Addressing the IP Dispute Resolution Paradox: Combining Mediation with Arbitration and Litigation

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Introduction

Clients and lawyers often consider negotiation or litigation to be their only options for resolving IP disputes. While IP arbitration is on the rise, there is still a tendency to view these processes as the only alternatives to one another. A much broader range of processes, however, can and should be considered to resolve IP disputes in most situations.

While seasoned IP practitioners tend to focus on adjudicative processes (e.g., litigation and arbitration), non-adjudicative processes can help reduce the time and cost to outcome, improve settlement rates, preserve business relationships and provide higher satisfaction ratings. These non-adjudicative processes may be non-evaluative (e.g., mediation) or evaluative (e.g., conciliation or expert determinations). The inclusion of non-adjudicative processes (particularly mediation) in conjunction with adjudicative processes is likely to lead to significantly faster, cheaper and better outcomes, with higher compliance and satisfaction ratings in over 90 per cent of IP disputes, both in domestic and international matters. Such 'mixed mode' processes should be considered in all IP disputes.

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Despite the benefits, IP practitioners and in-house experts are still reluctant to include mediation or other non-adjudicative steps in resolving their disputes. This creates a paradox. Adjudicative processes remain the first port of call despite being inherently unpredictable, costly and risky. This is despite non-adjudicative processes having been actively promoted within IP circles for over a quarter of a century, such as by the World Intellectual Property Organization (WIPO) and the International Trademark Association, as well as by national IP courts and judges. It is also despite the growing amount of evidence of clearly improved settlements rates (e.g., above 75 per cent when mediation is used on its own and above 80 per cent when mediation is combined with arbitration), reduced time to outcome (measured in weeks instead of months or years), significant cost savings and higher satisfaction ratings.

This paradox seems to be, in part, because of a lack of personal familiarity with such processes, misunderstandings regarding the enforceability of settlement agreements reached through them and a reticence to trying something new or too soon. This creates a perfect catch-22 situation. Unless and until IP practitioners and their clients become accustomed to using mediation and other non-adjudicative forms of dispute resolution first (even if only to discuss the disputants' procedural options), IP litigators are unlikely to gain greater personal familiarity with such processes, recommend them or generate the benefits and savings these processes can offer their clients.

This situation is further exacerbated by misunderstandings regarding the range and types of non-adjudicative processes that exist (e.g., mediation as distinct from conciliation), and how and when to include them in adjudicative IP proceedings.

This chapter attempts to untangle and demystify some of the issues surrounding when and how to use non-adjudicative processes (particularly mediation as a distinct process from conciliation) and proposes some practical solutions, such as mixed-mode and guided choice processes, that allow for mediation and other forms of non-adjudicative dispute resolution processes to be integrated earlier into litigation and arbitration for the benefit of all disputants and stakeholders, especially in IP disputes.

The risks of traditional adjudicative dispute resolution proceedings

Corporate expenditures on adjudicative IP proceedings have more than doubled over the past 10 years and continue to grow.[2] The number of disputes and the length

2 See Benchmarking IP Litigation 2019, a study commissioned by Morrison Foerster. See also *Burford Quarterly*, No. 1 (2022) (a review of legal finance). The Norton Rose Fulbright's

of these proceedings have also consistently increased across all IP categories.[3] IP disputes are increasingly comprising a complex mix of technologies (e.g., with the rise of artificial intelligence and new interdisciplinary combinations of data or software-driven technologies, such as bioinformatics, neuroinformatics, DNA computing and theragnostics[4]), and the situation is no different in this regard post-covid-19.

This makes it more difficult to deconstruct some IP disputes into distinct IP categories, such as patents, trademarks, copyright, trade secrets and design rights, requiring greater expert involvement and potentially resulting in greater complexity, delays and costs. A forensic analysis of each issue on its own is likely to be too time-consuming and complex, even if it were to be affordable (which is unlikely to be the case, given the need to find different experts in each key jurisdiction).

Resolving IP disputes solely by adjudicative processes is, therefore, fraught with risk and can lead to highly unpredictable outcomes, even in the best of cases. This is just as true for patent disputes (e.g., the *Improver* cases on the Epilady invention in the 1980s[5]), trademark disputes (e.g., the *Budweiser* disputes that started in 1907 and have still not been fully resolved[6]) and other categories of IP disputes. This is partly because of the amorphous, technical and nationalistic nature of IP rights, but also because of the growing importance of these same intangible assets on corporate balance sheets and in the global economy (usually greater than 80 per cent of any disputant's corporate value) and the strong feelings IP owners may have towards their inventions, creations and brands.

An IP dispute is not only a technical or forensic exercise in the assessment of objective issues of infringement or validity, but often a culturally shaped and at times deeply emotional 'bet the company' or 'high-stakes' conflict, which

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2023 Annual Litigation Trends Survey further notes a broad increase in litigation volumes across various sectors, and Lex Machina's 2023 Patent Litigation Report indicates there has been a steady trend in patent litigation filings in the United States since 2020. None of these studies mention mediation or other non-adjudicative ADR proceedings as possible solutions to the problems identified in the reports, underscoring the paradox of the low use of ADR in IP proceedings by IP and litigation experts.

3 ibid.

4 A new term referring to the growing integration of diagnostics as part of therapy in the life sciences.

5 See Hatter J, 'The Doctrine of Equivalents in Patent Litigation: An Analysis of the Epilady Controversy', *Ind. Int'l & Comp. L. Rev*, Vol. 5:2 (1995), pp. 461–94.

6 'Budweiser trademark dispute' (2022) Wikipedia, https://en.wikipedia.org/wiki/Budweiser_trademark_dispute (accessed 9 May 2024).

unavoidably depends on subjective determinations (e.g., assessments of scope or quantum/value, which are an art rather than a science) as well as determinations of whether something is a copy or derived from someone else's work or ideas. Adjudicative processes are not equipped to handle such subjective considerations, and even the 'objective' aspects are often subject to different interpretations in IP disputes, for a number of reasons.

Adjudicative IP dispute resolution processes such as litigation and arbitration tend to be fragmented, not only by applications of different national laws and rules of civil procedure but because of the different professionals who need to be involved to resolve them (e.g., the agents who registered them, the transactional lawyers and solicitors involved in commercialising them, and the trial lawyers and barristers who litigate them). They are also fragmented because of the different categories of overlapping IP rights that may exist in the same matter,[7] requiring different expertise. It is extremely rare to find one person who can advise across several countries and categories of IP rights. Bringing several experts from different countries and fields of intellectual property together can lead to disparate or even inconsistent legal advice on how best to resolve an IP dispute.

Much ink has already been spilled on the variability in outcomes of the same IP rights being simultaneously litigated in several jurisdictions.[8] The costs, time frames, outcomes, damages and types of relief available when litigating the same IP asset in many countries vary significantly (even if they originate from the same Madrid system trademark application, the same Patent Cooperation Treaty patent application or the same original copyrighted work), which makes any international IP dispute inherently unpredictable.[9] Not only do the application of applicable norms vary from country to country (despite repeated attempts to harmonise them), but IP disputes are often driven by the disputants' subjective perceptions, needs, interests and concerns, and the tribunal's own cultural

7 For example, copyrights versus designs versus trade secrets versus utility patents or models versus trademarks versus domain names versus sui generis database rights.

8 For a fairly recent analysis of this recurring problem, see Tamar Khuchua, 'Different "Rules of the Game" – Impact of National Court Systems on Patent Litigation in the EU and the Need for New Perspectives', *Journal of Intellectual Property, Information Technology and E-Commerce Law*, Vol. 10 (2019).

9 For examples of recent publications on the variability and national subjectivity of patent disputes, see the 'Global IP Project: Annual Global Patent Litigation Report 2014', *Patent, Trademark & Copyright Journal* (2015); and the chapter in WIPO's 'World Intellectual Property Indicators 2018' report entitled 'An overview of patent litigation systems across jurisdictions'.

approaches to the same IP rights. (The distinction between the words 'copyright' and 'authors' rights', for example, reflect deep historical and cultural differences when considering the rights of authors.)

Inventors, creators and brand owners are often personally invested in their ideas or products, and these subjective factors, coupled with different cultural influences and the devastating impact that inconsistent outcomes may have on the disputants' careers, valuations or senses of justice can fuel conflict escalation and an adversarial system that would often benefit from a less positional or evaluative approach earlier on.[10]

Arbitration of IP disputes may seem at first glance to be a more attractive solution to domestic or multi-jurisdictional IP litigation. Appointing arbitrators with incontestable legal or technological expertise may be viewed as a solution to unpredictable jury trials, overloaded dockets or unspecialised court tribunals, but IP arbitration is also fraught with uncertainties, risks, costs and technicalities. Top experts can differ on their assessment of the evidence or facts, and the outcomes of IP arbitration remain just as unpredictable as expert IP court proceedings. Furthermore, arbitral awards may be unenforceable in several jurisdictions if they are not carefully drafted to avoid public policy concerns (e.g., as declarations of invalidity only *inter partes* as opposed to *erga omnes*).[11]

Arbitration also entails high costs and significant timelines and is an unclear or risky value proposition, especially given the limited rights of appeal that apply to arbitral awards. Where the stakes remain high, large costs need to be sunk up front, and reputations remain equally vulnerable. Relationships can also deteriorate during the course of arbitration, not only between the experts, but also between the lawyers and external teams of experts who represent or advise them. This is particularly unfortunate in certain industries where the same people tend to interact repeatedly. Even in the event of a successful outcome, the applicability

10 J Lack, 'National Intellectual Property Rights: The Importance of Mediation in an Increasingly Global and Technological Society', 72 *Arbitration* No. 4 (2006).

11 The provisions of the European Union's new Unified Patent Court (UPC) and its EU trademark courts and community design courts still provide exclusive competency to the EU courts on all issues of validity, registration, revocation and infringement of these IP rights. While arbitration is viable for disputes arising from licensing agreements, infringement settlements or other contractual matters related to EU IP rights, an arbitral award that purports to invalidate or enforce a unitary patent or a European patent, trademark or design might not be recognised.

of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) is uncertain for some international awards (e.g., if an arbitral tribunal declared a registered IP asset to be invalid).

The members of an arbitral tribunal may perceive the facts and the laws differently from one another or from the parties. They may have significantly different appreciations of the scope or value of the IP rights at stake. This may be because of invisible cultural influences, different interpretations of laws or jurisprudence, unconscious biases or different original professional source trainings. The subjectivity and unpredictability of the relief and damages available, even in IP arbitration, combined with the costs, stress, complexity, lost management time, formality and length of the proceedings, may render IP arbitration equally as unattractive as litigation before national courts – especially if an outcome is needed within a matter of months rather than years, if it is expected to have extraterritorial impact, or if the disputants cannot afford to spend the hundreds of thousands (not to mention possibly millions) of US dollars that full-blown arbitration may entail.

