to the specific circumstances of the case and the needs of the parties.

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[109] J.P. ZAMMIT and J. HU, "Arbitrating Intellectual Property Disputes", *Dispute Resolution Journal* 2009, 2-4; R. MOUFANG, "The Extraterritorial Reach of Patent Law" in PRINZ ZU WALDECK UND PYRMONT, W., ADELMAN, M.J., BRAUNEIS, R., DREXL, J. and NACK, R., *Patents and Technological Progress in a Globalized World: Liber Amicorum Joseph Strauss,* Berlin, Springer-Verlag, 2009, 601-618.

[110] J. ELLIS, "Arbitration, A cost-effective alternative for litigating patent disputes", *Biotechnology Law Report* 2013, vol. 5, 313-318.

[111] D. FOX and R. WEINSTEIN, "Arbitration and Intellectual Property Disputes", *Micronomics* 2012, 2-7; T. COOK and A.I. GARCIA, *International Intellectual Property Arbitration*, Alphen aan den Rijn, Kluwer Law International, 2010, 29; PETRAKIS, K., "The role of Arbitration in the Field of Patent Law", *Dispute Resolution Journal* 1997, 24-31.

[112] R.E. LEVINE and M.V. TOPIC, "Using alternative dispute resolution mechanisms to resolve patent disputes", *Journal of Intellectual Property Law & Practice* 2012, vol. 7, 199-125.

40. As there are fewer possibilities to appeal arbitral decisions, they have greater finality than a court decision.[113] Parties can agree on making the arbitrator's decision final and therefore not subject to appeal.[114] In this manner, they can avoid extra costs of appeal proceedings. When it concerns an international dispute, which is often the case in patent disputes, it is easier for the parties to enforce an arbitral award than a civil judgment.[115] In this way, the patent holder can avoid having to litigate in multiple jurisdictions. This is further explained in section 6. Needless to say, just as for the length of the proceedings, the behaviour of the parties is a core element that has a big impact on the costs of the proceedings. An example of this is that arbitrators adapt their fees according to how much time they spend on the dispute.[116]

41. International arbitration is especially cheaper than litigation in common law jurisdictions. A first reason for this is that evidence rules are less strictly in arbitration proceedings, compared to the evidence rules in common law jurisdictions.[117] This is because in most cases disclosure is excluded in arbitration proceedings.[118] A second reason is that hearings are usually shorter in international arbitration. Complex patent disputes can be followed by long trial hearings. Arbitral proceedings last shorter because the possibility of cross-examination is limited.[119] When hearings take up less time, the costs will be limited too. As stated in paragraph 19, the costs of a patent dispute in the United States are on average two to three million dollars. Patent arbitration may cost only 50 to 75 per cent of that amount.[120] The cost difference between civil litigation and international arbitration will be smaller than compared to common law litigation. But

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[113] J. ELLIS, "Arbitration, A cost-effective alternative for litigating patent disputes", *Biotechnology Law Report* 2013, vol. 5, 313-318.

[114] C. METCALF, "Resolution of technology and patent disputes by arbitration and mediation: A view from the United States", *Arbitration* 2008, 385-394; M. LIM, "ADR of patent disputes: a customized prescription, not an Over-The-Counter Remedy", *Cordozo Journal of Conflict Resolution* 2005, vol. 6, 155-190.

[115] T. COOK and A.I. GARCIA, *International Intellectual Property Arbitration*, Alphen aan den Rijn, Kluwer Law International, 2010, 23; J. ELLIS, "Arbitration, A cost-effective alternative for litigating patent disputes", *Biotechnology Law Report* 2013, vol. 5, 313-318; P. LEUNG, "Is ADR the way forward or FRAND?", *Managing Intellectual property* 2015, 1-3.

[116] T. COOK and A.I. GARCIA, *International Intellectual Property Arbitration*, Alphen aan den Rijn, Kluwer Law International, 2010, 42.

[117] J. ELLIS, "Arbitration, A cost-effective alternative for litigating patent disputes", *Biotechnology Law Report* 2013, vol. 5, 313-318; M. LIM, "ADR of patent disputes: a customized prescription, not an Over-The-Counter remedy", *Cordozo Journal of Conflict Resolution* 2005, vol. 6, 155-190.

[118] IBA WORKING PARTY, "Commentary on the New IBA Rules of Evidence in International Commercial Arbitration", *Business Law International* 2000, 20.

[119] T. COOK and A.I. GARCIA, *International Intellectual Property Arbitration*, Alphen aan den Rijn, Kluwer Law International, 2010, 42.

[120] K. R. CASEY, "Alternative Dispute Resolution and Patent Law", *Federal Circuit Bar Journal* 1993, 2-3; J.S. LARSON, "Alternative Dispute Resolution in Patent Law: Considering the Non- Practising Entity and Increased Availability of Declaratory Judgment", *Intellectual Property & Technology Law Journal* 2010, vol. 12, 15-20.

especially when it concerns a complicated cross-border patent disputes, international arbitration will be the cheaper alternative to cross-border litigation.[121]

42. The parties only have to pay the arbitrators fee. This is a reasonable amount compared to the cost, time and uncertainties that come with patent litigation.[122] So, we cannot state that arbitration is a cheap means of dispute resolution, but it is clear that parties have much more possibilities and techniques to control the costs of the proceedings in comparison with court litigation.[123]

SECTION 2. CONFIDENTIALITY

43. Another advantage of arbitration is that the parties can decide to keep the proceedings and/or the arbitral award confidential.[124] This is especially useful since many patent rights are connected to trade secrets, know-how and other commercially sensitive information. This kind of confidential information would lose its value if it would be made public.[125] Arbitration makes it possible for the parties to control access and disclosure of information. The arbitral decision itself, together with the fact that parties are involved in an arbitration procedure, can also be held secret for the public.[126] Parties can expressly cover confidentiality in the agreement or they can refer to confidentiality rules that are laid down in the constitutional rules that they made applicable to the arbitration proceedings. Given the importance of confidentiality of patent rights, the WIPO Arbitration Rules include a list of provision concerning the confidentiality of the arbitration procedure in intellectual property disputes.[127] In patent cases, it is strongly recommended to the parties to incorporate such an implied or express reference to confidentiality rules. If there's no agreement on the applicable rules, the *lex arbitri* will be applicable concerning confidentiality. This can be problematic because national law about confidentiality can vary very much from

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[121] T. COOK and A.I. GARCIA, *International Intellectual Property Arbitration*, Alphen aan den Rijn, Kluwer Law International, 2010, 42.

[122] J.S. LARSON, "Alternative Dispute Resolution in Patent Law: Considering the Non- Practising Entity and Increased Availability of Declaratory Judgment", *Intellectual Property & Technology Law Journal* 2010, vol. 12, 15-20.

[123] T. COOK and A.I. GARCIA, *International Intellectual Property Arbitration*, Alphen aan den Rijn, Kluwer Law International, 2010, 43.

[124] C. METCALF, "Resolution of technology and patent disputes by arbitration and mediation: A view from the United States", *Arbitration* 2008, 385-394.

