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Alternate Dispute Resolution

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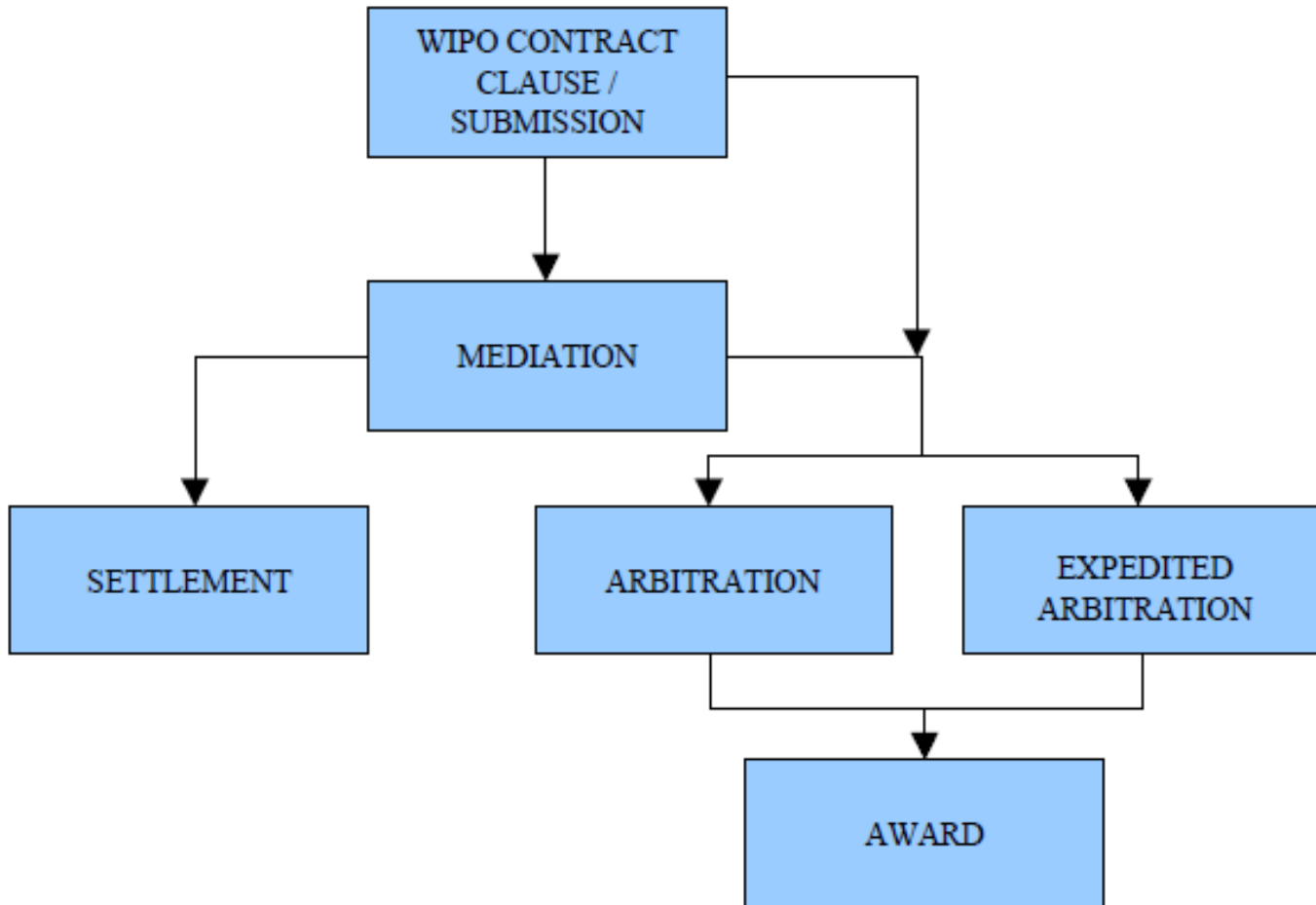
United Nations Economic and Social Commission for Asia and the Pacific (UN ESCAP) in New Delhi, India



INTRODUCTION

- With the increase of commercialization of intellectual property, the number of disputes are also increasing.
- But IP battles are protracted, expensive and complex considering the intangibility of the property in dispute and the nuances of the technology.
- One way of addressing these disputes is to use Alternate Dispute Resolution (ADR).
- According to WIPO, ADR is a “neutral mechanism” that allows “parties to solve their disputes outside of court in a private forum, with the assistance of a qualified neutral intermediary of their choice”.