Furthermore, applying varying interpretations of the same legal concepts in each relevant jurisdiction can still lead to contradictory outcomes in arbitration, just as in multi-state litigation. Arbitral tribunals cannot be expected to calculate a weighted average of likely country-by-country outcomes, given the diametrically opposed outcomes that may emerge, and given the inherent subjectivity and unconscious biases that may exist in the tribunal members' own minds regarding what may be fair or equitable.

The probability of winning any adjudicative process (whether litigation or arbitration) remains a gamble, with odds of only 60 per cent even in very strong IP cases.[12] There will always be evidentiary surprises and invisible subjective variables influencing the outcome, such as the composition of the tribunal, unconscious biases, and cultural, cognitive, social and emotional factors affecting interpretations of the dispositive facts or applicable laws.[13]

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12 This 60 per cent figure is the result of interviews of several IP litigation experts by the author, including a renowned expert IP judge who provided a 55 per cent 'best case' figure for the best odds of winning the strongest possible IP case.

13 Examples of varying interpretations of 'objective norms' as facts or laws can be found in the fragmented rulings of national courts of successful appeals from lower instance decisions. See, for example, the *en banc* decision of the US Federal Circuit in *CLS Bank v. Alice Corp.*, summarised by E Harmon Arner and L Freyer in 'CLS Bank v. Alice Leads to an Even Murkier Morass', Finnegan (28 May 2013). While the case was ultimately resolved by a unanimous decision of the US Supreme Court in 2014 the application of that unanimous decision remains unpredictable (see J Saltiel, 'In the courts: five years after Alice - five

Even if an arbitral award is favourable, its extraterritorial effect and enforceability will remain uncertain, especially with regard to third parties. In licensing disputes, this may seem to be less risky, but if hundreds or thousands of royalties are at stake (e.g., in a fair, reasonable and non-discriminatory (FRAND) licence dispute,[14] where many IP rights and multiple owners are involved), the generation and application of norms regarding what may be fair or reasonable may require mediative competencies or dialogue facilitation, where a broader and more inclusive range of skills may be needed to discuss criteria, brainstorm ideas and understand the subjective needs or interests of the various stakeholders involved, looking to the future and not only to the past.

For all these reasons, arbitration on its own is unlikely to provide complete closure to the parties involved in an IP dispute or deal with its root causes. Resolving one dispute may simply lead to a new dispute arising between the same parties.

Appropriate dispute resolution: the choices available to IP disputants

'ADR' is often defined as alternative dispute resolution or amicable dispute resolution. This, however, is a limitative interpretation that restricts its true potential. A more inclusive approach is to consider mediation, conciliation, arbitration and

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lessons learned from the treatment of software patents in litigation', WIPO Magazine (Aug. 2019)). They can also be found in the politically shaped language of Article 69(1) of the European Patent Convention 1973, which sought a compromise between common law and civil law approaches to patent claim interpretation, stating that '[t]he extent of the protection conferred by a European patent or a European patent application shall be determined by the claims. Nevertheless, the description and drawings shall be used to interpret the claims.' This confusing language led to the equally confusing and vague Protocol on the Interpretation of Article 69 EPC in November 2000 (see Article 1 of the Protocol). The famous statement by the late English IP judge Hugh Laddie that 'Intellectual Property litigation in general and patent litigation in particular in Europe is in a state of some disarray' continues to apply to this day, especially post Brexit (see *Sepracor Inc. v. Hoechst Marion Roussel Limited et al.* (1999)). This was recently confirmed as being the case in K Cremers et al.,'Patent litigation in Europe', *European Journal of Law and Economics*, Vol. 44 (2017), pp. 1–44. The statement applies not only to European patents, but also to EU community trademarks and designs as well. It is equally true for EU copyrights, despite 11 directives and two regulations that have sought to harmonise and reduce national inconsistencies in this field. See European Commission, 'The EU copyright legislation', www.ec.europa.eu/digital-single-market/en/eu-copyright-legislation (accessed 9 May 2024).

14 FRAND licences create problems when trying to work out royalties in an industry where there may be thousands of industry-essential patents that need to be licensed for a single product to get to market.

litigation as all being parts of the same thing: appropriate dispute resolution. The use of ADR to mean appropriate dispute resolution, therefore, engenders a more holistic way of generating dispute resolution proceedings that can lead to complete closure of disputes, providing access to justice that is effective, affordable, efficient, flexible and enforceable.

This was the view proposed in 2016 by the Chief Justice of the Supreme Court of Singapore, Sundaresh Menon, at the opening ceremony of the Global Pound Conference Series (the GPC Series), an international series of 28 multi-stakeholder litigation meetings, to examine ways of improving access to justice and collecting data with a more disputant-centric approach to resolving commercial disputes, both domestic and cross-border. To quote the Honourable Chief Justice Menon:

> *[T]he acronym 'ADR' is commonly understood as a reference to 'Alternative Dispute Resolution'. This is a reflection of the widely held notion that such mechanisms are merely alternatives to the mainstream and conventional method of court-based dispute resolution. However, retaining the terminology of 'alternative' might mislead us, consciously or otherwise, into believing that the default – or even the best – approach is to be found in litigation. While the court-based approach to dispute resolution certainly has its strengths, it may not always be appropriate in every case. An ideal system of justice is one that delivers justice that is customised to each type of case, keeping in mind the subject matter, the parties, and the desired outcomes. This is a situation where one size does not always fit all. In this regard, it would perhaps be timely to embrace a paradigm shift and understand 'ADR' as a reference to 'Appropriate Dispute Resolution' instead. This requires us to move away from our traditional and rigid ideas of how disputes should be resolved, towards a flexible and option-laden model where disputants are well placed to choose the ideal mode of dispute resolution from a suite of options. Let me emphasise that the call for 'Appropriate Dispute Resolution' should not be seen as suggesting a reduced role for the courts. Even with the development of other dispute resolution options, the courts retain a special place in society as the guardians of the rule of law and, oftentimes, the principal and authoritative resolver of legal disputes. As such, quite the opposite of taking a reduced role, courts should embrace the reality that different disputes call for different measures, and be equipped or even redesigned to resolve disputes as appropriately as possible.*[15]

15 See www.imimediation.org/research/gpc (accessed 9 May 2024). The Hon. Chief Justice Menon's comments are particularly appropriate for this chapter, given his experience and expertise in international arbitration. He has written extensively not only to suggest that

It is an approach that is particularly appropriate for IP disputes and is the interpretation applied for the purposes of this chapter.

The data generated by the GPC Series is of particular relevance to the field of intellectual property. Votes from hundreds of dispute resolution professionals and users of dispute resolution services from around the world indicated a universal lack of familiarity by disputants and their counsel with their non-adjudicative procedural choices when faced with a conflict. The data also highlighted the confusion surrounding what ADR could entail given the kaleidoscopic views of different stakeholder groups in response to various questions regarding what is currently available and accessible in the commercial dispute resolution market.

The data identified significant gaps between what disputants want (the demand side of the market) and what is being offered (the supply side of the market),[16] as well as the following four key drivers as defining what disputants are seeking:

- Efficiency: efficiency (in time and cost) is the key priority of disputants when seeking dispute resolution proceedings.
- Greater collaboration: disputants expect greater collaboration from their advisers (e.g., lawyers) in dispute resolution proceedings.
- Pre-dispute and mixed-mode options: there was evidence of a growing global interest in the use of pre-dispute protocols and mixed-mode dispute resolution (i.e., combining adjudicative and non-adjudicative processes).
- In-house counsel to drive proceedings: in-house counsel are viewed as the agents most capable of orchestrating changes with regard to the above three drivers (whereas external advisers are perceived – including by themselves – as potential obstacles to such changes), while encouragement by judges, arbitrators and other providers of dispute resolution services is needed as well.[17]

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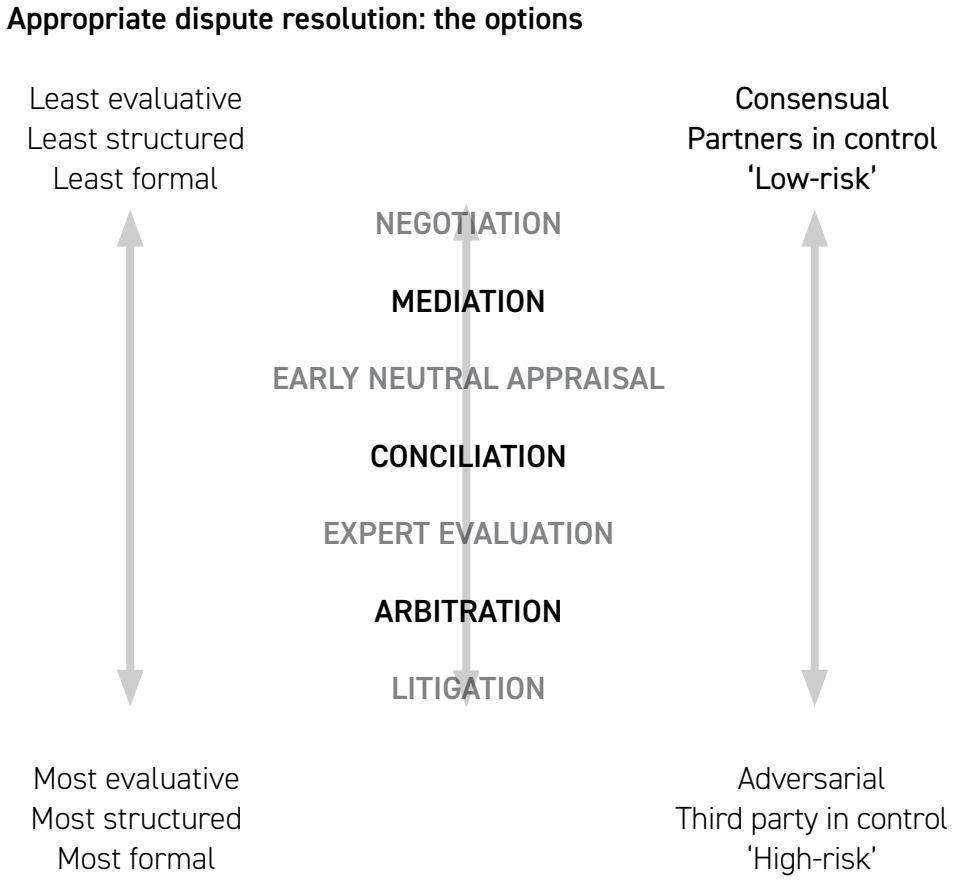
arbitration also needs to be more reflective of the needs of disputants, but also considers mediation to be part of the rule of law owing to its affordability, efficiency, accessibility, flexibility and effectiveness. See Natasha Mellersh, 'Chief Justice Sundaresh Menon On Mediation And The Rule Of Law', International Mediation Institute (9 May 2017), www.imimediation.org/2017/05/09/mediation-and-the-rule-of-law (accessed 9 May 2024).

