Alternative Dispute-Resolution Procedures: International View

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ABSTRACT

As multinational technology-development partnerships have become more common, so have disputes between the parties. Litigation, however, is not the only option for resolving such disputes. In fact, for partnerships between entities in developing and developed countries, litigation may be a complicated, time-consuming, expensive, and doubtful process. Arbitration and mediation may offer the promise of more effectively resolving disputes, and this chapter explains how these methods work, their advantages and disadvantages, and suggests which questions should be asked (especially for a developing country institution) to begin to establish a dispute prevention and resolution strategy. The chapter offers both strategic and practical insights about how to use these mechanisms to resolve disputes and preserve partnerships.

1. INTRODUCTION

Institutions in developing countries are increasingly entering the IP market, and multiparty, multinational IP relationships are becoming more common, and even essential to socioeconomic development. Through transactions involving these relationships scientific, technical, entrepreneurial, creative, and traditional knowledge is exchanged. Nonetheless, a protected right also tends to increase the likelihood of disputes related to that right.[1] While parties seek to reduce the frequency of disputes by rigorously managing their IP rights and obligations, disputes will inevitably arise. When they do, they can negatively affect both sides. Parties involved in IP transactions, therefore, should be aware of dispute-resolution methods and have a specific dispute-prevention and resolution strategy. Dispute-resolution procedures too often are unwittingly selected when a relationship begins, often years before a dispute actually arises. The dispute-resolution clauses will therefore have been inserted into contracts by people no longer involved in the issues. Moreover, clauses frequently are inserted with a limited awareness of their specific implications in a dispute-resolution scenario.

Litigation, the formal, public process for resolving disputes before national courts, is the most conventional method of dispute resolution. Particularly for transnational disputes, litigation may be risky, frequently protracted, and may at times require seemingly unlimited legal costs and management time. Moreover, a dispute taking place in multiple jurisdictions may result in different outcomes depending on which court decides the case.

This chapter explores alternative dispute resolution (ADR) procedures for resolving IP disputes, focusing on the interests of developing countries. ADR encompasses a range of options for resolving disputes outside of formal court procedures. These options differ in terms of formality, party control, and finality. Each option, moreover, offers benefits uniquely appropriate to different circumstances. This chapter concentrates on two

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representative ADR procedures, arbitration and mediation.

2. DISPUTE SCENARIOS

The following dispute scenarios discuss some specific circumstances that apply to health or agricultural IP disputes. The scenarios may have particular relevance for institutions in developing countries. Parties to the types of disputes in these scenarios will most likely first consider resorting to litigation in national courts. They will, however, often find court action stymied because of the challenges involved: cost, length of procedure, legal uncertainty, decision makers' lack of expertise, confidentiality/publicity, the difficulty of seeking action in foreign jurisdictions, and the negative impact on existing business relationships. Given these difficulties, parties should consider whether there are practical alternatives to expensive and protracted court proceedings.

2.1 *Research collaboration: ownership dispute*

Researchers in a medical research center in a developing country (Center X) build a research partnership with a leading university in a developed country (University Y). They collaborate on pursuing leads for pharmaceutically active compounds. The partners exchange data and discuss research directions. University Y has a well-established policy of patenting campus research, and an invention disclosure is filed with the technology transfer office (TTO). This becomes a patent application in the name of University Y, citing three of its researchers as inventors. There is no notice to, nor recognition of, the researchers in Center X. The researchers at Center X denounce the behavior of University Y and request that their names be included as inventors. When University Y refuses this request, the researchers contemplate legal action, but are stymied by prohibitive legal costs.

2.2. *Patenting of research outputs from genetic material*

A research institute obtains patent protection for a cell line developed from genetic material obtained from one of the institute's patients. The patient is from an indigenous group that lived an isolated existence until very recently. The indigenous group seeks redress, claiming ownership of interest in the patent and breach of fiduciary obligations by the research institute. The research institute asserts that it proceeded to commercialize the research result based on the patient's prior consent to treatment. The controversy, with claims of biopiracy, rapidly escalates into a global public debate.

2.3 *Claims based on traditional rights*

An ethnobotanist collects traditional medical herbs and associated knowledge about their therapeutic use from an indigenous community. The community is led to believe that this is the personal research of the ethnobotanist; the researcher acquires some of the knowledge after he falls ill on site and is treated by a traditional medicine man. The customary law of the indigenous community constrains both the dissemination and use of this knowledge within the community. The researcher subsequently publishes the knowledge, and details about the plants he collected, in a noncommercial academic publication. This publication is widely distributed and used by several private companies in their medical research. The disclosure of the information leads to patents, not directly on the traditional knowledge, but on further innovations, which are guided by and dependent upon the traditional knowledge. These patents acknowledge the prior publication, but give no direct reference to the traditional community itself. The traditional community attempts to seek relief but quickly finds that the legal remedies at their disposal are unclear and inappropriate for dealing with the cultural and spiritual harm incurred.