ADR Procedure



Advantages of ADR

SINGLE PROCEDURE

PARTY AUTONOMY

NEUTRALITY

EXPERTISE

CONFIDENTIALITY

FINALITY OF ENFORCIBILITY OF ARBITRAL AWARDS

WIPO Arbitration And Mediation Center

- Offices in Geneva and Singapore
- International dispute resolution service provider
- Specialized in IP and commercial disputes.
- Not for profit
- Commitment to time and cost effective conduct of cases
- Procedural guidance, training programs

Figure 1. Cases Administered By The WIPO Center

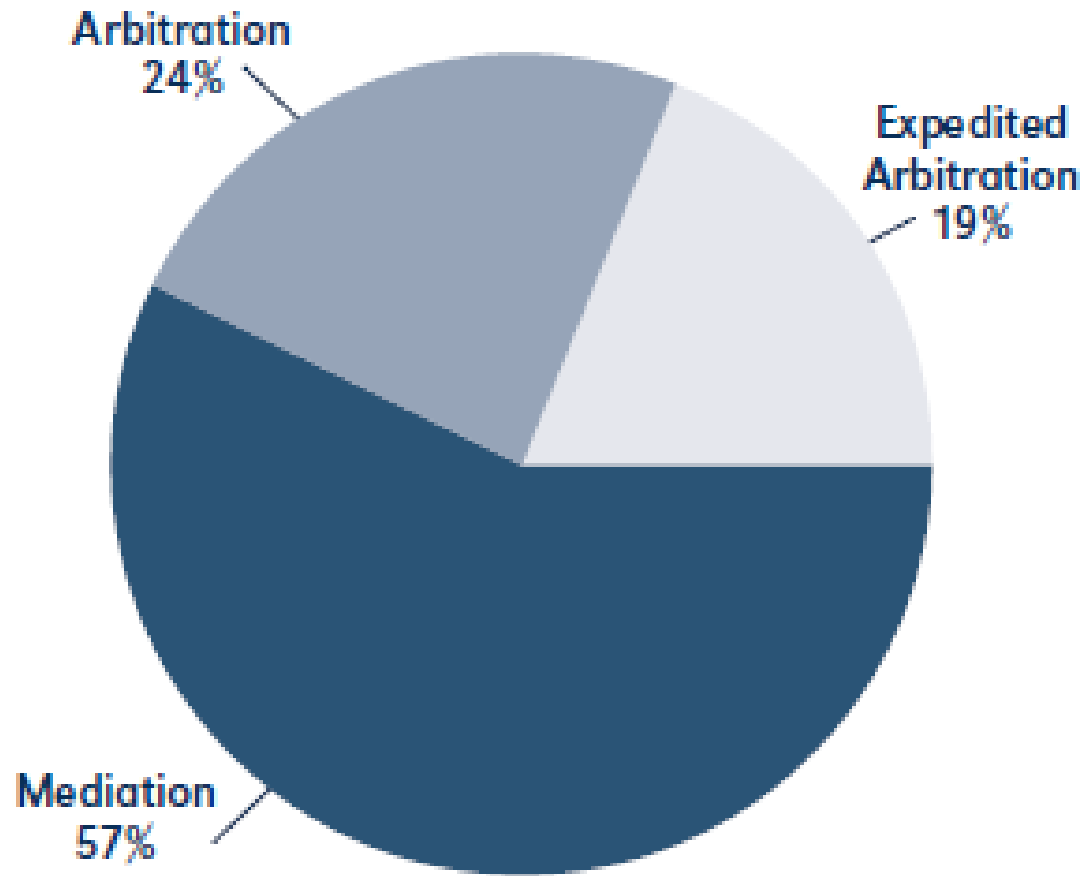
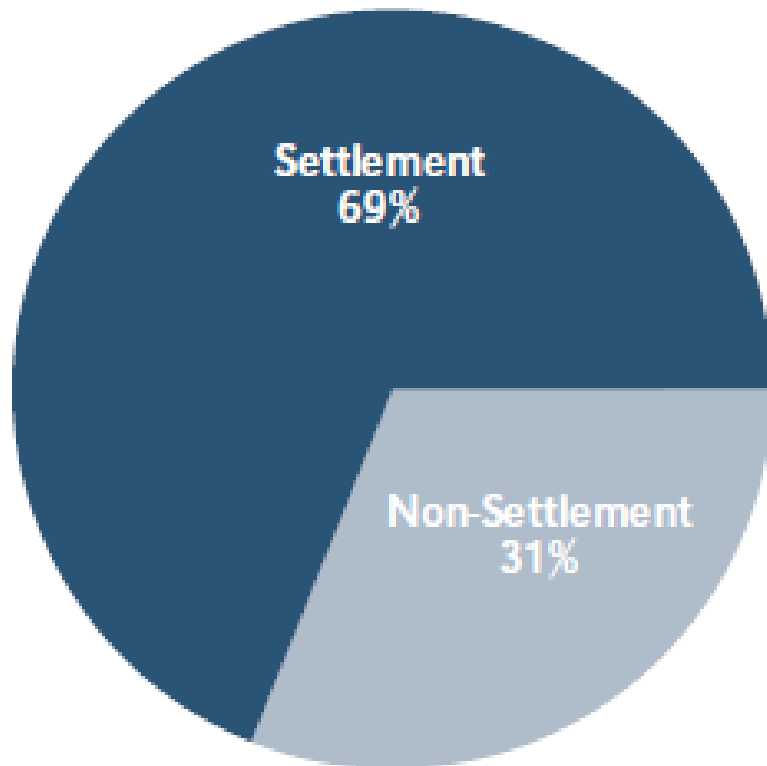
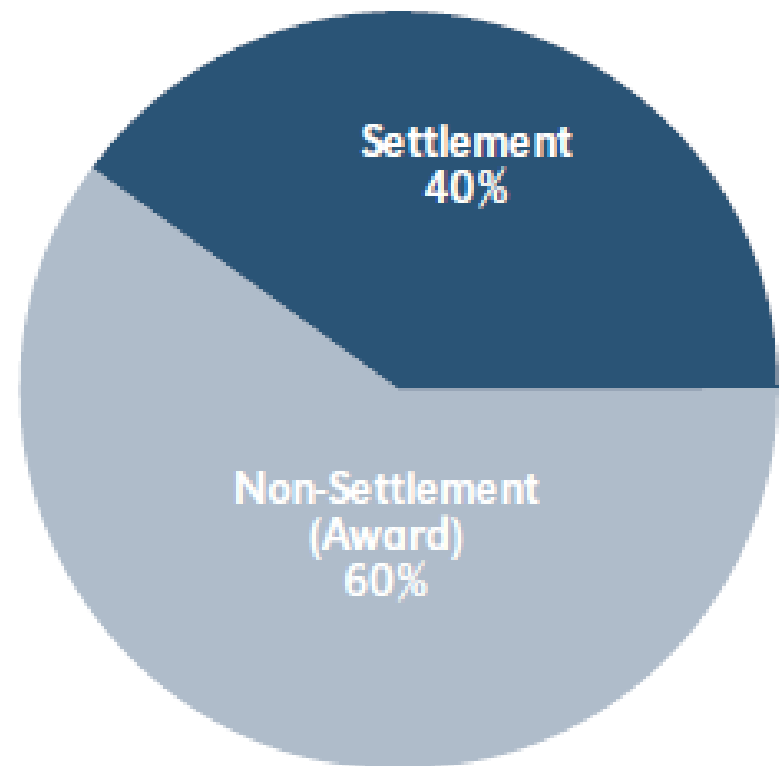