16 See International Mediation Institute, 'GPC Series Data and Reports', www.imimediation.org/research/gpc/series-data-and-reports (accessed 9 May 2024). For the raw data of the Global Pound Conference Series (the GPC Series), see www.imimediation.org/wp-admin/admin-ajax.php?juwpfisadmin=false&action=wpfd&task=file.download&wpfd_category_id=907&wpfd_file_id=35505 (accessed 9 May 2024).

17 The GPS Series Report, 'Global Pound Conference Series – Global Data Trends and Regional Differences' (2018), p. 3.

Figure 1: The range of procedural options available for IP disputes



Source: J Kalowski, JOK Consulting

Seeking appropriate dispute resolution processes provides a broader spectrum of possibilities, which may all be used at different stages of an IP dispute. It provides greater choice and provides for ways of combining or including different types of processes that can be considered earlier on. While disputants often tend to think in binary terms, with litigation being the obvious choice if negotiations break down, there is a wide range of possibilities that exists between these two extremes, including mediation, conciliation and arbitration as discrete and

separate processes, which are distinct from one another. Each has its own benefits and inconveniences, as indicated in Figure 1.[18]

Much has been written about the differences and similarities between arbitration and litigation. A lot has also been written about different forms of negotiation, such as 'interest-based' or 'principled' negotiation versus 'positional' negotiation or 'bargaining'.[19] Less has been written, however, about the range of different processes that lie between these extremes or comparing different types of non-adjudicative processes.

While arbitration and negotiation are respectively adjudicative and non-adjudicative processes that are clearly distinguishable from mediation and conciliation, the latter two processes are often confused with one another and thought to be synonymous. This is another reason why disputants often fail to think in terms of what is most appropriate in each case.

Distinguishing mediation from conciliation

Conciliation and mediation can and should be distinguished from one another, especially for IP disputes. They differ in their purposes and how they are conducted, and they have different social impacts on the behaviour of the participants engaged in the process, which is being increasingly recognised in new research emerging in the fields of brain and social sciences.

This distinction is an anathema to many common law practitioners, who prefer to think in terms of evaluative and non-evaluative mediation and are used to slipping seamlessly between these two forms of dispute resolution. It is often, however, a neutral-centric preference as opposed to a user-centric choice.

Nevertheless, to many civil law practitioners, the distinction between conciliation and mediation is very clear. While they are both amicable processes, they are very different from one another.

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18 For a general discussion on differences between these procedural options and how they relate to IP disputes, see J Lack, 'The growing need for ADR in IP disputes', Intellectual Property Magazine, December 2010, pp. 19–10. See also www.innovadr.com/useful-info (accessed 9 May 2024).

19 Harvard Law School's Program on Negotiation offers a wide range of seminal publications on this topic, starting with R Fisher, W Ury and B Patton's famous book *Getting to Yes: Negotiating Agreement Without Giving In*, Penguin Group (1981). For an excellent book providing an overview of negotiation and different approaches to negotiation that focuses on the negotiation of better deals and settlements from an in-house lawyer's perspective, see M Leathes, *Negotiation: Things Corporate Counsel Need to Know but Were Not Taught*, Wolters Kluwer Law & Business (2017).

Conciliation in many civil law jurisdictions is a court-annexed process that is evaluative. It has a different status than mediation, which is usually considered to be an extrajudicial process that is not evaluative, facilitative or transformative. From a neurobiological perspective, the processes are also very different, triggering different innate patterns of social behaviour (e.g., 'out-of-group' or 'in-group' mental shortcuts or heuristics).

When viewed as a social process, conciliation is a process where an evaluative ADR neutral helps the disputants to reach a mutually acceptable compromise between different positions, whereas a mediator is seen as a non-evaluative person who wishes to help the disputants to jointly consider new opportunities for settlement based on subjective considerations looking to the future that they may not have envisaged before.[20]

Conciliation

The purpose

The role of an IP conciliator is to be neutral, impartial and evaluative. IP conciliation may be considered a form of non-binding arbitration or an expert opinion process, designed to help the parties reach a mutually acceptable compromise. The classic IP conciliator is usually a learned expert (e.g., a retired judge, or an experienced agent or a lawyer) with relevant industry experience and knowledge of the products, services or technologies involved in the dispute, who understands what norms may or should apply in litigation.

The role of the IP conciliator is to help the parties understand and apply these norms, and discuss and generate a zone of possible agreement (ZOPA) based on the application of these norms. This may include opining on what an adjudicative court or arbitral tribunal might reasonably find. This process can entail meeting the parties separately, in caucuses, and doing reality testing: challenging the parties' assumptions about the strengths of their respective cases and helping

20 As a precautionary note, the distinctions made between mediation and conciliation in this chapter should not be taken as universally accepted. Conciliation is often referred to as 'evaluative mediation' in common law countries, which is an oxymoron in several civil law countries. This can be a great source of confusion when appointing an IP neutral for a non-adjudicative IP process. For a more detailed discussion on the confusion between mediation, conciliation and other forms of non-adjudicative ADR, see M Schonewille and J Lack, 'Mediation in the European Union and Abroad: 60 States Divided by a Common Word?' in M Schonewille and F Schonewille (eds.) *The Variegated Landscape of Mediation: A Comparative Study of Mediation Regulation and Practices in Europe and the World*, Netherlands, Eleven International Publishing (2014), pp. 19–44.

them to understand the weaknesses of their positions. The assessment of these norms includes:

- what the applicable legislation provides for;
- the relevant jurisprudence;
- the dispositive issues of fact and law that will need to be resolved;
- the range of possible outcomes if the findings of fact or law go one way or another;
- what the learned doctrine and textbooks suggest; and
- what a likely outcome ought to be, based on the law and facts provided.

This includes an understanding of the sector, the relevant technology, competitor products, the prior art and the context in which these issues of fact and law are being discussed and debated. It is basically a forensic process, looking primarily to the past, although the future might come into play when seeking to determine damages.

The process

Conciliation is a form of 'objective justice' that is based on the legal syllogism that 'facts + law = outcome'. The IP conciliator helps the disputants to understand the variables in this equation, and what is relevant as opposed to irrelevant with respect to what the outcome should be. It is a primarily retroactive approach, seeking to analyse and understand facts that occurred in the past, who or what caused them, who is responsible or liable for a breach or tort that occurred, and what appropriate damages or remedies, or principles of contributory fault or responsibility, should be applied.

The IP conciliator helps the parties to understand the key issues of fact and law to be determined to define and shape the ZOPA, and the suggested outcome of the dispute. If the parties are unable to reach an agreement within the ZOPA towards the end of the process (usually a one-day meeting after briefs and position papers have been submitted), then the IP conciliator is expected to make a non-binding settlement proposal, recommending where the parties might reasonably settle within the ZOPA. This can include recommendations on quantum or how to calculate damages.

The role of the IP conciliator is to help the parties understand not only their best alternative to a negotiated agreement (BATNA), but also their worst alternative to a negotiated agreement (WATNA), their reasonable alternative to a negotiated agreement (RATNA) and their probable alternative to a negotiated agreement (PATNA), which is usually litigation or arbitration.

Unlike an arbitrator, the IP conciliator can meet with the parties separately and provide opinions or recommendations before issuing a final proposal, because their personal view of the case is non-binding. While IP conciliators should be neutral and impartial, they are expected to be evaluative from the outset.

Conciliation is also a compulsory or non-voluntary step and part of court proceedings in many countries. In certain civil law jurisdictions, parties are not allowed to proceed to a hearing with a judge on the merits of their case, unless they have previously attended a compulsory conciliation session. The conciliator may be another judge, a magistrate, a justice of the peace or a court-appointed expert, who will normally have a limited amount of time available to hear the matter (e.g., a few hours) and is expected to give a recommendation.[21] In some jurisdictions, if the parties did not settle, the court may even ask to see the conciliator's final settlement proposal (unless the parties have agreed that this should not be the case) and sanction a party for having unreasonably failed to accept it. There is no reason for the parties or their advisers to try mediation if they perceive it as being a process similar to conciliation.

Mediation

The purpose

The role of an IP mediator is to be neutral, impartial (or equally multi-partial) and non-evaluative. Unlike a conciliator, the IP mediator is not expected to have or to

21 Switzerland is a civil law jurisdiction that has such an approach. Mediation is a purely voluntary process in Switzerland, where the parties always have to opt in to mediation proceedings by mutual consent or if it is suggested by a judge (which is rare), whereas conciliation is a compulsory stepping stone on the way to litigation under the Swiss Code of Civil Procedure (SCCP) and is non-voluntary. Conciliation is dealt with at Part 2, Title 1, Articles 197–212 of the SCCP, and mediation is dealt with in Part 2, Title 2, Articles 213–218. The conciliator is usually another magistrate, who will spend a few hours but not more with the parties to help them discuss the strength and weakness of their case. Swiss conciliators are also not used to having caucuses or separate meetings with the parties. Many Swiss arbitrators also hold conciliation sessions with the parties following evidential hearings (usually after they have written a first draft of their award) and may even present their thinking (and possibly the draft award itself) to the parties before issuing it, to facilitate possible settlement discussions before rendering their award. This practice may be frowned on in certain common law jurisdictions as a form of 'appeal before verdict', but it is very much in line with the GPC Series' findings and may explain the disproportionate popularity of Swiss arbitration and Switzerland as a venue for international commercial disputes. Unfortunately, mediation remains relatively unknown and unused in commercial and IP disputes in Switzerland, despite being significantly faster and cheaper, and taking into consideration a broader range of issues for international and cross-cultural disputes.

express an opinion regarding what the outcome of the dispute ought to be. His or her role is to be forward-looking: to help the disputants to look to the future and facilitate an interest-based negotiation rather than find a zone of compromise between different positions. While conciliators only have to consider a ZOPA, mediators also need to consider their zone of permitted evaluation (ZOPE).[22]

IP mediators can help to reinstate a constructive dialogue that helps the disputants to gain a broader and deeper understanding of one another's future needs and interests as a basis for generating solutions, without having to focus on the merits of the parties' respective positions. The IP mediator is primarily there to help the parties exchange meaningful information as part of a joint problem-solving process, treating the disputants as partners seeking mutually acceptable solutions, where the outcome can be based on subjective considerations, such as the disputants' understandings, preferences, perceptions, emotions, interests, concerns, feelings, beliefs, values, needs and fears looking to the future as well.