2.4 *Agricultural products and patents*

Farmers in a developing country have cultivated for centuries a certain type of grain that gains popularity in global markets. A biotechnological corporation obtains patents on the grain by introducing genetic modifications. Farmers in the developing country denounce their loss of international market share resulting from the actions of the biotechnological corporation.

The farmers are concerned, however, that any inherent right they may claim will be overshadowed in court by the economic, technical, and legal prowess of the corporation.

2.5 *David v. Goliath?*

An inventor in a developing country holds patents in a number of countries on components used in consumer goods. The inventor enters into a license agreement regarding these patents with a multinational manufacturer. A dispute arises regarding royalty payments under the license agreement. The inventor wants to enforce his rights, but does not dare to engage in protracted and expensive multijurisdictional litigation. Furthermore, the inventor hopes to maintain his profitable relationship with the manufacturer.

3. THE ARBITRATION OPTION[2]

Seeking resolution to the above disputes through litigation promises much pain and little certainty for parties in developing countries. An alternative approach to litigation, however, could offer better results. Arbitration, for example, involves submitting a dispute, by agreement of the parties, to one or more arbitrators who make a binding decision.

3.1 *Arbitration procedure*

To send a dispute to arbitration, the parties must sign an agreement to submit their existing or future disputes to arbitration. Such an agreement is the foundation of an arbitration arrangement.[3] It demonstrates the parties' genuine willingness to settle the dispute through arbitration and limits the parties' right to take the dispute to court.

Arbitration may be conducted in different ways, and it is up to the parties and the arbitrator(s) to decide how the procedure should unfold, subject to any applicable rules and public policy requirements. Parties may agree on the number of arbitrators, type of arbitration (ad hoc or institutional), place of arbitration, language of arbitral proceedings, and the applicable substantive law.

Figure 1 describes the principal steps in a typical arbitration, referencing the Arbitration Rules of the World Intellectual Property Organization (WIPO)[4] (see also section 6.2 below).[5]

3.2 *Role of the arbitral tribunal*

An arbitral tribunal operates differently from a judge in national court. Judges have powers defined by national laws. The powers of an arbitral tribunal are limited to those the parties have conferred to it. An arbitral tribunal may only determine the disputes stipulated by the parties involved, and may only do so using powers conferred by the parties through the arbitral clause and adopted rules.

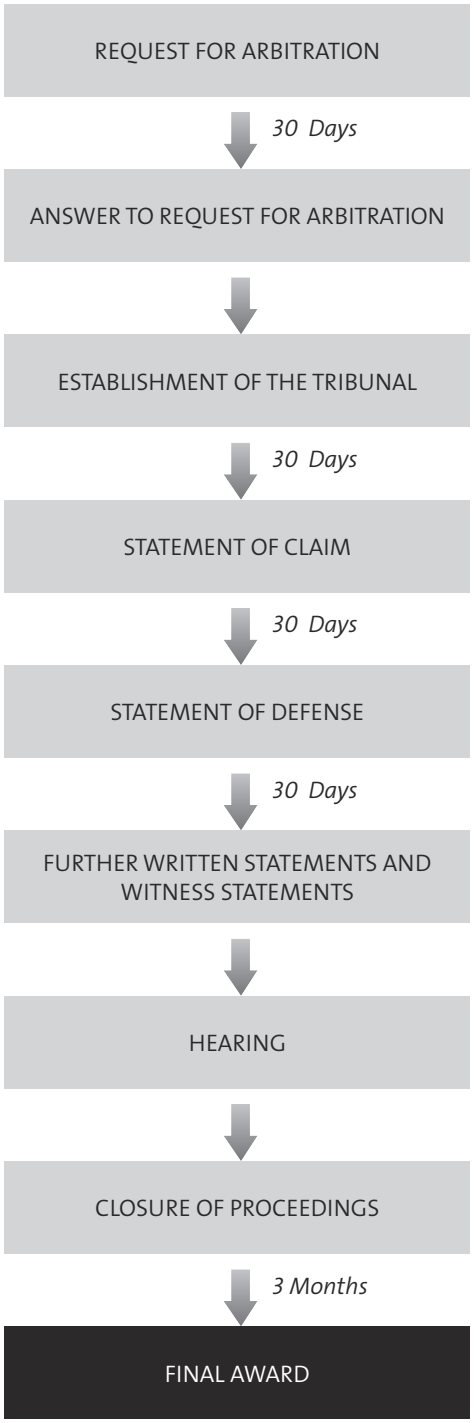
Since the arbitral tribunal is the dominant authority in settling the dispute, the appointment of the tribunal is probably the single most determinative step in an arbitration. Parties should, therefore, be able to exert as much influence as possible on the establishment of the tribunal. Parties can normally agree on the appointment procedure, the number of arbitrators to be appointed, any required qualifications of the arbitrators (including nationality), and persons to be appointed as arbitrators. In reviewing these factors, parties will have to weigh considerations of cost and efficiency against the weight and complexity of the dispute. The legal, cultural, and economic backgrounds of the parties will be reflected in the tribunal appointment process.