Figure 2: WIPO Mediation Settlements

Mediation



Arbitration



The Samsung & Nokia Arbitration Case

1.

- Samsung & Nokia agreed to settle a patent licensing dispute regarding Nokia's patents through the process of arbitration in the International Court of Arbitration of the International Chamber of Commerce

2.

- The arbitration was designed to fix their problems without getting into a costly legal battle and get an expedited decision.

3.

- Both the parties agreed to renew their license.
- They finally entered a binding arbitration agreement for settlement of additional compensations for Nokia's phone patents for a five-year period.

WIPO PROCEDURES

The WIPO Arbitration and Mediation Center offers rules and neutrals for the following procedures:

- **Mediation**: a non-binding procedure in which a neutral intermediary, the mediator, assists the parties in reaching a settlement of the dispute.
- **Arbitration**: a neutral procedure in which the dispute is submitted to one or more arbitrators who make a binding decision on the dispute.
- **Expedited arbitration**: an arbitration procedure that is carried out in a short time and at reduced cost.
- **Mediation followed, in the absence of a settlement, by arbitration**: a procedure that combines mediation and, where the dispute is not settled through the mediation, arbitration.

MEDIATION

- Mediation is an attractive option for parties that place a premium on the preservation or enhancement of their relationship, seek to maintain control over the dispute settlement process, value confidentiality, or want to reach a speedy settlement without damage to their reputations.
- Parties to contracts or relationships involving the exploitation of intellectual property often share these goals when a dispute arises.

CHARACTERISTICS OF MEDIATION

1.

- Mediation is a non-binding procedure controlled by the parties

2.

- Mediation is a confidential procedure

3.

- Mediation is an interest-based procedure

APPROACHES TO MEDIATION

Facilitative Mediations

- the mediator endeavours to facilitate communication between the parties and help each side to understand the other's perspectives, positions and interests with a view to settling the dispute

Evaluative Mediations

- the mediator takes a more active role by providing a non-binding evaluation of the dispute, which the parties may then accept as the settlement of the dispute or reject

Role of WIPO Arbitration And Mediation Center in Mediations

The Center administers mediations under the WIPO Mediation Rules. As administering authority, the Center:

- Assists the parties in selecting and appointing the mediator from its list of qualified neutrals.
- Sets, in consultation with the parties and the mediator, the mediator's fees and administers the financial aspects of the mediation.
- Provides a meeting room and party retiring rooms free of charge where the mediation takes place at WIPO in Geneva. Where the mediation takes place in other locations, it assists the parties in organizing appropriate meeting rooms.
- Assists the parties in organizing any other support services that may be needed, such as translation, interpretation or secretarial services.

WIPO MEDIATION RULES

- Parties can agree to submit future or existing disputes to WIPO mediation. By doing so, the parties adopt the WIPO Mediation Rules as part of their agreement to mediate. The WIPO Mediation Rules are designed to maximize the control of the parties over the mediation process. Setting a minimal framework for the process, the Rules:
- Indicate how a mediation can be commenced and the process determined (Articles 3-5 and 12)
- Define how the mediator is appointed (Article 6)
- Establish the confidentiality of both the process and any disclosures made during it
- (Articles 14-17)
- Determine how the mediator's fees are established (Article 22)
- Allocate the costs of the mediation (Article 24).
- Consistently with their control over the mediation, the parties are free to adapt the WIPO Rules to their specific requirements.

HOW MUCH DOES WIPO MEDIATION COST?

- The registration fees of the mediation center which amounts 0.10% of the dispute value or a maximum of US\$ 10,000.
- The mediators' fees are negotiated and fixed at the time of his appointment, which takes into account the complexity and economic importance of the dispute.

The hourly and daily rates of a mediator's fees are as follows :

	Minimum (USD)	Maximum (USD)
Per Hour	300	600
Per Day	1500	3500

R&D AND TECHNOLOGY TRANSFER DISPUTES

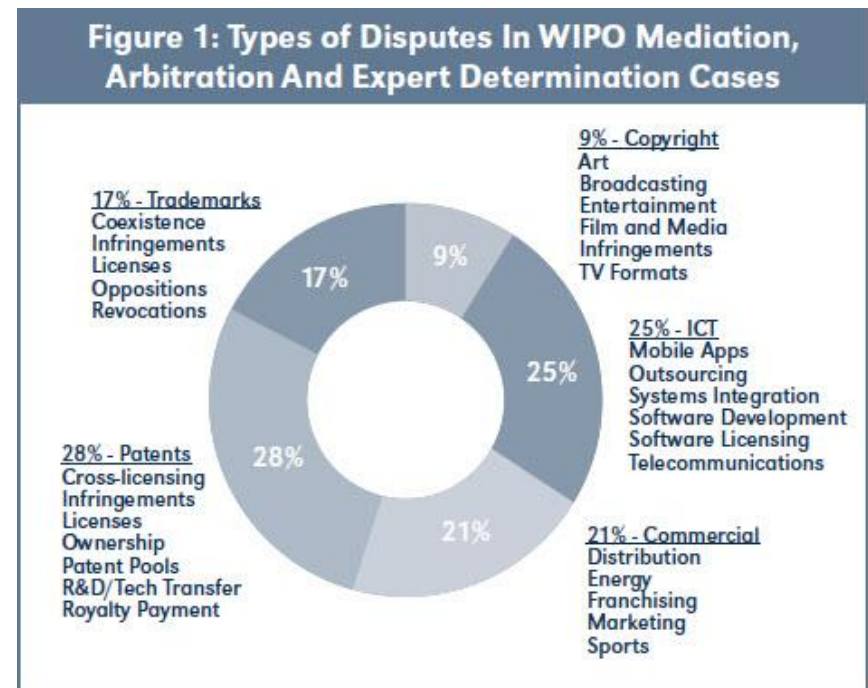
- International and domestic R&D and transfer of technologies involve a rich variety of contracts and transactions
- They may include research contracts, collaborative projects, licensing, joint ventures, alliances, spin-offs and buyer-supplier relationships.
- Efficient dispute avoidance and resolution practices are key in such complex situations
- Providing time- and cost-effective options, ADR may help parties to find solutions to their disputes, without the need for court litigation, contributing to the continuation of research activities.