[125] A. REDFERN and M. HUNTER, *Law and Practive of International Commercial Arbitration,* London, Sweet & Maxwell, 2004, 32; T. COOK and A.I. GARCIA, *International Intellectual Property Arbitration*, Alphen aan den Rijn, Kluwer Law International, 2010, 46.

[126] D. FOX and R. WEINSTEIN, "Arbitration and Intellectual Property Disputes", *Micronomics* 2012, 2-7; J. ELLIS, "Arbitration, A cost-effective alternative for litigating patent disputes", *Biotechnology Law Report* 2013, vol. 5, 313-318

[127] Article 75-78 WIPO Arbitration Rules; T. COOK and A.I. GARCIA, *International Intellectual Property Arbitration*, Alphen aan den Rijn, Kluwer Law International, 2010, 46.

country to country.[128] For example, French law and English law have rather strict confidentiality duties in arbitration proceedings, whereas Australian law and US law do not have such duties. Therefore, it is better to agree upon those rules in advance.

44. When filing for court litigation on the contrary, parties must accept the openness of the proceedings.[129] This is particularly undesirable when the patent holder does not want competitors to know that his patent is being challenged.

SECTION 3. SHORTER PROCEEDINGS

45. Although the length of proceedings always depend on concrete circumstances of the situation and on the behaviour of the parties, in general arbitration takes less time than litigation. As mentioned above[130], patent litigation can take years until a final decision is reached. Arbitration proceedings on the contrary, can be solved in less than a year, even in case of complex patent issues.[131] So this is another advantage of arbitration. Parties can save time by determining the procedural schedule and the duration of the arbitration proceedings previously with the arbitrator(s). The companies involved in the dispute can then adapt their business plans according to the schedule.[132] The duration of arbitration proceedings are shorter than litigation because the need for independent experts is eliminated because of the expert arbitrators. Also, in most arbitration systems, provisional measures are available. Consequently, parties can define their rights temporarily before the final arbitral decision and in doing so they protect their patents. This is useful since patents are rights with a limited duration, so they are very time-sensitive. These aspects ensure a swift and efficient procedure.[133]

SECTION 4. PARTY AUTONOMY

46. As already mentioned before, arbitration is a mechanism that is based on party autonomy. This is shown in different areas of the arbitral proceedings. First, arbitration serves as a neutral procedure, because parties can choose wherever they want to conduct the proceedings. Parties can have various reasons to choose for a forum in which none of the parties has its home-

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[128] T. COOK and A.I. GARCIA, *International Intellectual Property Arbitration*, Alphen aan den Rijn, Kluwer Law International, 2010, 46.

[129] 7th Circuit Court of Appeals (US), *Union Oil Co of California v Leavell,* 220 F.3d 562, 568, 2000.

[130] *Supra* paragraph 20

[131] M.M. LIM, "ADR of Patent Disputes: A Costumized Prescription, not an over-the-counter remedy", *Cardozo Journal of Conflict Resolution* 2005, vol. 6, 155-190; J.S. LARSON, "Alternative Dispute Resolution in Patent Law: Considering the Non- Practising Entity and Increased Availability of Declaratory Judgment", *Intellectual Property & Technology Law Journal* 2010, vol. 12, 15-20.

[132] C. METCALF, "Resolution of technology and patent disputes by arbitration and mediation: A view from the United States", *Arbitration* 2008, 385-394.

[133] T. ARNOLD, *Patent Alternative Dispute Resolution,* Eagan, Clark Boardman Callaghan, 1991, 5.

jurisdiction.[134] Neutrality can be reflected by the choice of the seat of the arbitral tribunal, the nationality of the arbitrators and the governing law. This is specifically beneficial in intellectual property disputes, where the patent holder granted a license to a licensee seated in a developing country. In such cases, it is not likely that the licensor who is seated in a developed country wants to litigate in a developing country or vice versa. For this reason, an arbitral tribunal in a third country can serve as a neutral alternative to litigation.[135] According to some authors, because the parties must agree on procedural elements of the proceedings, may increase the possibility of reaching a settlement without actually having to enter into arbitral proceedings.[136] Since arbitration is less adversarial than court proceedings, it is more likely that the opponent parties will be able to maintain a healthy business relationship after the arbitral proceedings.[137] Furthermore, the costs that come with a damaged business relationship can be avoided when choosing arbitration.[138]

47. Regarding the party autonomy, another advantage is that parties can agree on the procedural conduct of the arbitral proceedings. Parties can agree on a timeline and on the procedural details, such as applicable rules of evidence, rules concerning pleadings and other procedural matters.[139] This means that no national procedural rules are applicable to the proceedings.[140] But most of the arbitration rules of arbitral tribunals contain rules about the procedure on which parties can rely. A comprehensive example can be found in the WIPO Arbitration Rules.[141]

48. In some sectors in which patent are very frequent and important, such as the pharmaceutical sector and technological sector, parties have the opportunity to agree on submitting possible disputes to a standby arbitral tribunal. Reason for this is that the parties do not want to

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[134] G. BOM, *International Commercial Arbitration,* The Hague, Kluwer Law International, 2009, 7; K. SAJKO, "Intellectual Property Rights and Arbitration - Miscellanous" in PRINZ ZU WALDECK UND PYRMONT, W., ADELMAN, M.J., BRAUNEIS, R., DREXL, J. and NACK, R., *Patents and Technological Progress in a Globalized World: Liber Amicorum Joseph Strauss,* Berlin, Springer-Verlag, 2009, 445-461.

[135] T. COOK and A.I. GARCIA, *International Intellectual Property Arbitration*, Alphen aan den Rijn, Kluwer Law International, 2010, 28.

[136] T. COOK and A.I. GARCIA, *International Intellectual Property Arbitration*, Alphen aan den Rijn, Kluwer Law International, 2010, 32; G. BOM, *International Commercial Arbitration,* The Hague, Kluwer Law International, 2009, 9; H. RAESCHKE-KESSLER, "The Arbitrator as Settlement Facilitator", *Arbitration International* 2005, 523.

[137] D. FOX and R. WEINSTEIN, "Arbitration and Intellectual Property Disputes", *Micronomics* 2012, 2-7; G.A. PARADISE, "Arbitration of Patent Infringement Disputes: Encouraging the use of Arbitration Trough Evidence Rules Reform", *Fordham Law Reform* 1995, 247-264.

[138] J.S. LARSON, "Alternative Dispute Resolution in Patent Law: Considering the Non- Practising Entity and Increased Availability of Declaratory Judgment", *Intellectual Property & Technology Law Journal* 2010, vol. 12, 15-20.

[139] T. COOK and A.I. GARCIA, *International Intellectual Property Arbitration*, Alphen aan den Rijn, Kluwer Law International, 2010, 29.

[140] G. BOM, *International Commercial Arbitration,* The Hague, Kluwer Law International, 2009, 8.