3.3 *Legal framework of arbitration*

While arbitration is a private mechanism, it is not altogether free from regulation by national laws. In international arbitration, different systems of law, most notably the law governing the *substance of a dispute* and the law governing the *arbitration procedure*, will typically interact. In general, parties are free to choose, by agreement, which laws will apply.

Parties may agree on which national law should govern the substance of the dispute. Parties may also agree that the dispute be determined on the basis of what is *just and good* (*ex aequo et bono*). In certain fields of consequence to developing countries, such as agriculture, biotechnology and traditional knowledge, the legal regime is actively evolving, and the basis and extent of rights and obligations can be controversial. In these cases the possibility of dispensing with law, and deciding the dispute in equity, may be an attractive option.

Figure 1: Principal Steps in a Typical WIPO Arbitration



A WIPO arbitration begins with a claimant submitting a request for arbitration to the WIPO Arbitration and Mediation Center. The request for arbitration should contain summary details concerning the dispute.

Within 30 days of receipt of the request for arbitration, the respondent must file an answer to the request.

The parties may choose the number of arbitrators that will sit on the tribunal. In the absence of an agreement by the parties, the WIPO Center will appoint a sole arbitrator, except where the WIPO Center determines that three arbitrators are appropriate.

The statement of claim must be filed within 30 days of the constitution of the tribunal.

The statement of defense must be filed within 30 days of the receipt of the statement of claim.

The tribunal may schedule further submissions.

By party request, or by tribunal discretion, a hearing may be held for the presentation of evidence by witnesses and experts, and for oral argument.

When the tribunal is satisfied that the parties have had adequate opportunity to present submissions and evidence, it will declare the proceedings closed.

The final award by the tribunal should be delivered within three months of the closure of the proceedings.

The law applicable to the arbitration procedure (*lex arbitri* or arbitral law) is the law that governs the procedural framework, such as whether a dispute is arbitrable, the availability of interim measures of protection, the conduct of the arbitration, and the enforcement of the award. The arbitral law need not be the same as the law applicable to the substance of the dispute. A tribunal may, for example, be subject to the arbitral law of Switzerland, but may be required, by party agreement, to apply Indian law to the substance of the dispute.

4. THE MEDIATION OPTION

Arbitration is not the only option to litigation. The parties can also opt for mediation, a non-binding, confidential procedure in which a neutral intermediary assists the parties in reaching a mutually satisfactory settlement of their dispute.[6]

4.1 *Mediation procedure*

The starting point of a mediation, like an arbitration, is the agreement of the parties to submit their existing or future disputes to mediation. Once a dispute arises and there is an agreement (either *ex ante* or *ex post*) to mediate, a party will initiate the process by informing the other party of the commencement of mediation. The mediation procedure is then largely determined by the parties, together with the mediator. Figure 2 describes the principal steps in a typical mediation.

4.2 *Role of the mediator*

Unlike a judge or an arbitrator, whose mandate is to issue a binding decision or award, a mediator does not have any power to impose a settlement on the parties. The role of a mediator is to serve as a catalyst for party negotiations. A mediator works to improve communication between the parties, helps parties clarify their understanding of their mutual interests and concerns, sheds light on the strengths and weaknesses of each party's legal position, explores consequences of not settling, and helps generate options for a mutually agreeable resolution of their dispute.