Advantages of Mandatory Mediation

- Time and cost-effective.
- Patent litigations in India are known to be lengthy
- Confidentiality
- No threat of a validity challenge
- Assessing the strength of the opponent's case
- Negotiating in good faith

ARBITRATION

- Despite country specific IP laws, it is now broadly accepted that disputes relating to IP rights are arbitrable.
- The WIPO Centre has introduced specialised channels of sector specific arbitration ensuring a speedy and economical resolution of disputes, is one of the several reasons why arbitration is emerging as a preferred mode of dispute resolution in the intellectual property space.



IP Dispute addressed by Arbitration

COMMON FEATURES OF IP DISPUTE	RESULTS GIVEN BY ARBITRATION
International	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.
Technical	Parties can select arbitrator(s) with relevant expertise
Urgent	Arbitrator(s) and parties can shorten the procedure. WIPO Arbitration may include provisional measures and does not preclude seeking court-ordered injunction.
Require Finality	Limited appeal option
Confidential/Trade Secret and Risk to Reputation	Proceedings and award are confidential

Characteristics of Arbitration

Arbitration is consensual

Parties choose the arbitrator(s)

Arbitration is neutral

Arbitration is a confidential procedure

Decision of the Arbitral tribunal is final and easy to enforce

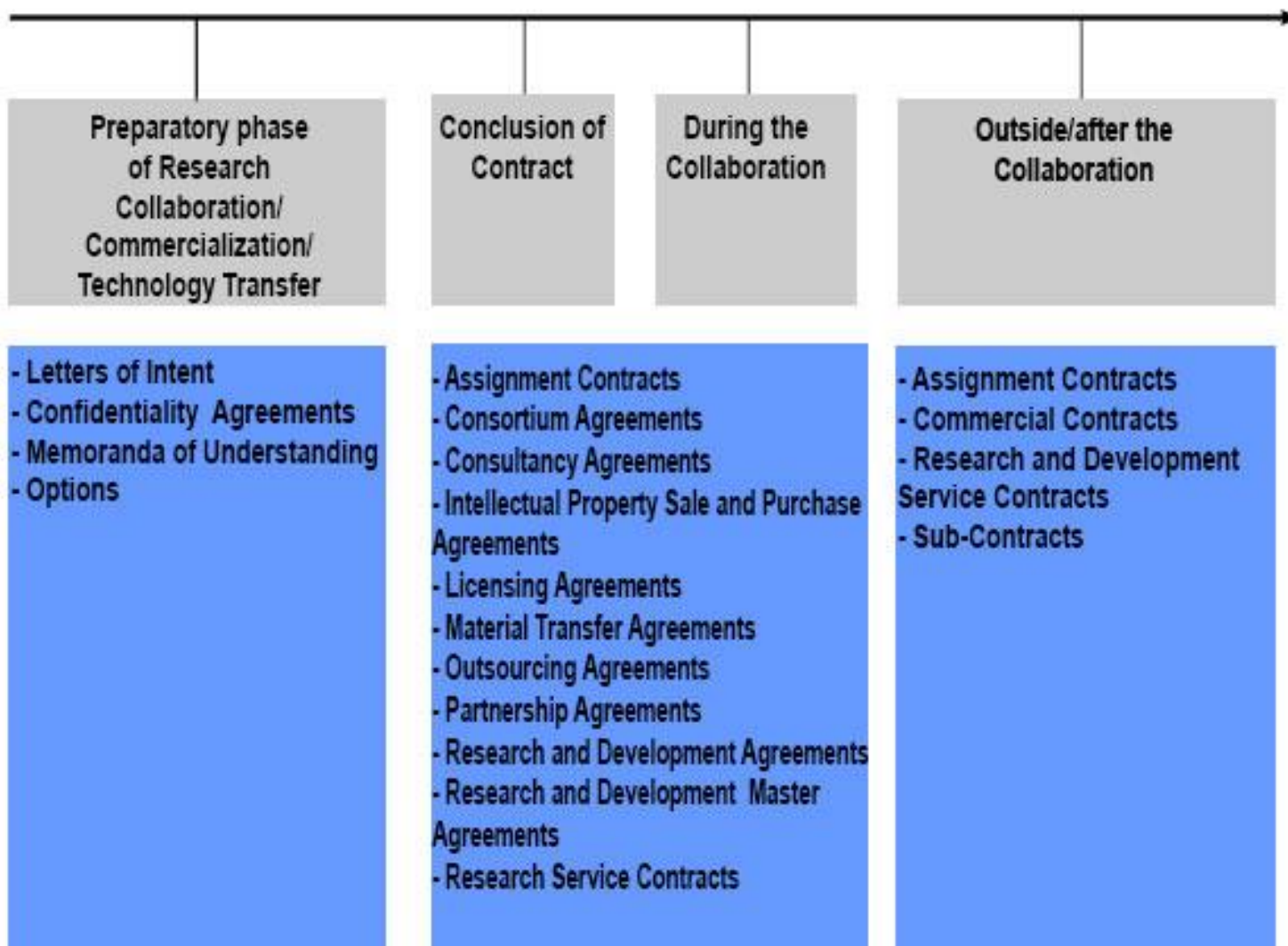
WIPO EXPEDITED ARBITRATION

- WIPO Expedited Arbitration is a form of arbitration that is carried out in a shortened time frame and, therefore, at a reduced cost. To achieve those objectives, the WIPO
- Expedited Arbitration Rules provide for:
 - A sole arbitrator rather than a three-member tribunal;
 - Shortened time periods for each of the steps involved in the proceedings;
 - A shorter hearing; and
 - Fixed fees (including the arbitrator's) in the case of disputes of up to US\$ 10 million.

How Much Does WIPO Arbitration Cost?

- WIPO believes that arbitration should be cost effective.
- Therefore, the Centre in consultation and parties and arbitrators ensure that all fees charged under WIPO arbitration are appropriate according to the circumstances of the dispute.
- Cost of arbitration depends on different factors, including the amount in dispute, the complexity of technology involved and conduct of parties.
- WIPO Expedited Arbitration provides for fixed arbitration costs when the amount in dispute is upto US\$10 Million