[141] WIPO Abitration Rules 1994.

jeopardize their long-term business relationship when a dispute arises. This way, any dispute can be solved in a relatively short timespan.[142]

SECTION 5. SPECIALIZED ARBITRATORS

49. Parties are able to choose the arbitrators. They have the chance to determine the experience and expertise of the decision-makers of their dispute. This is a crucial aspect of their party autonomy.[143] Since the parties can choose the arbitrators, they will choose people who have expertise in the specific field of the disputed patents. They are appointed because of their specific knowledge of the disputed technical matter and of law. This shows a big contrast with court judges. Especially in civil law countries, judges are usually not skilled with any scientific or technical knowledge, although this is very much needed to comprehend a patent case. It follows that the judges have to rely on the conclusions of experts.

50. Arbitrators with relevant expertise can provide the parties with a more objective view on the case.[144] The decisions of arbitrators are not as unpredictable as those from judges or a jury, because they are familiar with the specific technical and legal standards in the issue. If there are more than one arbitrators appointed, they can form a panel of experts each with a different background. In this way all aspects of the case are covered. In a case about a manufacturing patent for example, the parties could appoint three arbitrators: one engineer with experience in the relevant technical field, one business attorney and one patent attorney. Hence, each arbitrator is specialised in one aspect of the dispute.[145] Parties can even specify in the arbitration clause the necessary qualifications for the appointed arbitrator. For example, they can stipulate in the arbitration clause/agreement that 'the arbitrator must have experience with patent dispute arbitration' or 'that the arbitrator should have a general familiarity with patent law'.[146] The outcome of arbitration proceedings would be more predictable for the parties involved.[147] If the

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[142] B. NIBLETT, "The Arbitration of Intellectual Property Disputes", *The American Review of International Arbitration* 1994, 118.

[143] T. COOK and A.I. GARCIA, *International Intellectual Property Arbitration*, Alphen aan den Rijn, Kluwer Law International, 2010, 29.

[144] C. METCALF, "Resolution of technology and patent disputes by arbitration and mediation: A view from the United States", *Arbitration* 2008, 385-394; J.S. LARSON, "Alternative Dispute Resolution in Patent Law: Considering the Non- Practising Entity and Increased Availability of Declaratory Judgment", *Intellectual Property & Technology Law Journal* 2010, vol. 12, 15-20.

[145] T. ARNOLD, "Booby traps in arbitration practice and how to avoid them", *Practicing Law Institute-Patent Litigation* 1994, 222; C. METCALF, "Resolution of technology and patent disputes by arbitration and mediation: A view from the United States", *Arbitration* 2008, 385-394.

[146] J.S. LARSON, "Alternative Dispute Resolution in Patent Law: Considering the Non- Practising Entity and Increased Availability of Declaratory Judgment", *Intellectual Property & Technology Law Journal* 2010, vol. 12, 15-20; K. R. CASEY, "Alternative Dispute Resolution and Patent Law", *Federal Circuit Bar Journal* 1993, 2-3.

[147] C. METCALF, "Resolution of technology and patent disputes by arbitration and mediation: A view from the United States", *Arbitration* 2008, 385-394.

parties make a considered decision concerning which arbitrators to appoint for deciding on their patent dispute, it is a valuable way to reduce the aforementioned shortcomings that come with a judicial system and with a court judge. It is clear that choosing adequate expert arbitrators can provide an unrivalled advantage to litigation in patent cases.[148]

51. In US common law judicial system, these cases are often decided by a jury trial. Also in this case, it is very unlikely that the jurors have enough scientific or technologic knowledge to resolve the case.[149] On the contrary, in arbitral proceedings, there is no need for expert witnesses because expert arbitrators better understand the issue at stake.

SECTION 6. EASILY ENFORCEABLE

52. The outcomes of arbitration are enforceable in court and they are binding when the parties have agreed upon it.[150] There is no global treaty dealing with the enforcement of judgments in foreign countries. As a result, the enforceability of foreign judgments depends on the discretion of national laws that are applied by the national courts. The rules for enforceability can differ very much from country to country, which it makes it hard to obtain enforceability in diverse countries.

53. On the contrary, for arbitration there is the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 ('the New York Convention'). This makes enforcement of foreign arbitral awards is much more easy to achieve because it enjoys a greater acceptance than enforcement of court judgments.[151] It is one of the most widely accepted international laws with its 157 member states.[152] An important rule laid down in the treaty is that the member states can only refuse recognition and enforcement of a foreign arbitral award in case of fulfilment of some very restrictive grounds. So, only a small percentage of applications for enforcement and recognition are rejected.[153] The fact that the enforceability of arbitral awards on a cross-border

[148] T. COOK and A.I. GARCIA, *International Intellectual Property Arbitration*, Alphen aan den Rijn, Kluwer Law International, 2010, 29.
[149] J. MARTIN, "Arbitrating in the Alps rather than Litigating in Los Angeles: The Advantages of International Intellectual Property-Specific Alternative Dispute Resolution", *Stanford Law Review* 1997, 917; S.J. ELLEMAN, "Problems in patent litigation: Mandatory Mediation May provide Settlement and Solutions", *Ohio State Journal on Dispute Resolution* 1997, 759.
[150] J.S. LARSON, "Alternative Dispute Resolution in Patent Law: Considering the Non- Practising Entity and Increased Availability of Declaratory Judgment", *Intellectual Property & Technology Law Journal* 2010, vol. 12, 15-20.
[151] T. COOK and A.I. GARCIA, *International Intellectual Property Arbitration*, Alphen aan den Rijn, Kluwer Law International, 2010, 24.
[152] UNCITRAL, "Status Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html*; M. MUSTILL, "Arbitration: History and background", *Journal of Internation Arbitration* 1989, 49.
[153] A.J. VAN DEN BERG, "Why are some awards not enforceable?", *ICCA Congress Series* 2005, 291-326.

level is so widely accepted, is an advantage for patent holders since patents are often globally exploited.[154]

SECTION 7. FINALITY OF ARBITRAL AWARDS

54. An arbitral award is final and binding unless parties agree on consecutive adjustment of the award.[155] So generally, arbitral awards are not subject to appeal by national courts. Nonetheless, an exception to this principle is when there has been manifest disregard of the law or in case of a serious irregularity of the arbitral tribunal.[156] This is one of the reasons why arbitral proceedings take up a shorter amount of time and are less expensive than litigation. This holds as a consequence that there is more certainty about the timing of the final judgment. The ratio behind the lack of appeal is the party autonomy. Since parties were able to 'construct' the procedure according to their wishes and they appointed experienced and qualified arbitrators, parties do not need additional judicial review anymore. Also, when parties appoint more than one arbitrator (usually three), this can also work as some sort of judicial control.[157]

55. Arbitral awards only have *inter partes* effects.[158] It follows that if an arbitral tribunal invalidates a patent right, this usually does not have *erga omnes* effect. Important to mention is that in some jurisdictions an arbitral tribunal has the competence to decide on *erga omnes* invalidity of a patent. For example, according to Belgian law, this is possible.[159] But in general it is not. Another advantage concerning the finality of arbitral awards is that parties can predict when the dispute will be finally resolved. This enables them to decide on key issues concerning the production of the patented invention.[160] We can conclude that in most cases international arbitration is a safer option if the patent rights face invalidity challenges.[161]