5. CHARACTERISTICS OF ARBITRATION AND MEDIATION

5.1 *Resolving multijurisdictional disputes*

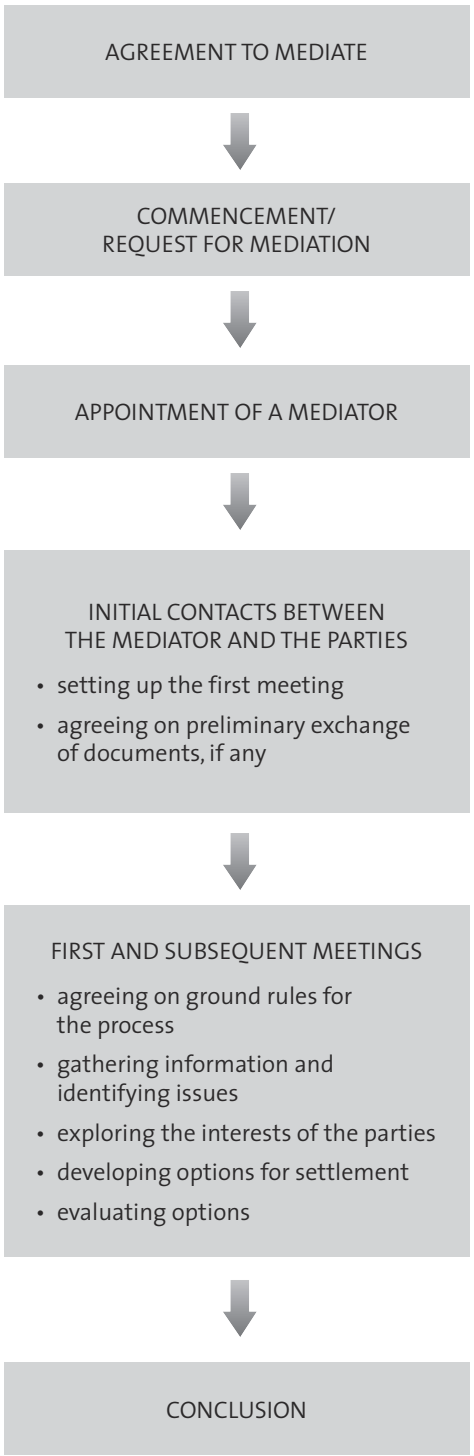
With the creation and exploitation of international IP rights, disputes are increasingly multijurisdictional. Resolving transnational disputes through litigation requires the expense and complexity of pursuing parallel proceedings in a number of countries and confronting multiple rounds of appeals in each jurisdiction. Furthermore, despite broad harmonization of substantive IP laws, national prejudices and differences in approaches still remain. Therefore, in a multijurisdictional dispute, a win in one jurisdiction will not necessarily translate into a win in other jurisdictions. The risk of inconsistent results is significant.

Through arbitration or mediation, the parties can agree to resolve, in a single procedure, disputes involving intellectual property in a number of countries. For a deep-pocketed party that has an interest in broadly manifesting its strong IP enforcement policy, litigation may be a more appealing option. The threat of drawn-out court procedures in multiple jurisdictions may be an effective strategy to induce the other party with limited resources to accept a quick settlement. On the other hand, for a party seeking a timely, cost-efficient resolution of the immediate dispute, resolution through a single arbitration or mediation procedure may be more advantageous.

5.2 *A neutral dispute-resolution forum*

Litigation between parties of different nationalities means that the home party enjoys an advantage, since the other party bears the burden of a foreign and unfamiliar jurisdiction. In arbitration or mediation, parties may resolve a transnational dispute on neutral territory, so neither party is subjected to foreign court procedures, laws, customs, languages, and prejudices. In arbitration or mediation, parties may appoint an arbitrator or mediator of a neutral nationality and choose a neutral language and venue of procedure. In arbitration, parties may agree on neutral substantive and procedural law.

Figure 2: Principal Steps in a Typical Mediation



Recourse to arbitration or mediation in a convenient, neutral forum may be especially attractive when public entities are party to a dispute.[7] If a dispute is between a state entity and a private party, the private party will be disinclined to go to the court of the state entity, and the state party will not want to submit to the jurisdiction of the courts of another state. In such a case, a neutral procedure such as arbitration or mediation may be the only option acceptable to both parties. This feature may be particularly relevant in IP transactions involving entities in developing countries, where public institutions often largely own IP rights.

5.3 *Autonomy*

Arbitration and mediation are based on consent of the parties. It follows that arbitration or mediation proceedings require party autonomy and that parties largely retain control over the dispute-resolution process.