SELECTED AREAS OF DISPUTE



DRAFTING ARBITRATION CLAUSES

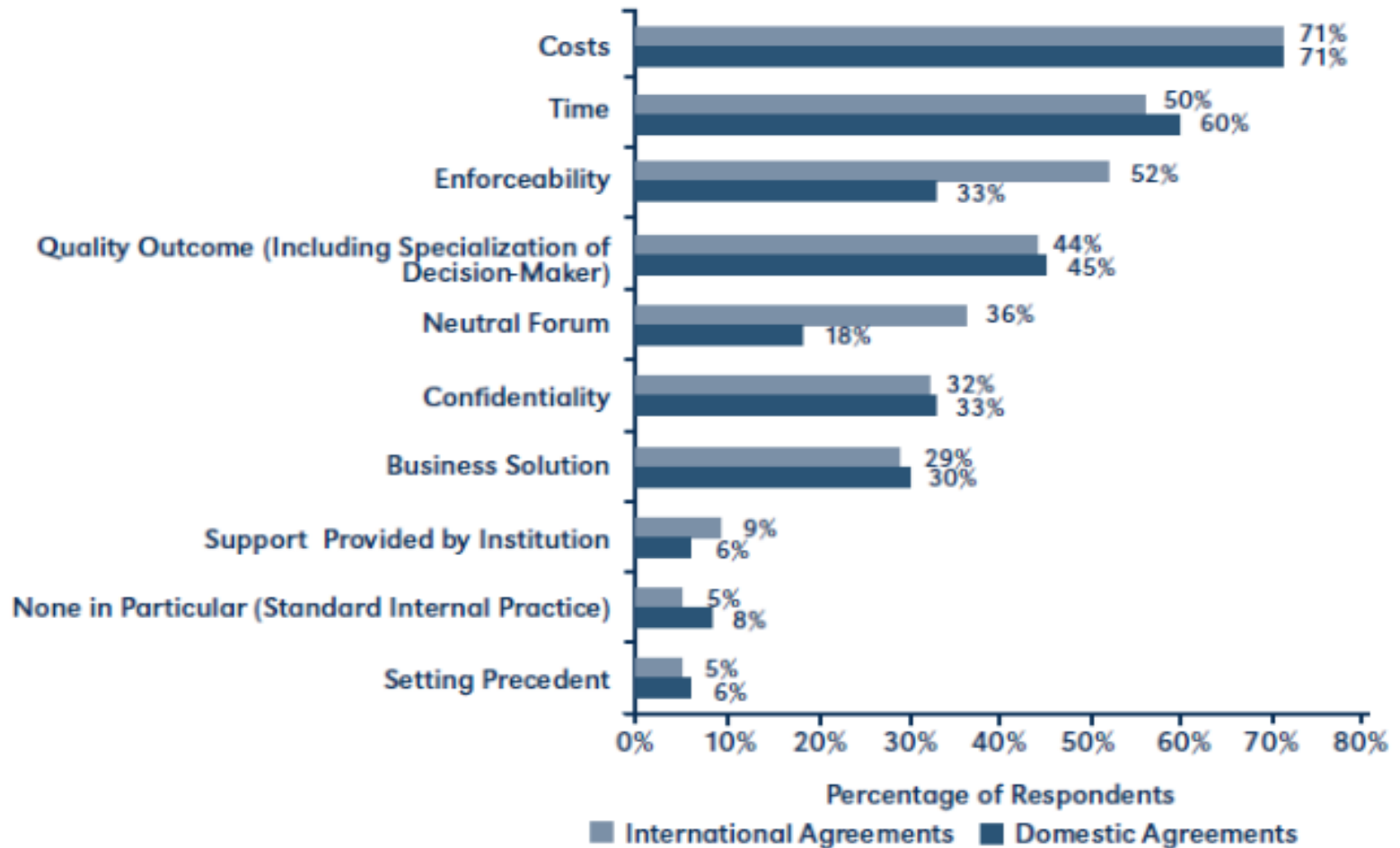
STRATEGIC ISSUES

- Is the other company in a different country?
- Is a dispute arising from this license likely to be an important case for the company?
- How important is confidentiality?
- How important is discovery?
- How important is a cost containment?
- How important is equitable relief from a court?

KEY ISSUES

- Scope of Arbitrable Issues
- Procedural Rules, Governing Law and Venue
- How are the Arbitrators Selected?
- What Remedies Can the Arbitrators Impose?
- Scope of Discovery
- Hearing Procedures and Duration
- Confidentiality
- Enforcement

Figure 3: Main Considerations When Negotiating Dispute Resolution Clauses



ARBITRATION SCENARIO IN INDIA

- The Arbitration proceedings in India are governed by the Arbitration and Conciliation Act, 1996.
- The Indian Arbitration Act is based on the UNCITRAL Model Law on International Commercial Arbitration 1985 and the UNCITRAL Arbitration Rules 1976.
- Section 5 of the Act eliminates the scope of judicial intervention and enumerates that no judicial authority shall intervene except where so provided by the Act.
- The Delhi High Court in the case of **Ministry of Sound International v. M/S Indus Renaissance Partners** held that disputes pertaining to IPR can be arbitrated upon on premise that there is no absolute bar on arbitration involving questions relating to IPR.

ARBITRAL TRIBUNAL

- Under Section 2(1)(d) of the Arbitration and Conciliation Act, arbitral tribunal means a sole arbitrator or a panel of arbitrators.
- The parties are free to agree on a procedure on the appointment of an arbitrator.
- In a panel or board of arbitrators the award of the majority will prevail.
- The arbitration tribunal shall decide any challenge to the very existence or validity of the arbitration agreement in question.
- Any party can take any objection taken on the ground of lack of its jurisdiction

CENTRES FOR ARBITRATION IN INDIA

- **ICA (Indian Council of Arbitration)**

The ICA was established in 1965 as a specialized arbitral body at the national level under the initiatives of the Govt. of India and apex business organizations like FICCI etc. It is based in New Delhi.

- **DAC (Delhi International Arbitration Centre)**

DAC came into existence on 25th November 2009. DAC is an institution intended to facilitate and encourage litigating parties to take recourse to arbitration as their chosen mode for settlement of disputes.