Although private meetings with the parties may also occur, the purpose of such caucuses is different from IP conciliation insofar as the mediator is not there primarily to reality test or challenge the parties or their positions and beliefs, but to help the disputants exchange information, look to the future, and generate and consider new opportunities for settlement. The mediator can also help the disputants think through the possible consequences or ramifications of different alternatives and brainstorm new options.

Reality testing can also be a key tool in mediation to help the disputants consider the likely consequences of any outcome for themselves, their partners in the dispute and other key stakeholders. The mediator may also help the disputants to consider the benefits of bifurcated proceedings, the different positions that may be argued regarding the quantum of damages and the incidence of such different calculations (e.g., situations in which an alleged infringer cannot afford to pay anything, they may end up moving elsewhere or working with another

22 This is a new concept arising from the work of Working Group Three of the Tripartite Taskforce on Mixed Modes set up by the US College of Commercial Arbitrators, the International Mediation Institute (IMI) and the Straus Institute for Dispute Resolution, Pepperdine School of Law. For the Taskforce's global findings, see www.imimediation.org/about/who-are-imi/mixed-mode-task-force (accessed 9 May 2024). For the findings of Working Group Three, led by Véronique Fraser and Kun Fan, which came up with the concept of ZOPE, see 'Draft Report of Working Group 3: Practice Guidelines For Mediators Use Of Non-Binding Evaluations And Settlement Proposals', co-chaired by Veronique Fraser and Kun Fan.

competitor, and there are other mutually beneficial outcomes that can be generated without having to pay cash up front).

While conciliation may seem to be ineffective for IP disputes where the IP rights are clearly valid or there is sufficient evidence of wilful infringement or pirated goods, mediation can still be beneficial to both parties in such cases, even with infringers who acted in bad faith, when viewed from a purely pragmatic perspective. Known IP offenders have ended up becoming key strategic allies as a result of mediation in some IP cases, where any form of dialogue was originally completely dismissed out of hand for fear of being considered as willing to compromise or weak.

The process

Mediation is a form of 'subjective justice'. The primary role of the IP mediator is not to set a ZOPA, apply the legal syllogism or analyse WATNAs, RATNAs or PATNAs, but to assess their ZOPE and help the disputants exchange information about their subjective needs, interests concerns and motives, looking to the future rather than the past.[23] They may even have an aspirational win-win goal of helping the disputants to reach outcomes that are equal to or better than their BATNAs.

The IP mediator can start with broader procedural questions, such as any shared values regarding the process itself and what relationships or stakeholders need to be borne in mind, and treat the disputants not as parties to a dispute but as partners working together to find a mutually acceptable outcome. They may help the parties generate and apply their own norms, exchange information about their future concerns, needs and interests, and consider a broader range of options that are not shaped by what a court or tribunal might do.

The IP mediator is not normally allowed to make settlement proposals (although they can suggest options as part of a brainstorming session to help the partners generate more ideas and explore a wide range of possible solutions that

23 The Swiss Arbitration Centre, in its 2019 Swiss Rules of Mediation, succinctly defined the distinction between mediation, expert opinions and conciliation as follows: 'Mediation is a method of dispute resolution whereby the parties attempt to reach an amicable settlement of their dispute or avoid future conflicts with the assistance of a neutral third party, the mediator. The mediator facilitates the exchange of information and perspectives between the parties and encourages them to explore solutions that meet their needs and interests. Unless specifically requested by the parties, the mediator does not give his or her own views (as would an expert) and abstains from making proposals (as would a conciliator).' This is an example of how mediation is distinguished from conciliation in some civil law jurisdictions, which can be useful for international IP disputes.

might address their subjective needs, concerns and interests). The IP mediator may also take into consideration the personal chemistry of the members of each team and reorganise them into smaller teams, taking cultural factors or mutual professional interests into account and helping to build personal working relationships within these groups.

The IP mediator helps the parties to realise that their needs and interests may not necessarily be in competition with one another but that, on the contrary, there may be opportunities to 'expand the pie' by looking at the IP rights involved in the dispute in terms of different business sectors or their potential for generating revenues in different ways or countries. They can encourage the disputants to understand different cultural perspectives regarding applicable norms, without having to evaluate who is right or wrong, and encourage the parties to work through certain hypotheses to find solutions that work for both of them.

Needs and interests often turn out not to be in competition when viewed from this perspective. It is even common for IP disputants to have complementary technologies, know-how or access to customers whose interests may converge and may be better served by working cooperatively rather than competitively.

Most IP disputants have the same needs and interests: to increase revenues, decrease costs, retain key employees and maintain good reputations or brands. They may have a mutual interest in creating barriers to entry for competitors, but markets can also be reorganised by industry sector or geographically, where the disputants may have different operational strengths or weaknesses. This can lead to increased sales or royalties, reduce the needs for capital expenditure and enable both disputants to benefit from better distribution channels in other countries.

Nothing is irrelevant in mediation. Emotions, relationships, quality of life, stress, fears, values, personal needs and interests (e.g., impacts on careers or personal lives) are just as relevant as issues of fact or law. This does not mean that norms have no importance at all in IP mediation. It will still be useful for the IP mediator to know the relevant industry and sector, and even the applicable laws, technologies, products, services and competitive landscape as they can be useful benchmarks by which to assess possible options (although not to recommend options or for the mediators to provide their own views regarding how these norms should be applied). The mediator can ask open questions to explore whether the disputants have considered and discussed different options, and what the consequences of different outcomes might be for them in the future. The legal syllogism can still serve as a benchmark, but only to assess whether the partners have co-created a solution that is better than or equal to what they might have obtained through litigation or arbitration.

IP mediation can also happen in stages, initially focusing on confidence-building measures, to help each partner understand and gain trust in one another, before exploring underlying opportunities that may exist in the future, such as cross-licensing or working together. Such avenues of thought often lead to surprising results that would never have been considered feasible initially or in evaluative processes. The journey can be more important than the destination initially targeted. An acrimonious IP dispute (even in cases that are at an advanced stage of litigation or arbitration) may turn into a joint venture, a co-branding or a cross-licensing opportunity, allowing all the disputants to increase their revenues, decrease costs and strengthen their brands or reputations.

This happens more often in practice than traditional IP practitioners may think possible. Even if the parties are not able to agree on dispositive issues and may need evaluative or adjudicative input on certain issues, they are still able to maintain good working relationships and align their shared interests when it comes to reducing the costs, time and complexities of reaching an outcome that will provide mutually acceptable closure. This is something a mediator can assist with as well, sometimes even bringing in an expert (with the participants' consent) to provide an opinion within mediation proceedings in a way that has been discussed and agreed to by the partners involved in the process.

Mediation versus conciliation

Mediation and conciliation may be considered as having different objectives: mutually acceptable compromises based on different initial opinions or positions, as opposed to optimal outcomes that can be win-win by targeting subjective needs and interests. For IP disputes, the neutrals should usually have some relevant industry experience and be able to understand the substantive issues at stake in both processes, but with different emphases. While objective parameters such as findings of fact or law may be the central focus of a conciliator, a mediator may seek to understand and take into consideration a broader range of cultural, personal, social and emotional factors.

While it is useful that both mediators and conciliators be informed of the relevant markets and the parties' respective market shares, this can be for different reasons. It may be to avoid inadvertent unlawful or unfair competition discussions (e.g., technology or pricing cartels), especially in certain industries, or to help the disputants explore together the impact of different options for key stakeholders, such as consumers, and whether the disputants wish to factor such considerations into their settlement discussions. There may also be conflicts where there are too many IP owners or IP rights involved to be able to apply norms consistently (e.g., in FRAND licensing disputes). In such cases, solutions may be found

by looking at a broader range of considerations, such as shared values, corporate social responsibility, industrial incentives and consumer needs. A possible solution may be viewed very differently when taking into consideration the future growth of the sector, and how to promote constant innovation and improvement in an open IP market, while ensuring a fair and reasonable return on investment for each party's respective contributions to the pool of relevant IP rights.

While the nuances between conciliation and mediation discussed in this section may seem trivial or somewhat conceptual or puritanical to some IP neutrals who are comfortable working both as mediators and as conciliators, the choice of process must also be considered not only from the neutral's perspective, but from that of the disputants themselves, especially if they are not familiar with the concept of ADR in general. Each process may have a different effect on social plasticity and emotional heuristics, affecting the quality of the dialogue between the disputants and their ability to hear and connect with one-another.

The tendency to conflate mediation and conciliation is not only a semantic source of confusion; it can lead to important distinctions in the way the process can impact the parties' behaviour and the solutions they are able to generate together.[24] Many non-adjudicative neutrals may contest this distinction on the grounds that they know when and how to act evaluatively and non-evaluatively, considering conciliation as simply being a form of evaluative mediation. Some mediators may even believe it is always best to swap hats between these two non-adjudicative styles, for example starting off as facilitative and non-evaluative in the beginning of the process, but becoming increasingly evaluative as time goes by, especially if a deadline was set by which the process should end, or the parties set themselves a fixed budget in terms of the mediator's time. Such mediators may also believe that it is their job to give a mediator's proposal at the end of the process, if the parties did not settle.

24 A good example of the confusion created by this conflation can be found in the 2018 UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation. While the definition of 'mediation' in Article 1.3 of the Model Law clearly states that it is 'a process, whether referred to by the expression mediation, conciliation or an expression of similar import, whereby parties request a third person or persons ("the mediator") to assist them in their attempt to reach an amicable settlement of their dispute', Article 7.4 of the Model Law clearly states: 'The mediator may, at any stage of the mediation proceedings, make proposals for a settlement of the dispute', which is something only a conciliator should be doing. Fortunately this language does not appear in the United Nations Convention on International Settlement Agreements Resulting from Mediation (New York, 2018) (the Singapore Convention on Mediation).