In principle, parties are free to agree on the procedure to be followed in the arbitral proceedings. Depending on their needs, parties can select streamlined or more extensive procedures and choose the applicable procedural and substantive law, place and language of the arbitral proceedings, and the arbitrator(s). Thus, the parties can adapt an arbitration procedure to fit the dispute.

Mediation offers parties control over not only the procedure to follow, but also the outcome of the process. Parties may fashion the mediation process to their specific needs. Commencement of the mediation is based on the parties' agreement to resolve the dispute through mediation, and continuation of the process depends on the parties' continued acceptance of the terms of the mediation. Unlike arbitration, a party that has submitted the dispute to mediation may withdraw at any time from the mediation. The outcome of a mediation also depends on the will of the parties. While the mediator will assist in the procedure, it is ultimately up to the parties to determine whether they will settle the dispute in accordance with their interests or seek resolution in a different forum, such as litigation or arbitration.

5.4 *Choosing relevant expertise*

Judges often have varying degrees of experience and qualification, and national courts are frequently ill equipped to deal with technically complex issues presented in IP disputes.

In arbitration, parties normally participate in selecting arbitrators and are, in principle, free to appoint arbitrators of their choice. Arbitrators may be chosen for their skill and expertise in a specific legal, technical, or business field. Arbitrators with relevant expertise will ensure proper understanding of facts and law and, therefore, contribute to a timely, cost efficient resolution of the dispute. When the dispute involves parties of different cultural and economic backgrounds, an arbitrator's knowledge of cultural or social sensitivities may also be helpful.

As in arbitration, parties select their mediators. A mediator's role, however, is fundamentally different from that of a judge or an arbitrator. The mediator's role is not to render a decision but to facilitate the process through which parties endeavor to settle their dispute. The mediator may inject a degree of detachment and objectivity into the dispute. The role of the mediator as an intermediary may be especially crucial when the share of information and bargaining power between the parties is unequal. An effective mediator will address these concerns.[8] A mediator also will help parties rebuild trust to increase the chances for settlement.[9]

The success of an arbitration or a mediation depends largely on the quality of the arbitrator(s) and mediator(s), and the challenge is often to find candidates that have both arbitration or mediation skills and experience with the specialized knowledge of the disputed subject matter.

5.5 *Confidentiality*

Parties to arbitration or mediation can keep the proceedings and any results confidential. In doing so, parties can focus on the merits of their dispute and avoid distraction from external factors, such as unwanted negative press coverage. Confidentiality may be especially important where the terms of the parties' relationship are undisclosed to the public, as in most licensing agreements, and where commercial reputation

and trade secrets are at stake. Particularly in mediation, the private nature of the procedure allows parties to engage in frank, exploratory settlement negotiations and not be intimidated by formal legal procedures.[10]

On the other hand, if one of the parties wishes to establish a public precedent to dissuade other parties from engaging in similar conduct, the confidential nature of arbitration and mediation may make these options less desirable. In certain cases, it may be more effective to take the case to the public and seek the support of public organizations or nongovernmental organizations. A degree of publicity may at times assist in negotiating a settlement.[11] For disputes involving issues of broad public concern, which is often the case in health and agriculture, it may be inappropriate to keep the existence of the dispute, and its outcome, confidential. When appropriate, parties may agree to employ mediation or arbitration to resolve the dispute and consent explicitly to make the process and result public.

5.6 *Preserving relationships*

As multiparty, complex IP relationships become more common, partnerships between actors in government, academia, and industry in developing and developed countries occur regularly and, frequently, expand beyond a single short-term transaction. The multiparty nature of such relationships exacerbates the complexity of dispute resolution. When disputes arise out of these relationships, a party's desire to resolve the immediate dispute should not eclipse safeguarding the relationship.

The adversarial nature of litigation often fosters hostility and resentment between the parties, rendering the dispute intractable and potentially destroying a working relationship. On the other hand, the consensual nature of mediation, and to a certain extent arbitration, accommodates a long-term approach. Parties can resolve the dispute at hand and still maintain a working relationship. In this way, antagonism between parties can be mitigated and mutual understanding fostered. This feature of mediation and arbitration may be particularly relevant for entities in developing countries that rely on alliances with foreign enterprises. Developing countries are still dependent on foreign sources for technology, and so there is a marked need to maintain these relationships. Also, a large proportion of innovation occurs in university or government laboratories, after which rights are exploited in collaboration with foreign companies. Foreign IP rights holders will demand a particular level of protection; entities in developing countries, especially those in the public sector, may need to accommodate these demands with national development goals or other vested interests.[12]

