Vive la resolution!

A WIPO survey into the attitudes of technology professionals reveals a growing appetite for alternative dispute resolution, says King & Spalding's **Jane Player**

The IP industry trend to consider a wider range of dispute resolution options is on the rise. While costs and time remain the prime concerns for the technology sector, recent research from the World Intellectual Property Organization's (WIPO) Arbitration and Mediation Center illustrates a gulf between litigation, arbitration and alternative dispute resolution (ADR) in handling these and other concerns.

The WIPO survey quizzed 393 technology experts from 62 countries across various IP-rich industries. These included sectors such as chemicals, consumer goods, electronics, IT, mechanical, pharmaceutical/biotechnology and telecoms. The participations were asked for their views on dispute resolution in domestic and international jurisdictions. Respondents were specifically asked to provide information on the dispute resolution clauses used in the technology agreements they concluded during the past two years.

The survey provides some interesting illustrations to the statement made in my previous article in *Intellectual Property Magazine* in March (2013) about the need to move from the rights-based approach to interests-based approach to dispute resolution in IP disputes. For example, the survey quotes a French IP lawyer saying that there is a trend away from one-off licensing of A to B, and towards multi-party know-how and IP arrangements in the context of bigger projects. It follows that IP-focused businesses and their lawyers have to adopt a wider range of options that would help parties to collaborate even at a point of conflict, including ADR.

Too long and too costly

As a rule, costs and time have always been the main factors in choosing dispute resolution options and WIPO findings are not an exception; 71% and 60% of the responses highlighted the respective concerns.

I discussed in the earlier article that in practice litigation and arbitration have both become too costly and take too long for commercial needs. The survey supports this statement and indicates that the market preferences are moving towards out-of-court dispute resolution mechanisms, wherever possible.

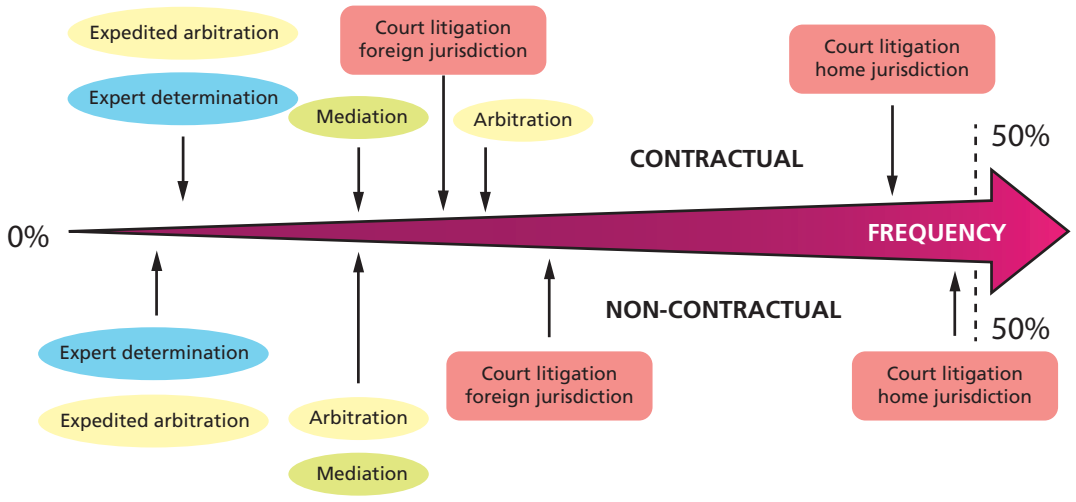
For example, even though WIPO found that court litigation was the most common stand-alone dispute resolution clause in almost a third of technological disputes (32%), it is also perceived to be the most expensive and time-consuming route. Almost half (47%) claim that domestic court litigation typically took between two and five years, with the average duration of around three years. The average legal cost of litigation in this instance amounted to (US)$475,000 to $500,000.

These figures increased when it came to litigation in a foreign jurisdiction. More than half (55%) said cases took at least between two and five years to be resolved, with the average duration creeping up to three-and-a-half years. The most dramatic increase came in legal costs, which averaged between $850,000 and $875,000, nearly twice the cost of home jurisdiction litigation. Around a third (32%) indicated that these costs typically surpass the $1m mark. These cases usually involve larger businesses engaged in larger disputes across numerous jurisdictions. The recent spate of "smart phone wars" across the globe shows the scale that such litigation can reach.