56. Nevertheless, any form of arbitration must allow judicial appeal in order to meet the requirements of the right to a fair trail.[162] The concrete possibilities for parties to agree on

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[154] T. COOK and A.I. GARCIA, *International Intellectual Property Arbitration*, Alphen aan den Rijn, Kluwer Law International, 2010, 25.
[155] M.M. LIM, "ADR of Patent Disputes: A Costumized Prescription, not an over-the-counter remedy", *Cardozo Journal of Conflict Resolution* 2005, vol. 6, 155-190.
[156] S.E. HOLLANDER, "Patent Counsel Debate Pros and Cons of ADR, *National Law Journal* 1997, 20-24.
[157] T. COOK and A.I. GARCIA, *International Intellectual Property Arbitration*, Alphen aan den Rijn, Kluwer Law International, 2010, 38.
[158] 35 U.S.C. § 294(c).
[159] Article XI. 59 Code of Economic Law *(Wetboek van Economisch recht)*; S. MOMBAERTS, "Nietigheid van octrooien", *Jura Falconis* 2011-2012 (4), 623-655.
[160] M.M. LIM, "ADR of Patent Disputes: A Costumized Prescription, not an over-the-counter remedy", *Cardozo Journal of Conflict Resolution* 2005, vol. 6, 155-190.
[161] T. COOK and A.I. GARCIA, *International Intellectual Property Arbitration*, Alphen aan den Rijn, Kluwer Law International, 2010, 39.
[162] Article 6 European Convention on Human Rights.

appellate review depend on the *lex arbitri*. The viewpoint on this varies highly between different countries.[163] According to W. KINGSTON, this would not often be used by small or medium sized firms because they lack the needed resources.[164] But even big enterprises would not lodge an appeal after arbitration proceedings because the inexpert court will probably attach a great deal of importance to the decision of the expert arbitrator. Another reason is that parties risk losing the benefits of the arbitral proceedings, such as confidentiality. This would be highly undesirable for parties in a patent dispute.[165] In general we can say that filing for appeal after arbitration would undermine the legal certainty of the parties because this way arbitration and court litigation, which are two different types of dispute resolution, are being mixed up to solve one particular dispute.[166]

CHAPTER 2. ADVANTAGES OF MEDIATION FOR PATENT DISPUTES

57. Mediation is a consensual way of solving disputes. It allows disputants to meet in a more neutral environment.[167] The aim of mediation procedure is to reach a mutual beneficial solution.[168] Unlike in arbitration, the strategy of the mediator plays an important role in successfully ending the mediation process. In patent cases, parties can benefit from a proactively directive mediator, who provides the parties with directions and advice to effectively solve the dispute. Since the chosen mediator usually has expertise in the relevant field, he can give the parties some guidance to reach a resolution, which preserves the interests of both parties.[169] It follows that mediation is a low-risk dispute resolution mechanism with advantages concerning timing, costs and acceptability of the result.[170] Some judges encourage parties to try to solve their dispute

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[163] W. PARK, "Irony in Intellectual Property Arbitration", *Arbitration International* 2003, 453; T. COOK and A.I. GARCIA, *International Intellectual Property Arbitration*, Alphen aan den Rijn, Kluwer Law International, 2010, 39.
[164] W. KINGSTON, "Reducing the cost of resolving intellectual property disputes", *European Journal of Law and Economics* 1995, vol. 2, 85-92.
[165] W. KINGSTON, "Reducing the cost of resolving intellectual property disputes", *European Journal of Law and Economics* 1995, vol. 2, 85-92; T. COOK and A.I. GARCIA, *International Intellectual Property Arbitration*, Alphen aan den Rijn, Kluwer Law International, 2010, 39.
[166] T. COOK and A.I. GARCIA, *International Intellectual Property Arbitration*, Alphen aan den Rijn, Kluwer Law International, 2010, 40.
[167] M. VITORIA, "Mediation of Intellectual Property Disputes", *Journal Of Intellectual Property Law & Practice* 2006, 398-405; J.S. LARSON, "Alternative Dispute Resolution in Patent Law: Considering the Non- Practising Entity and Increased Availability of Declaratory Judgment", *Intellectual Property & Technology Law Journal* 2010, vol. 12, 15-20.
[168] M. VITORIA, "Mediation of Intellectual Property Disputes", *Journal Of Intellectual Property Law & Practice* 2006, 398-405.
[169] C. METCALF, "Resolution of technology and patent disputes by arbitration and mediation: A view from the United States", *Arbitration* 2008, 385-394.
[170] M. VITORIA, "Mediation of Intellectual Property Disputes", *Journal Of Intellectual Property Law & Practice* 2006, 398-405; J. PLAYER and C. MOREL DE WESTGAVER, "Chapter 11: IP Mediation" in T. COOK and A.I. GARCIA, *International Intellectual Property Arbitration*, Alphen aan den Rijn, Kluwer Law International, 2010, 362.

through mediation instead of immediately going to court. However, a judge cannot order parties to do this against their will.[171]

SECTION 1. LOWER COSTS

58. When mediation is used in a profitable way, it can save more than 70 per cent of the costs of patent court litigation.[172] The only costs the parties have are to instruct a mediator and to prepare for the process. Parties also avoid the risk of enforcement costs because it is not likely that there will be non-compliance with a resolution in case of a mediated settlement.[173] Mediation is a non-binding process. This means that the mediation process can be terminated at any time, without any sanction. In case of termination of the process, parties will not suffer any immediate monetary loss, except for the mediator fees and possible legal costs.[174]

SECTION 2. CONFIDENTIALITY

59. Mediation can afford the parties more privacy. Mediation is confidential as far as the parties agreed on that. In this way, parties can protect their trade secrets, commercial information and other confidential or sensitive information.[175] Confidentiality can be waived in writing. Documentation and communication obtained during the mediation process, such as reports of the proceedings and opinions of the parties or mediator cannot be published, nor can they be used as evidence in potential subsequent court proceedings.[176] Parties can also impose duties of confidentiality on the mediator. For instance, parties can require that information that is disclosed to the mediator will not be communicated to the other party. Naturally, this involves a