- **ICC Council of Arbitration (Indian Chamber of Commerce)**

This is a body within the fold of Indian Chamber of Commerce (ICC) dedicated to the mission of extending institutional service for the Alternative Dispute Resolution (ADR) of commercial disputes. For more information

- **ICDAR (International Centre for Alternative Dispute Resolution)**

The Government of India thought it necessary to provide a new forum and procedure for resolving international and domestic commercial disputes quickly.

The ICADR is an autonomous organization with **its headquarters at New Delhi** and **Regional Centres at Hyderabad and Bengaluru.**

MEDIATION SCENARIO IN INDIA

- The Commercial Courts, Commercial Division and Commercial Appellate Division of High Court (Amendment) Ordinance of 2018, dated May 03, 2018, has inserted **Section 12A to the Commercial Courts Act, 2015**, contemplating pre-institution mediation and settlement, before the filing of any commercial disputes.
- Specifically, Section 12A (1) states that *“a suit which does not contemplate any urgent relief under this Act, shall not be instituted unless the plaintiff exhausts the remedy of pre-institution mediation and settlement in accordance with such manner and procedure as may be prescribed by rules made by the central government”*.

ADR Clause in licensing Agreement

Any dispute, controversy or claim arising under, out of or relating to this contract and any subsequent amendments of this contract, including, without limitation, its formation, validity, binding effect, interpretation, performance, breach or termination, as well as non-contractual claims, shall be **submitted to mediation**.

The mediator shall be a member of Panel of Trademark Mediators.

The place of mediation shall be [specify place].

The language to be used in the mediation shall be [specify language].

ADR Clause in licensing Agreement

If, and to the extent that, any such dispute, controversy or claim has not been settled pursuant to the mediation within [60][90] days of the commencement of the mediation, it shall, upon the filing of a Request for Arbitration by either party, be referred to and finally determined by arbitration in accordance with the WIPO [Expedited] Arbitration Rules.

Alternatively, if, before the expiration of the said period of [60][90] days, either party fails to participate or to continue to participate in the mediation, the dispute, controversy or claim shall, upon the filing of a Request for Arbitration by the other party, be referred to and finally determined by arbitration in accordance with the WIPO [Expedited] Arbitration Rules. [The arbitral tribunal shall consist of [a sole arbitrator][three arbitrators].]

The place of arbitration shall be [specify place]. The language to be used in the arbitral proceedings shall be [specify language]. The dispute, controversy or claim referred to arbitration shall be decided in accordance with the law of [specify jurisdiction].”

Case study



Case Study

- Apple had filed a lawsuit accusing Samsung of copying the “look and feel” of the iPhone in 2011 when the Korean company created its Galaxy line of phones.
- Samsung countersued Apple for not paying royalties for using its wireless transmission technology. Since then, the number of patents under dispute has skyrocketed, according to the Korea Times, as has the number of courts involved in various countries.
- The two companies have repeatedly accused each other of copying the appearance and functions of their smartphones and tablet devices.

Court Directed Mediation

- The companies showed some willingness to compromise in an effort to avoid going to court: at the California court's suggestion, they cut the number of disputed patents in half.
- But even as the CEOs sat down at the table for their mediation, which was urged by the court, Apple filed a motion asking the presiding judge to bar the sale of Samsung's Galaxy Tab 10.1 on the grounds that the tablet was designed to "mirror" Apple's second-generation iPad
- Both sides had said they hoped to avoid a legal battle. Given that Samsung is one of Apple's biggest suppliers, the companies had a strong incentive to move beyond their dispute and build on their ongoing partnership.

Outcome

- For two days in late May 2012, Apple CEO Tim Cook and Samsung CEO Gee-Sung Choi met with a judge in the U.S. District Court of Northern California in an attempt to reach a settlement in a high-profile U.S. patent case, a sobering example of negotiation in business.
- Yet the two-day mediated talks between the CEOs in late May ended in an impasse, with both sides refusing to back down from their arguments. The suit later went to trial twice, with Apple ultimately winning more than \$409 million.

Mediation between Business Negotiators and Chances of Success

- As this example of negotiation in business suggests, mediation as a dispute resolution technique between business negotiators is far less likely to succeed when the parties are grudging participants than when they are actively engaged in finding a solution. When negotiators feel they have spent significant time and energy in a case, they may feel they have invested too much to quit.
- Moreover, the longer they spend fighting each other, the more contentious and uncooperative they are likely to become. The lesson? When a business dispute arises, you should always do your best to negotiate or mediate a solution before taking it to the courts.

Monsanto wins arbitration ruling in 2019 against Indian seed company in dispute over GMO cotton patent in India



Thank you

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