5.7 *Arbitration's finality*

The protracted nature of litigation, which pushes parties into multiple rounds of appeals, is a common problem when litigating transnational disputes. In addition, it is difficult to enforce any court judgment outside the court's jurisdiction. The end result of arbitration is, on the contrary, a final, binding award. Normally appeals are not allowed, and awards are directly enforceable by national courts under the Convention on the Recognition and Enforcement of Foreign Arbitration Awards (New York Convention).[13] This convention, currently ratified by 139 countries, greatly facilitates the enforcement of awards across borders by providing for recognition of awards on a par with domestic court judgments, without review on the merits. The convention only permits awards to be set aside in very limited circumstances.

5.8 *Mediation's nonbinding, interest-based procedure*

In litigation or arbitration, the outcome of a case is determined by the facts of the dispute and the applicable law. Mediation, on the other hand, involves more than the exercise of rights and obligations set within legal parameters. It is often a coordinated exercise of legal rights, with consideration given to other economic and social variables.[14] With mediation, the dispute resolution options are broadened, allowing the parties, with the help of the mediator, to craft innovative, common-sense solutions that amicably settle the dispute. Parties may find a solution to their dispute by considering their business or social interests. They may also reach package deals that

include nonmonetary benefits, such as technology transfer agreements, training programs, or infrastructure development.

In certain circumstances, mediation may be the only option available for resolving the dispute. Parties in a dispute may each have a claim that is valid and enforceable and, yet, impossible to fulfill.[15] The dispute may involve a subject matter where there is no established legal framework, or where there are certain interests that may not be adequately addressed by traditional legal means.[16] In such cases, the only strategy to break the impasse may be a cooperative solution, such as mediation.

The nonbinding nature of mediation means that a decision cannot be imposed on the parties and that all involved must voluntarily agree to accept the settlement. Any settlement may be recorded in a contract; if either party does not perform the contract, actions for breach of contract may be brought. Of course, if the outcome of a mediation represents the interests of the parties, the outcome is more likely to endure as a long-term solution to the conflict.

5.9 *Mediation—minimal risk*

Even when the parties have agreed to submit a dispute to mediation, if a party feels that it is not making any progress, that the procedure is becoming too costly, or that the other party is not acting in good faith, the party may withdraw from the mediation process at any time and seek to resolve the dispute through litigation or arbitration. Accordingly, mediation involves low risk. Should mediation not produce a settlement, the procedure might still assist the parties by defining the facts and issues of the dispute, thus preparing parties for subsequent arbitration or court proceedings.

5.10 *Comparing options at a glance*

Table 1 provides an overview of the different strengths and weaknesses of litigation, arbitration, and mediation.

6. PRACTICAL CONSIDERATIONS

Since arbitration and mediation are private proceedings, the support of lawyers and experts skilled in the process is essential. Institutions in developing countries will want to exercise care in retaining appropriate counsel when exploring arbitration and mediation options.

6.1 *Controlling costs*

The validity of a claim may be irrelevant if the concerned parties are unable to afford the appropriate dispute-resolution procedure. Institutions will need to confront any financial constraints that might complicate the choice of a dispute-resolution strategy.

Arbitration and mediation are essentially private processes, and a number of advantages, including party autonomy, confidentiality, neutrality, and expertise, stem from the private nature of the proceedings. This private nature, however, also means that parties are obliged to bear the costs. The parties involved in a dispute do not pay judges in national courts, but they do pay arbitrators and mediators.

In an arbitration, parties must cover legal fees, plus the additional fees and expenses of arbitrators. If an institution administers the arbitration, administrative fees must also be paid. Thus, arbitration may not necessarily be less costly than litigation. However, parties can consciously try to limit costs by expediting the procedure and by selecting cost-efficient venues for meetings and hearings. Parties can also endeavor to appoint an arbitrator that is sensitive to the financial constraints of parties, and choose an arbitral institution that charges reasonable administrative fees. Furthermore, while arbitration may be costly, the finality and enforceability of arbitral awards may make arbitration less costly than litigation, which often involves multiple appeals and requires a judgment to be enforced in a foreign jurisdiction.

In mediation, costs are more easily contained. Mediation costs include the legal fees of each party, the mediator's fees, and administrative fees (if an administering institution is present). Parties can monitor the costs and progress of the mediation to determine whether to continue it. While the cost of mediation is generally shared equally between the parties, parties may agree to change this allocation of costs depending on the economic power of each party.