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[171] M. VITORIA, "Mediation of Intellectual Property Disputes", *Journal Of Intellectual Property Law & Practice* 2006, 398-405.
[172] D. CIRACO, "Forget the Mechanisms and Bring in the Gardeners", *University of Baltimore Intellectual Property Law Journal* 2000, vol.9, 70.
[173] J. PLAYER and C. MOREL DE WESTGAVER, "Chapter 11: IP Mediation" in T. COOK and A.I. GARCIA, *International Intellectual Property Arbitration*, Alphen aan den Rijn, Kluwer Law International, 2010, 362.
[174] J. PLAYER and C. MOREL DE WESTGAVER, "Chapter 11: IP Mediation" in T. COOK and A.I. GARCIA, *International Intellectual Property Arbitration*, Alphen aan den Rijn, Kluwer Law International, 2010, 363.
[175] C. METCALF, "Resolution of technology and patent disputes by arbitration and mediation: A view from the United States", *Arbitration* 2008, 385-394; J. PLAYER and C. MOREL DE WESTGAVER, "Chapter 11: IP Mediation" in T. COOK and A.I. GARCIA, *International Intellectual Property Arbitration*, Alphen aan den Rijn, Kluwer Law International, 2010, 363.
[176] M.M. LIM, "ADR of Patent Disputes: A Costumized Prescription, not an over-the-counter remedy", *Cardozo Journal of Conflict Resolution* 2005, vol. 6, 155-190; W. L. DEAN, "Let's make a deal: Negotiating Resolution of Intellectual Property Disputes Through Mandatory Mediation at the Federal Circuit", *John Marshall Review of Intellectual Property Law* 2007, 369.

high level of trust in the integrity and impartiality of the mediator. Compared to arbitration proceedings, parties have even more control over the disclosure of confidential information.[177]

SECTION 3. SHORTER AND FASTER PROCEEDINGS

60. Mediation provides parties with a quicker solution than litigation would do. As said before, patent rights are very time sensitive. Due to the fact that the lifespan of technological innovation becomes shorter and shorter, it is beneficial for companies if the decision on the disputes is taken as quickly as possible. The longer the parties are involved in judicial proceedings, the more opportunities, and therefore time and money they lose.[178] METCALF gives the example of a pharmaceutical company that is involved in patent litigation. During the time they have to passively wait for the court decision, they do not have exclusivity on the pharmaceutical drug. This means that the company misses out on income and it costs them a lot. In a mediation process, the parties can control the duration of the proceedings by setting deadlines.[179] Mediation is in general even shorter than arbitration. It usually takes only one to five months, with a mediation meeting that takes one or two days.[180]

SECTION 4. FLEXIBLE AND CREATIVE SOLUTIONS

61. Mediation is an entirely contractual arrangement. As a consequence, parties in a mediation procedure have control over the course of the proceedings and over the outcome. They can decide what rules will be applicable on the procedure, as well as the conditions for a settlement. The mediator has no such power.[181]

62. Mediation allows the parties to reach a win-win situation. With the assistance of the mediator, parties can get to a solution that is beneficial for both.[182] There are no limits on what parties can negotiate about. This is in contrast with litigation, where the judge generally decides on a winner and a loser within the limitations of the claims made by the parties. He can only judge on *ultra petita* grounds. Mediation allows parties to design innovative solutions that would not

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[177] J. PLAYER and C. MOREL DE WESTGAVER, "Chapter 11: IP Mediation" in T. COOK and A.I. GARCIA, *International Intellectual Property Arbitration*, Alphen aan den Rijn, Kluwer Law International, 2010, 363.

[178] C. METCALF, "Resolution of technology and patent disputes by arbitration and mediation: A view from the United States", *Arbitration* 2008, 385-394.

[179] C. METCALF, "Resolution of technology and patent disputes by arbitration and mediation: A view from the United States", *Arbitration* 2008, 385-394.

[180] T. COOK and A.I. GARCIA, *International Intellectual Property Arbitration*, Alphen aan den Rijn, Kluwer Law International, 2010, 44.

[181] J. PLAYER and C. MOREL DE WESTGAVER, "Chapter 11: IP Mediation" in T. COOK and A.I. GARCIA, *International Intellectual Property Arbitration*, Alphen aan den Rijn, Kluwer Law International, 2010, 362.

[182] M.M. LIM, "ADR of Patent Disputes: A Costumized Prescription, not an over-the-counter remedy", *Cardozo Journal of Conflict Resolution* 2005, vol. 6, 155-190.

be possible in court.[183] This is favourable in patent license disputes or in patent infringement disputes because parties can explore different types of solutions for their dispute. Those solutions constitute of practical commercial benefits.[184] Parties are able to negotiate about these solutions in order to reach a win-win outcome for both parties. These creative solutions can be proposed by the parties or by the mediator.[185] For example, a dispute that starts with the infringement of the patent rights on a particular type of software can end in a new license agreement between the former countersparties.[186] This way, parties also avoid the risk of receiving an unreasonable verdict by a judge or jury that is undereducated.[187]

63. These are some examples of such solutions that can form commercial benefits for both parties in patent cases. The patent holder can grant a license to the infringer in order to legitimize the infringement. This way the patent can be exploited on a new territory. Another possibility is a cross-license. By cross-licensing connected patents or technology, the holder assures maximum exploitation of its patent portfolio.[188] Parties, who are already taking part in a license agreement, can renegotiate the royalty rates. A quite radical solution can also be to merge.

SECTION 5. PRESERVATION OR CREATION OF BUSINESS RELATIONSHIP

64. Patent disputes mostly arise between parties who are already in some kind of contractual relationship, such as a license agreement. In that case, parties tend not use formal dispute resolution, such as litigation or arbitration.[189] It is clear that it is crucial to them to preserve their business relationship. Since it is a more neutral mechanism than litigation and since it is more based on trust between the parties, mediation allows the parties to continue their ongoing relationship.[190]

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[183] C. METCALF, "Resolution of technology and patent disputes by arbitration and mediation: A view from the United States", *Arbitration* 2008, 385-394; J. PLAYER and C. MOREL DE WESTGAVER, "Chapter 11: IP Mediation" in T. COOK and A.I. GARCIA, *International Intellectual Property Arbitration*, Alphen aan den Rijn, Kluwer Law International, 2010, 363.

[184] J. PLAYER and C. MOREL DE WESTGAVER, "Chapter 11: IP Mediation" in T. COOK and A.I. GARCIA, *International Intellectual Property Arbitration*, Alphen aan den Rijn, Kluwer Law International, 2010, 364.

[185] A.W. KOWALCHYK, "Resolving Intellectual Property Disputes Outside of Court: Using ADR to Take Control of Your Case", *Dispute Resolution Journal* 2006, vol. 2, 28-37.

[186] J. PLAYER and C. MOREL DE WESTGAVER, "Chapter 11: IP Mediation" in T. COOK and A.I. GARCIA, *International Intellectual Property Arbitration*, Alphen aan den Rijn, Kluwer Law International, 2010, 364.

[187] W. L. DEAN, "Let's make a deal: Negotiating Resolution of Intellectual Property Disputes Through Mandatory Mediation at the Federal Circuit", *John Marshall Review of Intellectual Property Law* 2007, 369.

[188] J. PLAYER and C. MOREL DE WESTGAVER, "Chapter 11: IP Mediation" in T. COOK and A.I. GARCIA, *International Intellectual Property Arbitration*, Alphen aan den Rijn, Kluwer Law International, 2010, 365.

[189] J. PLAYER and C. MOREL DE WESTGAVER, "Chapter 11: IP Mediation" in T. COOK and A.I. GARCIA, *International Intellectual Property Arbitration*, Alphen aan den Rijn, Kluwer Law International, 2010, 367.