Recent findings from social and brain sciences, however, support treating conciliation and mediation as separate processes. Scientists are beginning to understand and explore such concepts as social and emotional plasticity, and the different innate patterns of thought or heuristics that can be preconsciously triggered to limit or enhance cognitive reflection. Mediation and conciliation are likely to impact group dynamics and rational thought processes very differently when considered from this perspective.

It is only in recent years that functional magnetic resonance imaging studies have been available to study functional neural plasticity in the human brain, associated with different emotional states, attention orientation and social heuristics, such as empathy or compassion (or the participants' inability to feel empathy or compassion for one another). Different networks seem to be unconsciously activated in the human brain, when people are primed to feel 'in-group' as opposed to 'out-of-group', leading to very different outcomes.[25] This is a new area of science, and the results and their implications for commercial dispute resolution are already surprising.

If parties are unconsciously primed by an IP conciliator to think of each other as separate groups, out-of-group heuristics are likely to be activated. This leads to innate patterns of thought that can reduce helping behaviour and increase aggressive behaviour, which is associated with greater feelings of distress, negative emotions and social disconnectedness. Different parts of the brain, such as the anterior cingulate cortex or the anterior insula appear to be involved in the metabolism of oxygen or glucose in those cases.

In IP mediation, however, if the parties are primed to think of each other as partners seeking a mutually acceptable outcome (as opposed to an equally

25 For an interesting consideration of human social plasticity and 'in-group' versus 'out-of-group' behavioural patterns in this context, see O Klimecki, 'The plasticity of social emotions', *Social Neuroscience*, Vol. 19, No. 5 (2015), pp. 466–73 and O Klimecki,'The Role of Empathy and Compassion in Conflict Resolution', *Emotion Review*, Vol. 11, No. 4 (2019), pp. 1–16, which provide new insights into how mediation and conciliation may prime different heuristics and pro-social as opposed to antisocial patterns of behaviour. In H Rafi, F Bogacz, D Sander and O Klimecki, 'Impact of couple conflict and mediation on how romantic partners are seen: An fMRI study', *Cortex*, Vol. 130 (2020), pp. 302–317, neuroscientists studied romantic couples trying to resolve recurring disputes through negotiation and mediation. While negotiation was very effective, mediation provided even greater settlement rates and satisfaction ratings, with less perceptions of unresolved remaining issues. The presence of a non-evaluative mediator seemed to activate the nucleus accumbens, an area of the brain linked to reward circuits in the brain, including optimism and problem-solving. This may have significant implications for IP disputes as well.

unhappy compromise), an in-group script can be triggered, which may lead to greater helping behaviour, less aggressive behaviour, greater feelings of compassion and positive emotions, and a sense of social connectedness between the disputes. The participants are likely to engage in deeper thinking and think creatively, responding better to one another's non-verbal cues.

A neutral simply swapping hats between mediation and conciliation without the express prior understanding or approval of the disputants about these different processes, and especially the benefits of working in-group or out-of-group, may prevent the disputants from having true party autonomy and self-determination when selecting or designing their own ADR processes. Not discussing such nuances up front with the disputants and letting each ADR neutral simply decide for themselves when to be facilitative or evaluative can have unintended consequences and may adversely impact the participants' cognitive abilities or willingness to engage in empathetic or compassionate discussions with one another, even if this may all be subconscious or pre-conscious.

Emotions often reflect unmet needs. The stronger the emotion, the greater the unmet need. Many inventorship or authorship disputes are based on personal needs, such as personal recognition of who contributed what or who should be given greater credit. This is not only about financial compensation, but personality traits and a subjective sense of justice. Co-ownership or cross-licensing solutions may turn out to be better resolved by approaching outcomes cooperatively, rather than assuming a competitive 'winner takes all' mindset from the beginning, especially if the IP assets at stake may be vulnerable.

The IP mediator's role can, therefore, be distinguished from that of the IP conciliator, not only as focusing on different issues and objectives, as outlined above, but also as priming in-group scripts of behaviour that trigger greater pro-social behaviour, such as cooperation, a desire to be helpful and reduced aggression. It can also trigger mirror neurons and mental attribution systems differently, generating greater compassion or empathy between the disputants, and enhance reward circuitry and the ability to find new solutions. This also avoids more competitive or out-of-group heuristics from being activated, which can hijack conciliations, leading to lower settlement rates.

Evaluative processes and discussions can easily trigger out-of-group scripts, especially if parties feel they need to develop a coalition with the conciliator, and caucuses are used to do robust reality testing, regardless of the disputants' ongoing trust and willingness to work with the same IP neutral. These will impact how the parties perceive and consider one another's proposals in ways that they may

not be consciously aware of.[26] Mediation is, therefore, particularly useful in highly emotional disputes or where profound cultural differences may be at play, which are common attributes in IP disputes.

Understanding and discussing these procedural differences early on can lead to very different choices when jointly selecting or designing an optimal ADR process. Looking at process design from a social, emotional and cognitive perspective allows greater choice, party autonomy and informed consent.

Combining conciliation and mediation

Mediation and conciliation are not mutually exclusive. Combining them as part of a 'med-con' or 'co-mediation' process with two neutrals (one acting as a mediator and the other as a conciliator) may be particularly beneficial in IP disputes.

Although appointing two non-adjudicative neutrals may easily be perceived as simply adding costs as compared to a traditional IP mediation or conciliation, these additional costs are negligible given the added value and satisfaction such combined proceedings have the ability to provide. Med-con processes are likely to generate settlement rates greater than 90 per cent based on anecdotal reports of the use of such combined processes in the Netherlands in the field of labour disputes. They are also likely to provide greater satisfaction both to the disputants and to their advisers, especially traditional IP practitioners.

This combination provides both the opportunity to consider and analyse traditional issues of fact and law that lawyers are comfortable addressing, and to take into consideration the participants' subjective needs and interests (which lawyers may be less experienced in focusing on). While one person could have the cognitive prowess to play both roles, swapping hats between the role of conciliator and mediator, there is likely to be a different impact on emotional and social plasticity when two separate neutrals work together. It is natural to seek to create coalitions with a single person who will be perceived to act at some stage as a conciliator (priming out-of-group behaviour between the participants). There is no purpose, however, in seeking to build such coalitions with a mediator, who can

26 For further discussion of some of these considerations, see J Lack, 'A mindful approach to evaluative mediation', *Mfn Tijdschrift Conflicthantering*, No. 3 (2014), pp. 18–23 and J Lack and F Bogacz, 'The Neurophysiology of ADR and Process Design: A New Approach To Conflict Prevention And Resolution?', *Cardozo Journal of Conflict Resolution*, Vol. 14 (2012), pp. 33–80. It should be stated, however, that this field is still in its infancy, and great caution must be applied when considering if and how to apply some of these ideas. Suffice it to say that conciliation and mediation may not only differ procedurally, but also in terms of the outcomes they may generate.

never be considered as a potential threat, given that they will not be evaluative if a conciliator is also present.

The mediator in a med-con process can, therefore, help the participants reflect on the quality and flow of information, promoting pro-social and in-group behaviour, without having to focus as much on the substance or the legal norms. Such a combined process holds great promise for resolving IP disputes in a faster, cheaper way, and it is better than solely resorting to adjudicative IP proceedings.

Implementing mixed-mode ADR: benefits of combining processes

Adjudicative and non-adjudicative processes such as mediation, conciliation and arbitration are fundamentally compatible and complementary.[27] Taking into consideration procedural precautions to prevent a mediation from adversely affecting the recognition and enforceability of an arbitral award under the New York Convention (e.g., by ensuring that information heard by a mediator or conciliator in a caucus is never shared with an arbitrator), they may be combined sequentially, in parallel or as integrated processes, as indicated in Figure 2. Independent of the time and costs savings, there are a number of additional benefits to be considered by combining such processes to design bespoke mixed-mode processes, especially for complex IP disputes.[28]

Distinct topics and issues (especially those involving subjective needs, interests and concerns looking to the future, or corporate motivations or strategies) can be carved out of adjudicative IP processes. Courts or tribunals may often wish to create mediation or conciliation windows during IP proceedings, not only to encourage the parties to settle but also to discuss and consider additional considerations. While IP tribunals may invite disputants to meet with a non-adjudicative neutral (e.g., to discuss evidential issues, the ranges of royalty rates to be applied or to jointly identify the key dispositive issues they would like to have adjudicated), they are unlikely to do so. They are often not comfortable raising or proposing such proceedings themselves, for fear that such a proposal might be perceived as compromising their impartiality or willingness to tackle their own mandate themselves, or because they fear hearing things that they should not take into consideration. It is instead for the disputants, their counsel and advisers to seize those initiatives.

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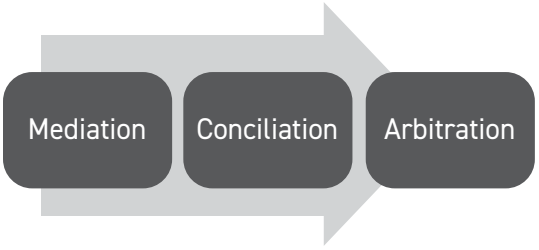
27 R Dendorfer and J Lack, 'The Interaction Between Arbitration and Mediation: Vision v Reality', *Dispute Resolution International*, Vol. 1 No. 1 (June 2007), pp. 73–98.

28 J Lack, 'Appropriate Dispute Resolution (ADR): The Spectrum of Hybrid Techniques Available to the Parties', in A Ingen-Housz (ed.) *ADR in Business, Practice and Issues Across Countries And Cultures*, Kluwer Law International (2011), pp. 339–79.