Table 1: Litigation, Arbitration, and Mediation Compared

Common features of many IP disputes	Litigation	Arbitration	Mediation
International	solution limited to court's jurisdiction multiple proceedings under different laws, with risk of conflicting results possibility of actual or perceived advantage to party that litigates in its own country	global solution a single proceeding under the law determined by parties arbitral procedure and nationality of arbitrator can be neutral to law, language, and institutional culture of parties	global solution single proceeding mediation procedure and nationality of mediator can be neutral to law, language, and institutional culture of parties
Technical	decision maker might not have relevant expertise	parties can select arbitrator(s) with relevant expertise	parties can select mediator(s) with relevant expertise
Urgency	procedures often drawn out injunctive relief available in certain jurisdictions	arbitrator(s) and parties can shorten the procedure arbitration may provide provisional measures and does not preclude seeking court-ordered injunction	mediator(s) and parties can shorten the procedure while provisional measures are not available in mediation, parties not precluded from seeking court-ordered injunction
Legal framework	court generally applies only its national laws	applicable law may be determined by parties; absent party agreement, arbitrator(s) will select the law(s) that it determines appropriate to the dispute multiple national laws may concurrently apply tribunal may decide in equity (rather than specific law)	procedure less governed by law and more by the social and economic interests of parties

(Continued on Next Page)

Table 1 (continued)

Common features of many IP disputes	Litigation	Arbitration	Mediation
Finality	appeal possible	limited appeal option	any settlement agreement is binding between parties as a matter of contract law
Confidential/ trade secrets and risk to reputation	public proceedings	proceedings, disclosures, and awards confidential	proceedings, disclosures, and outcomes confidential
Continuing relationship	parties may or may not be in a continuing relationship dispute may be resolved without adverse party's active participation adversarial nature of litigation may further antagonize parties	parties often in a continuing relationship	parties often in a continuing relationship mediation shields the relationship by fostering an amicable resolution of dispute

Whether in arbitration or mediation, parties should bear in mind that the procedure is largely under their control and costs will vary depending on the choices made throughout the procedure.

6.2 *Ad hoc or institutional procedure?*

Arbitration and mediation may take place ad hoc or under the aegis of an institution. In an ad hoc procedure, the parties, with the arbitrator or mediator, administer the proceedings themselves. This requires sufficient cooperation among the parties and the arbitrator or mediator, as well as considerable experience in arbitration/mediation procedures. In an institutional arbitration or mediation, the institution provides a procedural and administrative framework for initiating and conducting the procedure, and oversees the integrity and independence of the process. Especially where parties are inexperienced in dispute resolution, they should consider opting for an institutional procedure. Administrative fees vary greatly by institution and will be a factor in selecting one. However, the cost of using a moderately priced institution will guarantee considerable benefits, including administrative and technical assistance, availability of a tested set of procedural rules, and access to qualified arbitrators and mediators.

Governments and public institutions can help make arbitration or mediation procedures accessible and available by identifying and supporting neutral institutions that can provide cost-efficient, timely dispute-resolution services, and by catering to the needs of local enterprises, government agencies, and foreign entities. The Arbitration and Mediation Center of the World Intellectual Property Organization[17] (the WIPO Center) is worth keeping in mind. Established in 1994 to promote the timely, cost-effective resolution of IP disputes through alternative dispute resolution, the WIPO Center has created, with the active involvement of many ADR and IP practitioners, the WIPO mediation, arbitration, and expedited arbitration rules and clauses. Together with its extensive network of IP and ADR experts, the WIPO Center ensures that WIPO procedures are at the cutting edge of IP dispute-resolution techniques and that these procedures meet the needs of parties of different economic and social backgrounds.

6.3 *Drafting clauses*

Arbitration and mediation are premised on party agreement; it is uncommon that these procedures are adopted after a dispute arises, when animosity between parties generally overshadows their interest in resolving the dispute. Therefore, arbitration and mediation clauses often refer to potential disputes under a particular contract, including those conflicts that might emerge regarding patents, know-how and software licenses, franchises, trademark coexistence agreements, distribution contracts, joint ventures, R&D contracts, technology-sensitive employment contracts, and mergers and acquisitions with important IP aspects. These clauses generally determine a number of the procedure's essential elements, such as its specific type, language, number of arbitrators or mediators, and the applicable law. Arbitration and mediation institutions generally make available model clauses. Adopting these clauses will help to avoid any uncertainty that might unnecessarily burden the arbitration or mediation proceeding. Parties may introduce certain cost-saving models in appropriate circumstances.[18]

Dispute-resolution clauses can provide for a multitiered process, namely, by mandating mediation followed, in the absence of settlement, by arbitration. Even mediation may be preceded by direct party negotiation, which may be particularly relevant in disputes in public settings. When opting for a multitiered process, it is useful to stipulate time periods for each procedure in order to prevent protracted discussions and delays between the procedures.[19]

Public sentiment may not always support the development of and participation in ADR procedures. Public ADR pledges may be useful to handle this. Furthermore, legislative authorities may consider adopting procedural laws referring to or integrating ADR methods.