[190] M. VITORIA, "Mediation of Intellectual Property Disputes", *Journal Of Intellectual Property Law & Practice* 2006, 398-405.

65. Mediation can also initiate the creation of a new business relationship. Reason for this is that mediation is less adversarial than court litigation. The parties cooperate with the mediator in order to reach a satisfying solution of their dispute.[191]

SECTION 6. ENFORCEABLE CROSS-BORDER RESOLUTION

66. It is already mentioned before that patents are usually being infringed in several jurisdictions. This means that the patent holder should file patent suits in different jurisdictions concurrently. There is no court that can settle a dispute on a cross-border basis.[192] On the contrary, there are no territorial limitations to mediation. Since mediation is a contractual settlement mechanism, it allows parties to conclude a settlement that is internationally valid, in one single forum.[193]

CHAPTER 3. ADVANTAGES OF EXPERT DETERMINATION FOR PATENT DISPUTES

67. Since patents disputes are often very complicated, expert determination can be a very welcoming solution for disputants. Expert determination is especially useful when the dispute involves a complex technical, legal or scientific issue, and this highly complicated issue needs to be determined by an independent expert. There are some examples in which expert determination can be particularly helpful. The first example is when the value of a patent needs to be determined and in relation to this, when royalty rates need to be calculated. Another option is when the claims of the patent dispute need to be figured out. In patent license disputes, expert determination can be advantageous to determine the extent of the granted licenses. It is clear that expert determination can be a very useful mechanism for parties, especially when it concerns a complex patent case. Parties can decide whether the expert determination will be binding or not. They can also use it as a recommendation. The expert is an independent and neutral third party. Expert determination can be used alone or in combination with arbitration or mediation.[194] This shows the flexibility of this ADR mechanism.

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[191] CPR TECHNOLOGY COMMITTEE, *Alternative Dispute Resolution in Technology Disputes,* 1993, 3; C. METCALF, "Resolution of technology and patent disputes by arbitration and mediation: A view from the United States", *Arbitration* 2008, 385-394.
[192] M. VITORIA, "Mediation of Intellectual Property Disputes", *Journal Of Intellectual Property Law & Practice* 2006, 398-405.
[193] J. PLAYER and C. MOREL DE WESTGAVER, "Chapter 11: IP Mediation" in T. COOK and A.I. GARCIA, *International Intellectual Property Arbitration*, Alphen aan den Rijn, Kluwer Law International, 2010, 366; EUROPEAN COMMISSION, *Communication to the European Parliament and the Council: Enhancing the patent system in Europe*, Brussels, 3 april 2007, 14.
[194] WIPO, "Why Expert Determination in Intellectual Property?", *http://www.wipo.int/amc/en/expert-determination/why-is-exp..html*

CHAPTER 4. CONCLUSION

68. It is clear that ADR proceedings offer a more flexible alternative that can eliminate all of the downsides of patent litigation. ADR proceedings allow parties to solve a patent dispute in one single procedure, while they have the possibility to reduce costs and the duration. Moreover, the obtained award afterwards is almost worldwide enforceable.[195] The parties have much more autonomy to 'design' the conduct of their procedure, which allows them to stress the aspects that they find important. In patent disputes, one of these aspects is definitely confidentiality, because they want to avoid leakage of commercially sensitive information. Since parties have the autonomy to determine the schedule of the proceedings, they can assure that it won't take as much time as court litigation would do. Another important reason why parties utilise ADR proceedings to resolve their patent dispute is to secure the position on the market of the patent right. ADR also leads to a better preservation of the business relationship, which can be particularly important for patent rights.[196] We can conclude that the party autonomy is the most important asset of ADR proceedings. The foregoing aspects of ADR lead to a dispute resolution, which is more fair, reliable and flexible.

[195] J. PLAYER and C. MOREL DE WESTGAVER, "Chapter 11: IP Mediation" in T. COOK and A.I. GARCIA, *International Intellectual Property Arbitration*, Alphen aan den Rijn, Kluwer Law International, 2010, 361.
[196] J.S. LARSON, "Alternative Dispute Resolution in Patent Law: Considering the Non- Practising Entity and Increased Availability of Declaratory Judgment", *Intellectual Property & Technology Law Journal* 2010, vol. 12, 15-20.

PART 5. SPECIALIST BODIES AND PROCEDURES

69. To deal with intellectual property disputes, there are different specialized bodies and procedural rules established.[197]

CHAPTER 1. WORLD INTELLECTUAL PROPERTY ORGANIZATION (WIPO)

SECTION 1. ARBITRATION AND MEDIATION CENTER

70. The World Intellectual Property Organization is an intergovernmental organisation. It is a specialized agency of the United Nations.[198] It has 189 member states from all over the world.[199] It has always played an important role in the development and protection of intellectual property rights.[200] The WIPO has established the WIPO Arbitration and Mediation Center. According to their website this '*Arbitration and Mediation Center is a neutral, international and non-profit dispute resolution provider that offers time- and cost-efficient alternative dispute resolution.*'[201] The Center is specialized in intellectual property and related commercial disputes. There are four types of procedures: arbitration, expedited arbitration, mediation and expert determination. Any legally recognized person could bring a complaint to initiate one of these procedures.[202] Patent disputes take up almost 40% of the caseload of the WIPO Center.[203]

SECTION 2. WIPO RULES FOR ADR

71. The Center has established its own rules for arbitration and mediation proceedings, specifically for intellectual property disputes.[204] Leading experts in cross-border dispute settlement have developed these procedural rules. The most relevant rules for patent disputes will be discussed hereafter. WIPO also provides model dispute resolution clauses that parties can use in their agreements.[205] This is an example of a recommended mediation clause by WIPO:

'*Any dispute, controversy or claim arising under, out of or relating to this contract and any subsequent amendments of this contract, including, without limitation, its formation, validity,*

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[197] A. NIXON, "Arbitration – A better way to resolve intellectual-property disputes?", *Tibtech* 1997, vol.15, 484-486.
[198] A. NIXON, "Arbitration – A better way to resolve intellectual-property disputes?", *Tibtech* 1997, vol.15, 484-486.
[199] WIPO, "Member States", *http://www.wipo.int/members/en/*.
[200] M.L. CORDRAY, "GATT v. WIPO", *Journal of the Patent & Trademark Office Society* 1994, 121.
[201] X, "Alternative Dispute Resolution", *World International Property Organization* 2017, *http://www.wipo.int/amc/en/*.
[202] A. NIXON, "Arbitration – A better way to resolve intellectual-property disputes?", *Tibtech* 1997, vol.15, 484-486.
[203] H. WOLLGAST and I. DE CASTRO, "WIPO Arbitration and Mediation Center: New 2014 WIPO Rules; WIPO FRAND Arbitration", *ASA Bulletin* 2014, 286-296.
[204] C. METCALF, "Resolution of technology and patent disputes by arbitration and mediation: A view from the United States", *Arbitration* 2008, 385-394.
[205] These model clauses can be found on their website: *http://www.wipo.int/amc/en/clauses/*.