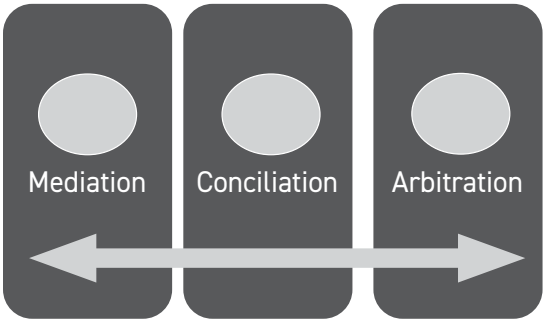
Figure 2: Considerations when designing mixed adjudicative and non-adjudicative processes

Process design and possible combinations



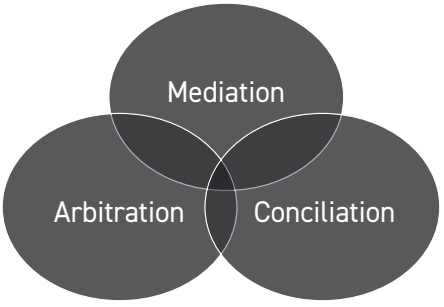
Sequential

- Med-arb
- Arb-med
- Windows
- Arb-med-con-med-arb
- Consent awards



Parallel

- Concurrent med/arb
- Carve-outs
- Shadow mediation
- Partnering



Integrated

- MEDALOA
- Dispute resolution boards
- Standing or standby neutrals
- Combined neutrals

Possible drivers

- Parties' needs and interests
- Certainty of outcome
- Costs
- Time and deadlines
- Relationships
- Applicable law(s)
- Languages
- Skill sets
- Venue and distances
- Institutional rules
- Nationalities and cultures
- Counsel
- Neutrals (roles and numbers)
- Availabilities
- Advisers and experts
- Confidentiality
- Discovery and disclosure
- Implementation
- Recognition and enforcement

The data from the GPC Series confirmed a growing interest in the use of mixed modes for resolving commercial disputes. As a result, a tripartite task force was set up by the College of Commercial Arbitrators, the International Mediation Institute (IMI) and the Straus Institute for Dispute Resolution at the Pepperdine School of Law (the Mixed Mode Taskforce), comprising seven working groups.

The first report of the Mixed Mode Taskforce was reported in May 2021 and can be found on IMI's website.[29] Its seven working groups identified five key procedural drivers for resolving commercial disputes: costs, time, relationships, self-determination and enforceability.

This report is likely to be of interest to IP disputants, especially since the Singapore Convention on Mediated Settlement Agreements came into force in September 2020.[30] The Singapore Convention provides broad and far-reaching enforceability provisions for mediated settlement agreements. It has already been signed by 55 signatory states, including leading IP jurisdictions, especially in the field of new technologies (e.g., Brazil, China, India, Israel, Singapore, South Korea, Turkey and the United States).[31]

The Singapore Convention filled a gap that existed between the New York Convention on arbitration and the Hague Convention Judgments Convention. As such, given some of the concerns raised by public policy exceptions to the extraterritorial enforcement of certain arbitral awards in some IP cases, and the narrow terms of reference that some IP arbitral tribunals may feel they are bound by, it may be judicious for IP disputants who are seeking internationally enforceable settlement agreements to initiate mediation and arbitration proceedings in parallel, and include in a mediated settlement agreement whatever cannot be included in an arbitral consent award.

Unlike awards or judgments that may be judicially reviewed, the logic of a mediated settlement agreement is not something courts or tribunals are competent to probe. The only questions will be whether the settlement agreement was obtained with the help of a bona fide mediator and whether it is clear on its face.

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29 IMI, 'Mixed Mode Task Force', www.imimediation.org/about/who-are-imi/mixed-mode-task-force. See also www.innovadr.com/useful-info. (URLs accessed 9 May 2024.)

30 United Nations Convention on International Settlement Agreements Resulting from Mediation.

31 United Nations Commission on International Trade Law, 'Status: United Nations Convention on International Settlement Agreements Resulting from Mediation', https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements/status (accessed 9 May 2024). As at 9 May 2024, the Singapore Convention has been ratified by 14 countries: Belarus, Ecuador, Fiji, Georgia, Honduras, Japan, Kazakhstan, Nigeria, Qatar, Saudi Arabia, Singapore, Sri Lanka, Turkey and Uruguay.

Disputants also typically share the same IP procedural interests in most IP disputes, such as spending as little time as possible on disputes, reducing the time to reach outcomes, preserving good relationships and preventing conflicts (and especially their costs) from spiralling or escalating further. Disputants usually prefer to treat the root causes of a conflict and not only its symptoms, which is one of the key benefits of mediation as compared to other dispute resolution processes.

Non-adjudicative processes should not be regarded as alternatives to arbitration or litigation but as complementary adjuncts. They are capable of catalysing faster, cheaper and better outcomes synergistically. This is true for institutional and ad hoc proceedings. A number of institutions already offer model clauses providing for mediation followed by arbitration or, as in the case of the Rule 9 of the Arbitration Rules and Mediation Procedures of the American Arbitration Association (AAA), or in the case of the Singapore International Arbitration Centre, incorporating mediation as part of arbitration proceedings.[32]

Some other mediation organisations are setting up new mixed-mode advisory services. For example, in May 2022, the International Institute for Conflict Prevention and Resolution set up a new pilot programme for resolving business disputes based on the findings of the Mixed Mode Taskforce.[33] In July 2023, the International Chamber of Commerce (ICC) also issued a new report and guide to drive thought leadership in dispute prevention and resolution, which also promote greater consideration and use of mixed modes.[34] This is something that WIPO has been encouraging for many years for IP disputes, as discussed below.[35]

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32 For two publications released in recent years on the Singapore Convention and its future applicability, see N Alexander and S Chong, *The Singapore Convention on Mediation: A Commentary*, Wolters Kluwer (2019) and H Abramson, *Singapore Mediation Convention Reference Book*, Benjamin N. Cardozo School of Law (2019).

33 Press Release, International Institute for Conflict Prevention and Resolution, 'CPR Launches Pilot Program For Resolving Business Disputes' (26 May 2022), https://drs.cpradr.org/about/press-releases/2022-05-26-cpr-launches-pilot-program-to-resolve-business-disputes (accessed 9 May 2024).

34 For copies of these two ICC documents, see www.iccwbo.org/news-publications/arbitration-adr-rules-and-tools/new-report-and-guide-to-drive-thought-leadership-in-dispute-prevention-and-resolution (accessed 9 May 2024). They largely incorporate and build on the recommendations of the Mixed Mode Taskforce.

35 For model escalation clauses including mediation and arbitration, the following serve as good examples: WIPO (www.wipo.int/amc/en/clauses/med_arb); ICC model mediation clause D (www.iccwbo.org/publication/suggested-icc-mediation-clause-english-version); Swiss Arbitration Centre model mediation clause 1 (www.swissarbitration.org/centre/mediation/mediation-clauses); and the International Centre for Dispute Resolution of the American Arbitration Association (AAA-ICDR) (www.adr.org/Clauses). Rule 9 of the

Rather than leave courts or arbitral tribunals to decide between competing positions or expert opinions in IP disputes, organising non-adjudicative sessions with the help of a neutral can help clarify and narrow the zone of potential settlement, exclude certain risks and possibly enable the parties to amicably identify and resolve key dispositive elements of the dispute faster. These sorts of discussions usually cannot be discussed in a tribunal's presence.

Deciding whether to do so, however, requires an appreciation not only of why, but also when and how to combine such non-adjudicative windows into mixed-mode ADR processes, and how to effectively combine them with arbitration or litigation to reach faster, cheaper and better outcomes, especially for IP disputes. This presupposes, however, understanding of the full range of ADR options, some of the key differences between different types of processes (e.g., mediation versus conciliation) and process design considerations.

Arbitration could also be combined with a med-con process to generate a 'med-con-arb' process. Rather than appointing a three-person arbitral tribunal, as is often the case for high-value commercial disputes, disputants may wish to consider saving time and money by appointing a sole arbitrator who can also act as a conciliator (if they do not attend caucuses) and can work together with a mediator, or by jointly appointing a three-person arbitral tribunal comprising three ADR neutrals: a chair (who would only act as an arbitrator and would not participate in any caucuses) and two 'wing arbitrators' (one who may act as a mediator and the other as a conciliator). The chair would ensure the ongoing quality and enforceability of a final arbitral award, which could include a consent award resulting from any mediation or conciliation sessions led by the two other wing arbitrators. It would be wise, however, to avoid caucusing separately with the parties if the conciliator and mediator intend to continue to function as arbitrators and participate in the final arbitral award.

AAA's Rules provides that mediation shall always be started in parallel with arbitration whenever the value of a dispute exceeds US$75,000 (which is almost inevitably the case in IP disputes) unless a party opts out of doing so. This provision was extended to the AAA's international ICDR International Arbitration Rules in 2021, where a new Article 6 was added stating that 'Subject to (a) any agreement of the parties otherwise or (b) the right of any party to elect not to participate in mediation, the parties shall mediate their dispute pursuant to the ICDR's International Mediation Rules concurrently with the arbitration' The Singapore International Arbitration Centre and the Singapore International Mediation Centre have also combined to offer a joint arb-med-arb process (see www.siac.org.sg/model-clauses/the-singapore-arb-med-arb-clause). (All URLs accessed 9 May 2024.)

Caucusing may still be possible with the mediator or with the conciliator in such cases, however, if certain precautions and safeguards are taken. These include signed waivers consenting to a conciliator or mediator continuing to work as an arbitrator following a caucus, or ensuring either that no information heard in caucus may be used or taken into consideration during the arbitral tribunal's discussions and determinations, or ensuring that information heard in caucus may only be relied upon if it was subsequently disclosed to all the parties, who will each have been given the opportunity to respond to it in accordance with due process, the *audi alteram partem* principle and the adversarial principle.[36]

Empirical support and data

There is a wide range of empirical data in existence demonstrating that combining adjudicative and non-adjudicative processes will lead to faster, cheaper and better outcomes in over 70 per cent of IP disputes.

WIPO is a financially independent agency of the United Nations, with 193 member states and offices in Algeria, Brazil, China, Japan, Nigeria, Russia, Singapore and Switzerland, where it has had its headquarters ever since it was created in 1967 in Geneva.[37] Its services and statistics confirm the existence of the IP paradox and provides data on which recommendations can be made for change and action. Foreseeing the importance of globalisation, new technologies and the rising economic importance of intellectual property for entities of all shapes and sizes in low-income, middle-income and high-income countries, WIPO created the Mediation and Arbitration Center in 1994.[38] Since then, IP rights have become ubiquitous, affecting international commerce, all industries and all consumers, especially in Asia. The Center accordingly opened up offices at Maxwell Chambers in Singapore in 2010, in addition to its Geneva office, in anticipation of a large increase in cases.

36 These considerations are well explained and set out by the consultation document issued by the Centre for Effective Dispute Resolution's Commission on Settlement in International Arbitration in 2009, chaired by Lord Wolf of Barnes and Professor Gabrielle Kaufmann-Kohler. See www.utcle.org/conferences/IA09/get-asset-file/asset_id/14178 (accessed 9 May 2024).