7. CONCLUSION

Entities in developing countries face a number of challenges, when a dispute arises, with entities in developed countries. The entities in developed countries will often have greater financial power and technical expertise with which to pursue a favorable dispute resolution. Since technology transfer is tied closely with economic development, disputes may trigger public reaction. Moreover, language and cultural barriers can be obstacles to effective communication, and questions may arise about how rights asserted by developing countries may be accommodated by the existing IP regime.

Having a dispute-resolution policy can help to address these concerns. It can also provide strategic benefits and minimize the risk of disputes escalating. The dispute-resolution strategies should therefore be crafted with regard to the specific circumstances of the dispute and the background of the parties. Ideally, a procedure that assists in mitigating economic inequalities between parties should be identified and implemented. Technical, commercial, legal, and social interests may need to be considered. In certain cases the result will be compromise; in other cases, robust enforcement will be sought.

Litigation, arbitration, and mediation operate within very different paradigms. To adopt the most appropriate dispute-resolution strategy for

a potential or existing dispute, parties should understand the differences between the procedures and determine which is most appropriate to the circumstances of the conflict. Remember, litigation is not the only option. Arbitration or mediation may offer a sustainable solution that will satisfy all the parties involved. ■

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1 O'Connor SN. 2005. Intellectual Property Rights and Stem Cell Research: Who Owns the Medical Breakthroughs? *New England Law Review* 39: 665.

2 Information in this section is largely extracted from the *Guide to WIPO Arbitration*. WIPO Publication no. 919. www.wipo.int/freepublications/en/arbitration/919/wipo_pub_919.pdf.

3 Redfern A and M Hunter. 2003. *Law and Practice of International Commercial Arbitration*. Sweet & Maxwell: London. pp. 135.

4 See, also in this *Handbook*, chapter 3.6 by A Taubman.

5 Parties who place a premium on time and cost effectiveness can opt for the procedural framework established by the WIPO Expedited Arbitration Rules, which condenses the principal stages of an arbitration under the WIPO Arbitration Rules.

6 Information in this section is largely extracted from the *Guide to WIPO Mediation*. WIPO Publication no. 449(E). www.wipo.int/freepublications/en/arbitration/449/wipo_pub_449.pdf.

7 See *supra* note 3, p. 42.

8 Williams BA. 2000. Consensual Approaches To Resolving Public Policy Disputes. *Journal of Dispute Resolution* 8 (2): 144.

9 Ibid..

10 Crowne CH. 2001. The Alternative Dispute Resolution Act of 1998: Implementing a New Paradigm of Justice. *New York University Law Review* 76 (6): 1768.

11 Boettiger S and A Bennett. 2006. The Bayh-Dole Act: Implications for Developing Countries. *IDEA: The Intellectual Property Law Review* 46(2), cites the example of the inventor of Golden Rice™ recounting that "*publicity sometimes can be helpful: Only a few days after the cover story about golden rice had appeared in* Time, *I had a phone call from Monsanto offering free licenses for the company's IP rights involved.*"

12 Reichman JH and D Lange. 1998. Bargaining around the TRIPS Agreement: the Case for Ongoing Public-Private Initiatives to Facilitate Worldwide Intellectual Property Transactions. *Duke Journal of Comparative and International Law* 9(11): 50-54.

13 See the full text of the New York Convention, with the list of its contracting states, at www.wipo.int/amc/en/arbitration/ny-convention/.

14 See *supra* note 12.

15 See *supra* note 1, p. 669. Herein is cited the example of patentable inventions being assigned to two or three different funding sources, each assignment being legally binding, yet impossible to fulfill.

16 See *supra* note 8, p. 139.

17 See *supra* note 4.

18 See the WIPO Center's recommended clauses at www.wipo.int/amc/en/mediation/contract-clauses/.

19 See, for example, the WIPO-recommended clause for submission to mediation followed, in the absence of a settlement, by arbitration at www.wipo.int/amc/en/mediation/contract-clauses/clauses.html.