binding effect, interpretation, performance, breach or termination, as well as non-contractual claims, shall be submitted to mediation in accordance with the WIPO Mediation Rules. The place of mediation shall be (specify place). The language to be used in the mediation shall be (specify language).'[206]

It is important that in patent disputes the parties refer to contractual as well as non-contractual claims arising under the contract. The reason for this is that in practice, patent infringements are often claimed under a tort regime.[207] The fact that also non-contractual disputes can be submitted to WIPO Arbitration or Mediation points out the flexibility of the WIPO Rules. It is recommended that parties specify the place, the language and the applicable law in their dispute resolution clause in order to avoid procedural disagreements. If they do not include such information, then the WIPO rules provide the procedural rules for selecting these aspects.[208]

72. The WIPO rules contain detailed confidentiality rules.[209] These rules are set up with the aim of refraining parties from falsely assert infringement with the intention of acquiring access to the other party's technology or trade secrets.[210] Article 54 of the WIPO Arbitration Rules gives a definition of 'confidential information'. It also stipulates that the conditions should be disclosed or protected under the arbitrator's authority.[211] The WIPO Mediation rules also contain a set of confidentiality rules in articles 15-18. These rules determine that information obtained during mediation proceedings cannot be used as evidence during possible subsequent arbitration of judicial proceedings.[212] These rules give parties the certainty that their confidential information will enjoy sufficient protection during the ADR proceedings.[213]

73. The WIPO guarantees neutral proceedings. Its objective is to form a neutral international institution.[214] The concept of neutrality is essential in an international environment with parties

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[206] WIPO, "Future Disputes: WIPO Mediation clause", *http://www.wipo.int/amc/en/clauses/mediation/.*
[207] C. METCALF, "Resolution of technology and patent disputes by arbitration and mediation: A view from the United States", *Arbitration* 2008, 385-394; R.H. SMIT, "General commentary on the WIPO Rules", *American Review of International Arbitration* 1998, 12.
[208] C. METCALF, "Resolution of technology and patent disputes by arbitration and mediation: A view from the United States", *Arbitration* 2008, 385-394; R.H. SMIT, "General commentary on the WIPO Rules", *American Review of International Arbitration* 1998, 13.
[209] Article 75-87 WIPO Arbitration Rules.
[210] R. COULSON, "Arbitration and Other Forms of Alternative Dispute Resolution: General Overview", *Worldwide Forum on The Arbitration of Intellectual Property Disputes (WIPO Publication)* 1994, 24.
[211] Article 54 WIPO Arbitration Rules.
[212] Article 18 WIPO Mediation Rules.
[213] C. METCALF, "Resolution of technology and patent disputes by arbitration and mediation: A view from the United States", *Arbitration* 2008, 385-394.
[214] C. METCALF, "Resolution of technology and patent disputes by arbitration and mediation: A view from the United States", *Arbitration* 2008, 385-394.

from different countries with diverse views on patent protection.[215] A neutral single forum takes away the risks that come with litigating in a foreign forum and the risk of an unsatisfying verdict due to factors such as impartiality or unawareness of the judge. Further, parties can avoid selecting and paying a local legal counsel.[216]

74. The arbitrator in a WIPO arbitration procedure has the power to impose provisional measures.[217] When it concerns an infringement dispute, this can be helpful to halt the infringement. Arbitrators are given the power to grant the parties the right to enforce their rights earlier on in the procedure.[218]

75. The WIPO provides a database of neutral arbitrators, mediators and experts. They are all independent. This list is however not publicly available.[219] There are also neutrals with specialized knowledge of patent law. This ensures parties that their dispute will be review by a neutral expert with knowledge in the relevant legal and technical areas. This improves the quality of the final decision. The WIPO Arbitration and Mediation Center can assist parties in choosing arbitrators.

CHAPTER 2. UNITARY PATENT AND UNIFIED PATENT COURT

76. The trend protecting patents in an adequate manner is also perceivable in Europe with the creation of the European Patent with Unitary Effect and the Agreement on a Unified Patent Court. The agreement was signed on February 19, 2013.[220] Almost all European member states are participating in the Agreement on a Unified Patent Court.[221] It will be a supranational court that will be part of the judicial system of its 26 member states. The European patent with unitary effect will be a patent that has unitary effect in the participating member states.[222] The Unified Patent Court will have exclusive competence for solving disputes relating to these European

[215] J. MILLS, "Note, Alternative Dsipute Resolution in International Intellectual Property Disputes", *University Of Baltimore Intellectual Property Law Journal* 1996, 230.
[216] C.A. LATURNO, "Comment, International Arbitration of the Creative", *Transnational Lawyer* 1996, 377; C. METCALF, "Resolution of technology and patent disputes by arbitration and mediation: A view from the United States", *Arbitration* 2008, 385-394.
[217] Article 48 WIPO Arbitration Rules.
[218] C. METCALF, "Resolution of technology and patent disputes by arbitration and mediation: A view from the United States", *Arbitration* 2008, 385-394.
[219] WIPO, "WIPO Neutrals", *http://www.wipo.int/amc/en/neutrals/index.html*.
[220] J. NURTON, "Unified Patent Court", *Managing Intellectual Property* 2015, 1-3.
[221] Spain, Italy en Croatia are not participating.
[222] J. 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", *Revista Brasileira de Arbtragem* 2014, 17-35; M. SCHNEIDER, "Patents in Europe and their Court – Is their light at the end of the tunnel?" in PRINZ ZU WALDECK UND PYRMONT, W., ADELMAN, M.J., BRAUNEIS, R., DREXL, J. and NACK, R., *Patents and Technological Progress in a Globalized World: Liber Amicorum Joseph Strauss,* Berlin, Springer-Verlag, 2009; 633-646.

patents. It will not have competence regarding to national patents. The UPC Agreement will also include the creation of a Patent Arbitration and Mediation Centre. This is stipulated in article 35 (2) of the UPC Agreement: '*The Centre shall provide facilities for mediation and arbitration of patent disputes falling within the scope of this Agreement.'* The Centre shall also establish rules for mediation and arbitration.[223] This provision is noteworthy because it is the first time a legal document on EU-level adopts a rule, which confirms the availability of ADR mechanisms to solve intellectual property disputes.[224] Another provision stimulates the judge to encourage parties to submit their dispute to ADR, in order to reach a settlement. So, the judge has the task of trying to keep IP disputes that meet certain conditions out of court.[225] The objective of the establishment of the Centre is to promote the use of ADR for solving intellectual property disputes and to provide an alternative for lengthy, costly and complex patent litigation proceedings, specifically for SME's.[226]

77. The UPC Agreement did not enter into force yet. The entry into force is relying on the completion of the national procedures concerning the ratification by the members.[227]

CHAPTER 3. THE AMERICAN ARBITRATION ASSOCIATION

78. This is the largest arbitral organization in the world. It is, however, less popular than WIPO Arbitration and Mediation Center, because parties consider it as strongly connected to the US government.[228] This creates concerns about the neutrality of the organization. The American Arbitration Association (the AAA) has developed a set of rules concerning patent disputes. Parties can adopt these rules when a patent dispute would arise, if they refer to these rules in their contract.[229] These rules contain detailed provisions about the appointment of arbitrators, about evidence, about the arbitral awards and many more. The patent arbitration rules are

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[223] Article 35 (3) UPC Agreement.