37 WIPO, 'Inside WIPO', www.wipo.int/about-wipo/en (accessed 9 May 2024).

38 WIPO, 'Development of WIPO's Dispute Resolution Services', www.wipo.int/amc/en/history (accessed 9 May 2024).

Today, the WIPO Mediation and Arbitration Center offers a broad range of procedural choices, including mediation, arbitration, expedited arbitration and expert determination.[39] It has developed a variety of online case administration tools for IP disputes, including an electronic case facility system to facilitate online dispute resolution and videoconferencing services.[40] While WIPO does not distinguish between mediation and conciliation, and specifically includes conciliation in its definition of mediation, it provides a full range of ADR solutions.[41]

WIPO has also adapted its procedural options to meet the needs of specific industry sectors, such as art, energy, fashion, entertainment, franchising, information and communication technologies, financial technology, FRAND licensing, life sciences, research and development (R&D), technology transfer, sports and trade fairs.[42] Despite the fact that hundreds if not thousands of new IP litigation proceedings are filed in almost every medium-income to high-income country since 2009, very few of those cases have been consolidated or resolved by international arbitration or mediation before WIPO, despite it having an enviable list of IP experts and ADR neutrals.

Since January 2013, WIPO has administered over 2,800 mediation, arbitration and expert determination ADR cases, with average settlement rates of 70 per cent using mediation and 33 per cent using arbitration. In 2023 alone, it was involved in the resolution of 679 IP disputes, which represents a 24 per cent increase from 2022 and a 280 per cent increase over the past five years.[43] Using WIPO's online case administration tools, the WIPO Center observed that settlement rates in mediation cases increased to 78 per cent.[44] Combining these statistics suggests that when mediation and arbitration are combined, the settlement rate should increase to above 82 per cent.

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39 WIPO, 'WIPO ADR Procedures', www.wipo.int/amc/en/center/wipo-adr.html (accessed 9 May 2024).

40 WIPO, 'WIPO Online Case Administration Tools', www.wipo.int/amc/en/eadr/index.html (accessed 9 May 2024).

41 The distinction between mediation and conciliation is something that may be worth thinking about when interviewing prospective neutrals for a WIPO mediation process.

42 WIPO, 'WIPO Alternative Dispute Resolution (ADR) Services for Specific Sectors', www.wipo.int/amc/en/center/specific-sectors (accessed 9 May 2024).

43 WIPO, 'WIPO Caseload Summary', www.wipo.int/amc/en/center/caseload.html; WIPO, 'WIPO ADR Highlights 2023', www.wipo.int/amc/en/center/summary2023.html. (URLs accessed 19 May 2024.)

44 WIPO, 'WIPO Caseload Summary ', www.wipo.int/amc/en/center/caseload-2021.html (accessed 9 May 2024).

This data is supported by other ADR centres and practitioners worldwide, who repeatedly provide the same statistics around the world, despite having different cultural approaches to mediation, conciliation and arbitration. They report settlement rates of 70 per cent to 85 per cent for non-adjudicative processes (higher if such processes are combined with adjudicative processes), time frames that are significantly faster than litigation or arbitration (usually within one to two days over a three-month period), costs that are considerably cheaper (1 per cent to 5 per cent of the value of the dispute depending on its size and complexity) and higher satisfaction ratings.[45]

Table 1 below shows a theoretical average cost reduction of 40 per cent if mediation and arbitration proceedings were to be combined, based on a number of publications.[46] These average costs are expressed as a percentage of the value of

45 For example, in 2009, the ACB Foundation in the Netherlands reported 92 per cent satisfaction ratings and a 79 per cent settlement rate for commercial disputes that have an average value greater than US$5 million, which were usually completed within four half-day sessions (i.e., two days on average). Including legal and institutional fees, this comes to 1.3 per cent of the average value of a dispute. A 2013 online report by America's Small Business Development Network (America's SBDC) claims average settlement rates of 85 per cent, and claims that mandatory mediation is only 10 per cent less effective than voluntary mediation (i.e., 75 per cent settlements even when the parties initially did not wish to mediate). For the source of these data and for a broader discussion on when, why and how to consider using negotiation, mediation, conciliation, arbitration or other ADR proceedings, see J Lack, 'When to Use Negotiation, Litigation, Arbitration, Conciliation and/or Mediation For Commercial Disputes?' (presentation) and American's SBDC, 'Is Mediation Your Best Option?' (23 Oct. 2013), www.americassbdc.org/is-mediation-your-best-option (accessed 9 May 2024). The Swiss Chamber of Commercial Mediation (SCCM) reported 67 per cent settlement rates in a 2021 survey (which increased to 77 per cent when using mediators with prior experience in more than five cases); the Paris Mediation and Arbitration Centre (CMAP) reported in 2021 a 60 per cent settlement rate; the Tenth Mediation Audit (2023) of the Centre for Effective Dispute Resolution (CEDR) reports 72 per cent of cases settling in one day (CEDR tending to have one-day sessions) and 20 per cent settling soon thereafter (i.e., a total settlement rate of 92 per cent); and the AAA-ICDR reports historical settlement rates exceeding 85 per cent. See SCCM website, www.skwm.ch/?lang=en; CMAP, 'Baromètre CMAP: Médiations réalisées en 2021; Arbitrages réalisés en 2020 et 2021', www.cmap.fr/wp-content/uploads/fichiers/barometre_2021.pdf; CEDR, 'The Tenth Mediation Audit', www.cedr.com/wp-content/uploads/2023/02/Tenth-CEDR-Mediation-Audit-2023.pdf; and ICDR, 'Guide to Drafting International Dispute Resolution Clauses', www.icdr.org/sites/default/files/document_repository/ICDR_Guide_Drafting_Clauses.pdf (accessed 9 May 2024).

46 For the data on which these numbers are based, see J Lack, 'When to Use Negotiation, Litigation, Arbitration, Conciliation and/or Mediation For Commercial Disputes?' (presentation) at slides 13–17. The data are based on the author's own calculations and estimates from the sources cited in that presentation. See also

the dispute and have been calculated by taking the mean averages of the costs of mediation and arbitration on their own, which are likely to be far too conservative. The savings are likely to be considerably higher in reality and also lead to significantly higher time savings and satisfaction ratings.

Table 1: Average costs of arbitration versus mediation versus mixed-mode processes

	World Bank Data	ACB (NL) Data	McIlwrath & Savage		McLaughlin & Alexander	Average (unweighted)
			Civil Law (Ave)	Common Law (Ave)		
Value of dispute (US$)	200,000	5 million	10 million	10 million	20 million	9 million
Estimated global cost (arbitration) (US$)	34,500	450,000	556,500	1,428,500	3,027,000	1.1 million
Arbitration cost (% of value)	17.3	9	5.6	14.3	15.1	12.2
Estimated global cost (mediation) (US$)	9,488	65,000	150,000	325,000	266,000	163,098
Mediation cost (% of value)	4.7	1.3	1.5	3.3	1.3	2.3
Hypothetical combined costs (% of value for (med+arb)/2)	11	5.2	3.5	8.8	8.2	7.3
Theoretical % of savings using mixed mode (%)	36.2	42.8	36.5	38.6	45.6	40.1

This author's assessment is that non-adjudicative processes combined with adjudicative processes will lead to significantly faster, cheaper and better outcomes in more than 90 per cent of IP disputes. This is particularly the case when combining mediation with arbitration, where the ADR neutrals can work with the parties, both separately and together, to explore and take into consideration a broader vision of the dispute, including the participants' procedural interests, needs, concerns, motives and perspectives early on. IP mediators can take into

www.innovadr.com/useful-info/#fcb, indicating why ADR should lead to faster, cheaper and better outcomes in most cases.

consideration factors that IP arbitrators cannot, and a mediated settlement may be just as enforceable, whether presented as a settlement agreement under the Singapore Convention or as a consent award under arbitration.

As a result of such statistics, new third-party funding mechanisms are beginning to appear to help parties diagnose, design, implement and finance mixed-mode ADR processes on a 'no settlement, no fee' basis. Such parties believe it is possible to resolve IP disputes within three to six months, at less than one-third of the costs of going to trial or arbitration, with settlement rates greater than 80 per cent. Fees are capped at one-third of the anticipated costs of going to trial, which provides savings of at least two-thirds for the disputants, which can be shared with counsel, who can benefit from an early settlement bonus as an additional incentive to help earlier resolution of disputes for their clients.[47]

Resistance to non-adjudicative processes

Most IP practitioners are in favour of the concept of mediation or conciliation; however, they often provide reasons for not using mediation in specific cases where litigation or arbitration have already been initiated. This is based, however, on theoretical concerns and lack of personal experience, which are not supported by the statistics cited above.

A typical reason for not trying mediation is that the parties already tried to settle through negotiation and failed, so there would be no point in trying mediation. This suggests that negotiation and mediation are the same thing.

Recent experiments in neurosciences, however, demonstrate that they are not. Parties who have mediated tend to reach a significantly higher number of settlements than parties who only negotiated, are significantly more satisfied with the content and the process of their discussions in mediation than in negotiation, and have significantly lower levels of remaining disagreements post-mediated discussions as compared to parties who only negotiated.[48] Mediation appears to trigger not only different prosocial and in-group dynamics as discussed with respect to

47 D Kovacevic, 'InnovADR enters the market with an innovative approach to financing dispute resolution', Litigation Finance Insider (5 May 2024), https://litigationfinanceinsider.com/p/innovadr-enters-market-innovative-approach-financing-dispute-resolution (accessed 1 July 2024).

48 F Bogacz, T Pun and O Klimecki, 'Improved conflict resolution in romantic couples in mediation compared to negotiation', *Humanities and Social Sciences Communications*, Vol. 7, Article No. 131, 2020.

conciliation above, but, as also described above, it has also been associated with increased activity in the nucleus accumbens, a key region in the brain's reward circuitry system, as compared to negotiation.[49]

Another reason given for not trying ADR in IP disputes is that it likely to be premature to negotiate until discovery has been completed, or some further assessment of the case has taken place and its merits are better understood. This inherent reluctance to try mediation early on in IP disputes may be based on the misconception of mediation and conciliation as being the same thing, as discussed above. If the disputants think mediation is an evaluative process like conciliation, they may be justified in feeling they need to know the strengths and weaknesses of their own cases better, as well as that of their opponents, before sitting down to the negotiation table to discuss the relative merits of their case with the help of a neutral facilitator.

But mediation (unlike conciliation) does not depend on knowing the strengths or weaknesses of one's case – only one's future needs and interests, both procedurally (e.g., reducing time and costs to reach outcomes) and substantively. It is possible even in the early stage of conciliation to assume, for the sake of argument, a 50:50 or 60:40 win–lose probability rate for the parties in opening discussions, in view of global 'win-rate' IP litigation statistics. Putting relevant merits aside early on enables the disputants to discuss their mutual procedural needs, interests and concerns such as budgetary and time constraints, which can already be a basis for common ground and trigger an in-group pattern of behaviour.