[224] J. 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", *Revista Brasileira de Arbtragem* 2014, 17-35.

[225] Article 52, (2) UPC Agreement: '*In the interim procedure, after the written procedure and if appropriate, the judge acting as Rapporteur, subject to a mandate of the full panel, shall be responsible for convening an interim hearing. Thah judge shall in particular explore with the parties the possibility for a settlement, including trhough mediation, and/or arbitartion, by using the facilities of the Centre referred to in Article 35.'*

[226] J. 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", *Revista Brasileira de Arbtragem* 2014, 17-35.

[227] UNIFIED PATENT COURT, "A message from the Chairman, Alexander Ramsay – June 2017", *https://www.unified-patent-court.org/news/message-chairman-alexander-ramsay-june-2017*.

[228] C.P. HALL and S.J. NEWTON, "International Arbitration Bodies; A Survey", *New York Law Journal* 1992, 1.

[229] J.S. LARSON, "Alternative Dispute Resolution in Patent Law: Considering the Non- Practising Entity and Increased Availability of Declaratory Judgment", *Intellectual Property & Technology Law Journal* 2010, vol. 12, 15-20; AAA, "Patent Arbitration Rules", *https://www.adr.org/sites/default/files/Patent%20Arbitration%20Rules%20Sep%2015%2C%202005.pdf*.

archived nowadays, but nothing prevents parties from taking these rules into consideration when drafting an arbitration agreement.

PART 6. CONCLUSION

79. Parties involved in a dispute usually have the habit to file claims before a court. But in patent disputes, this is not an ideal solution. More and more, this realization is being reached. Therefore, the trend of using ADR for solving intellectual property disputes is already expanding globally. Since patent rights are time sensitive and cross-border rights, ordinary court proceedings do not meet the requirement of efficient dispute resolution. Concerns rise about the expenses and duration of patent litigation, as well as about the lack of confidentiality. It is important to emphasize the advantages of using ADR for solving patent disputes.

80. It is clear that ADR proceedings better fulfil the parties' needs and expectations because of the far-reaching possibilities that come with party autonomy. The priorities of parties in patent disputes are flexibility, confidentiality, neutrality, international enforceability and the need for a global decision taken by an expert in one single forum. ADR provides all of these aspects on the one hand and outweighs the downsides of court litigation on the other hand. Parties have in general more control over the procedure because of their party autonomy. It is clear that ADR proceedings are much more flexible than court litigation. In a dynamic business that involves patents and innovation, this flexibility is very desirable for the parties.

81. Research shows us that the amount of patent cases that are solved in court proceedings did not increase, while the patent disputes become more and more frequent. This shows that ADR becomes more common to solve patent disputes, which is a positive trend.[230] This can also be observed in the fact that there are more and more new initiatives being taken by decision-makers. The WIPO Arbitration and Mediation Center and its elaborated rules are very useful tools, especially designed for parties involved in intellectual property disputes. The Unitary Patent and the Unified Patent Court are also two initiatives taken on European level with the aim of making patent dispute resolution simpler. The framework will hopefully enter into force shortly. If parties assess the benefits of ADR in a balancing exercise, they will come to the realization that an ADR procedure is more flexible and outbalances the disadvantages of patent litigation.

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[230] J.S. LARSON, "Alternative Dispute Resolution in Patent Law: Considering the Non- Practising Entity and Increased Availability of Declaratory Judgment", *Intellectual Property & Technology Law Journal* 2010, vol. 12, 15-20; E.R. QUINN, "Using Alternative Dispute Resolution to Resolve Patent Litigation: A Survey of Patent Litigators", *Marquette Intellectual Property Law Review* 1999, 77.

ABSTRACT ENGLISH

82. In today's economy, the intangible assets become more and more important for companies. Intellectual property rights are crucial to the majority of businesses nowadays. This implies that the intellectual property disputes are always increasing. This master thesis focuses on patent rights. Patent rights are a means to internationally protect inventions, for a limited period of time. Patent rights are often a major part of a company's resources. This means that it is important that patent disputes can be dealt with in an efficient way. This master thesis illustrates that patent litigation is not very efficient, as it is time-consuming, very expensive, complex and not confidential. It follows that court decisions on patent issues are often not satisfying for the parties involved. Alternative Disputes Resolution can eliminate the downsides of patent litigation. The most important types of ADR (arbitration and mediation) and their advantages for patent disputes are described. After that, the existing specialized bodies and procedures are being set forth. We can conclude that the mechanisms of alternative dispute resolution are the most suitable mechanisms to meet the needs of modern issues that come with patent rights.

ABSTRACT DEUTSCH

83. Immaterielle Vermögenswerte sind für Firmen von großer Bedeutung, insbesondere in der heutigen Wirtschaft. Immaterialgüterrechte sind essentiell für das Unternehmen. Dies bedeutet dass es vermehrt zu immaterialgüterrechtlichen Streitigkeiten kommt. Diese Masterarbeit befasst sich schwerpunktmäßig mit Patentrechten. Ein Patentrecht ist ein Schutzrecht für eine Erfindung. Patente sind die Triebfeder für die Förderung von Innovation.[231] Das Patent schützt die Erfindung innerhalb einer bestimmten Frist und innerhalb eines bestimmten Territoriums. Viele Patente verfügen über grenzüberschreitenden Schutz. Patentrechte sind essentielle Betriebsmittel. Daher gilt es Patenklagen auf effiziente Weise zu lösen. Traditionelle Patentklageverfahren vor Gericht sind nicht effektiv. Patentklageverfahren bringen die Gefahr langwieriger Auseinandersetzungen, hohe Rechtsstreitskosten und komplexe rechtliche Fragen mit sich. Oft gibt es abweichende oder unbefriedigende Ergebnisse. Die alternative Streitbeilegung (ADR) ist eine alternative, kostengünstigere Methode zur Beilegung der Patentstreitigkeiten. Die vorliegende Masterarbeit erläutert die Vorteile der alternativen Streitbeilegung (Vermittlungsverfahren und Schiedsverfahren). Anschließend werden Organisationen welche auf ADR spezialisiert sind und die Verfahrensregeln für

[231] KOMMISSION DER EUROPÄISCHEN GEMEINSCHAFTEN, *Mitteilung der Kommission an das Europäische Parlament und den Rat: Vertiefung des Patentsystems in Europa*, Brüssel, 3 april 2007.

Patentstreitigkeiten erklärt. Die Schlussfolgerung ist dass Alternative Streitbeilegung besser geeignet ist um die Patentstreitigkeiten zu schlichten.

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