Postponing the use of mediation to later stages in proceedings may also be counterproductive. While IP disputants are usually open to the idea that IP disputes are inherently unpredictable, the more time and money they spend gathering evidence, focusing on their cases' strengths and weaknesses, the more likely they are to fall prey to cognitive biases, such as anchoring, confirmation bias, sunk cost fallacy, in-group bias, belief bias, groupthink, optimism bias and reactance.[50]

This makes it increasingly difficult to shift to an interest-based dialogue as opposed to a positional debate as the case proceeds, except for at the eve of trial or if additional external pressure is placed on the disputants. So much money and time have already been spent by that stage that reputations (including those of the external advisers) are felt to be on the line, and settlements are dominated by fear and loss aversion. Late-stage compromises before litigation can also lead to irretrievably damaged relationships, leaving the parties dissatisfied with one

49 H Rafi et al., see footnote 25.

50 For a list of 24 of these biases, see www.yourbias.is (accessed 9 May 2024).

another and having only debated a very narrow range of topics. They may never have discussed their views of the market or one another's needs and interests, and what they could do cooperatively instead of only competitively. Focusing only on an application of the legal syllogism is a lost opportunity in such cases.

Another frequently given reason is that agreeing to mediation may be (mis)construed as a sign or weakness or a willingness to compromise. This, however, once again suggests a common misconception about the differences between mediation and conciliation. Mediation is not about compromising, but exploring faster, cheaper and better options, even if litigation or arbitration proceedings continue to exist in parallel.

The future of IP dispute resolution

IP dispute resolution is likely to become increasingly complex and expensive. Although artificial intelligence and new legal tech solutions may help to reduce some of the costs of litigation or arbitration, they are unlikely to produce reliable predictive analytics or reduce the uncertainties that surround adjudicative IP dispute resolution processes.

Despite the clear benefits of incorporating mediation into IP disputes, the adoption of mixed-mode ADR processes is unlikely to happen unless and until there is a paradigm shift, especially in the field of intellectual property. This shift needs to be led by IP owners and in-house IP counsel, as well as by IP judges and arbitrators. Judges and arbitrators can and should endorse the use of non-adjudicative processes themselves or provide incentives for doing so (e.g., refusing to award costs to a party who may have unreasonably refused to try a mediation or conciliation session earlier on).

An example of a rule that should be used with greater frequency and by more ADR centres is Rule 9 of the AAA's Arbitration Rules and Mediation Procedures imposing mediation by default.[51] There could be a greater use of mediation, expert determination and arbitration services in all IP disputes, a field that the AAA believes is particularly apt for such mixed-mode processes.[52]

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51 This provision has now been extended by the AAA to its ICDR Arbitration Rules as well. Article 6 (Mediation) of the ICDR's 2021 International Arbitration Rules now also provides: 'Subject to (a) any agreement of the parties otherwise or (b) the right of any party to elect not to participate in mediation, the parties shall mediate their dispute pursuant to the ICDR's International Mediation Rules concurrently with the arbitration.'

52 See the AAA's report '"Products of the Mind" Require Special Handling: Arbitration Surpasses Litigation for Intellectual Property Disputes' (2017).

Mediation is not a panacea. It may not always resolve substantive issues. It should, however, be used earlier on in all IP disputes, if only to help the parties discuss their procedural choices so that they can choose or design an optimal dispute resolution process and appoint the appropriate neutrals together. A process design facilitator, who can help the parties to focus initially on process issues, can be beneficial not only to help preserve good working relationships but also to explore how to save time, costs and avoid the conflict from escalating. This is the primary goal of utilising 'guided choice' processes using process design facilitators, as described below.

Using facilitators to design optimal processes

The choice and range of ADR processes may at first appear to be overwhelming to IP owners and counsel, especially those who are not yet familiar with the broad range of processes available and how to combine them. There are several ways of doing so quite easily, especially for IP cases, using the approach of a process design facilitator who can advise on setting up a 'guided choice' dispute resolution process.[53] This is a process by which a neutral process design expert or an ADR neutral with mediation and arbitration or litigation experience can be appointed early on in a complex commercial dispute to facilitate a discussion on procedural issues only (as opposed to substantive issues).

A guided choice process affirms the parties' autonomy and self-determination and allows them to generate an in-group mindset early on in terms of their shared desire to reduce their risks, costs, management time and expenses and to reach faster, cheaper and better outcomes. This is done by discussing and diagnosing the parties' procedural needs, interests and concerns, and how to prevent the dispute and its costs from escalating.

53 For more information on this process, see P M Lurie and J Lack, 'Guided Choice Dispute Resolution Processes: Reducing the Time and Expense to Settlement', *Dispute Resolution International*, Vol. 8, No. 2 (Oct. 2014), pp. 167–77 and P M Lurie and J Lack, 'The Seven Principles of Guided Choice Dispute Resolution Processes', *Who's Who Legal: Mediation 2014*. While early articles about guided choice processes often refer to the process design facilitator as a mediator, the term is no longer used to avoid possible confusion between the mediator who may subsequently be appointed to help resolve substantive issues, as opposed to the facilitator who initially helps the parties to discuss and align on procedural issues.

A guided choice process is a relatively simple seven-step process that permits IP disputants to discuss, shape and tailor their proceedings, with the ability to include adjudicative rulings with determinative opinions (e.g., arbitration or expert opinions). This can be periodically reviewed as the case evolves. The seven steps of a guided choice process are as follows:

- early use of mediation and a commitment to focus on process issues first, rather than substantive outcomes;
- confidential discussions between the process design facilitator with the disputants and their designated participants (as well as any other stakeholders, if so desired) to diagnose the conflict and help the parties diagnose the conflict and their procedural interests;
- tailored process design using option generation techniques based on the disputants' facilitated discussions and diagnostics;
- a code of conduct for any neutrals hired, setting principles of relevant information exchange in accordance with agreed evidence-sharing processes;
- anticipating and overcoming impasses;
- the ongoing role (if any) of the process design facilitator (even if the process is suspended once embarked on); and
- identifying and handling topics requiring expertise and evaluative input (binding or non-binding).[54]

The likelihood of success when using this process in IP disputes is already supported by WIPO's recent statistics regarding the Good Offices services its Arbitration and Mediation Center already offers, which comprise assisting prospective IP disputants with their procedural choices before deciding on any one type of ADR process provided by WIPO.[55] This includes going through a series of diagnostic checklists and flowcharts designed by WIPO to help identify the most appropriate dispute resolution process for each case.[56]

There has been a marked increase in the use of these Good Offices requests in recent years (more than 85 cases per year since 2019 and over 750 in total since 2011).[57] WIPO does not currently charge any fees for this service, which is particularly appropriate for small and medium-sized entities, artists, inventors,

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54 For more information on process design, especially in the context international IP disputes, see: J Lack and A Goh, 'The Importance of Process-Design when Selecting a Mediator for Cross-Border Disputes', *Who's Who Legal: Mediation 2019*.

55 WIPO, 'WIPO Good Offices', www.wipo.int/amc/en/goodoffices (accessed 9 May 2024).

56 See footnote 39.

57 See footnote 43.

entrepreneurs, start-ups, R&D centres, universities, museums, producers, collecting societies and other IP stakeholders.[58] This has led to an increase in post-dispute agreements to use WIPO ADR proceedings, as opposed to contractually-based ADR proceedings, where a previous dispute resolution clause existed.

The philosophy of guided choice process design is also supported by Article 14 of the WIPO Mediation Rules, which provides for the ability to use mixed-mode processes such as arb-med (arbitration with mediation) and mediation followed by last-offer arbitration (MEDALOA). While it is not the purpose of this chapter to explore specific mixed-mode processes, or whether the same neutral should be able or willing to swap hats, these two mixed-mode processes may be of particular interest for IP disputes where there are complex issues of quantum at stake.

The idea of arb-med for quantum issues is to first conduct a rapid and 'rough justice' arbitration of quantum issues, accepting that quantum calculations are usually more an art than a science. The arbitral tribunal then writes its finding (which could simply be a number) in an envelope, which is sealed pending the outcome of a mediation that is started subsequently. If the mediation does not settle by a specific date and time, the envelope is opened and becomes a binding award. The idea of such a process is to create pressure and an incentive to settle, taking into consideration what happened during the arbitral hearing but without knowing the outcome of that hearing.

The purpose of a MEDALOA process is likewise to create pressure for the parties to settle in view of discussions to date in the mediation. The parties make a binding offer at the end of the mediation process, which they consider to be the most reasonable for the other party to accept if the dispute did not settle. The mediator may then swap hats and select one of these final offers as a binding arbitral award. The settlements resulting from both of these processes can also be converted into consent awards that are enforceable under the New York Convention or written up as settlement agreements enforceable under the Singapore Convention.[59]

58 Good Offices Services from WIPO can be requested by filling out the form available on its website at www.wipo.int/amc-forms/adr/good-offices-services (accessed 9 May 2024).

59 For an article describing the arb–med process, see M Leathes et al., 'Einstein's lessons in mediation', *Managing IP* (July/Aug. 2006), pp. 23–26.

Conclusion

Most IP disputes are unlikely to be resolved effectively through standard litigation or arbitration alone. The integration of mediation at early stages offers a pragmatic solution, demonstrating potential for substantial time and cost savings, while enhancing outcome satisfaction for all parties involved. This approach aligns with the increasing recognition that non-adjudicative dispute resolution methods, such as mediation and conciliation, should not merely complement but be significantly integrated into adjudicative processes to catalyse better results.

Mediation, when used early, can address the broader dynamics of IP disputes, fostering more amicable resolutions and preserving business relationships. Given the high success rates and the reduction in costs associated with combined mediation and arbitration, it is economically sensible and strategically beneficial for disputants to consider these options. The evidence strongly supports the view that mixed-mode dispute resolution processes achieve more effective, efficient and satisfactory resolutions than traditional methods alone.

The question for IP disputants, as well as the IP litigation and arbitration community, should not be whether it is worth suggesting a mediation window in adjudicative proceedings, but whether the parties can afford not to try mediation in conjunction with adjudicative proceedings. Appointing a process design facilitator to guide the parties and their IP counsel in diagnosing and implementing a combination of process options early on is likely to lead to faster, cheaper and better outcomes in the overwhelming majority of cases. These combinations should greatly help to resolve the ADR paradox that IP disputants currently face.

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