Arbitration cases were perceived as taking less time than litigation, with the average duration of a little more than one year (61% even said hearings typically lasted between six months and one year). While the timeframe is considerably less, the costs are relatively comparable. The average cost of arbitration was put between $400,000 and $425,000.

Mediation on the rise

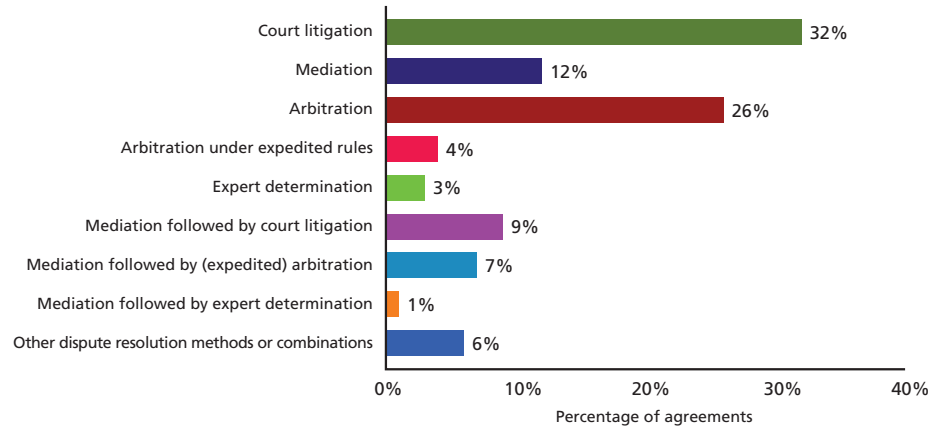
Lengthy timetables and increasing costs of litigation and arbitration encourage more clients to consider mediation at an early stage of a dispute, says a Canadian lawyer in the WIPO survey. Indeed, the vast majority of survey participants (91%) said that the costs of mediation typically did not exceed $100,000. The average mediation phase also



Relative use of court litigation, (expedited) arbitration, mediation, expert determination

ran for around eight months, with almost half (46%) claiming negotiations often took less than six months. In WIPO Center experience, mediation takes on average five months from start to finish and the costs of WIPO mediations amounted on average to $21,000.

The current trend in IP dispute resolution is that the use and knowledge of the advantages of mediation in terms of speed, costs and settlement rate is growing, according to a US litigation counsel quoted in the survey. Especially aware of ADR are internationally focused lawyers and clients, says a Swedish IP lawyer. His opinion is supported by the WIPO chart below that indicates that the mediation option is used almost as often as arbitration or foreign litigation.



Dispute resolution clauses included in agreements concluded by respondents in the past two years

The WIPO study confirmed our earlier thesis that finding a business solution is an important factor for those choosing mediation (53%). More and more businesses are willing to settle disputes not only to avoid costs but also to be able to refocus on the way forward for their core business, and in many cases meditation provides a facilitation tool for finding a business solution suitable for both parties.

Neutral forum

Neutrality of the forum has been listed as an important factor, especially in international disputes. 42% of WIPO survey respondents highlighted forum neutrality as an advantage of mediation (and arbitration) over litigation.

WIPO reports that mediation is only fractionally behind the two leaders, litigation (32%) and arbitration (30%), as the chosen dispute resolution clause in IP related agreements (29%). The use of mediation was either as a stand-alone dispute resolution mechanism (12%) or in combination with court litigation, (expedited) arbitration or expert determination (17%) (see chart below).

International Agreements – Considerations	Court Litigation Clause Used in +60% of Agreements	Mediation Clause Used in +60% of Agreements	Arbitration Clause Used in +60% of Agreements
Costs	69%	84%	58%
Time	48%	79%	64%
Enforceability	49%	37%	51%
Quality Outcome (including Specialization of Decision-Maker)	41%	37%	56%
Neutral Forum	25%	42%	42%
Confidentiality	21%	37%	31%
Business Solution	24%	53%	33%
Support Provided by Institution	- %	11%	18%
None in Particular (Standard Internal Practice)	12%	-%	2%
Setting Precedent	5%	11%	7%

Main considerations when negotiating dispute resolution clauses in international agreements

As indicated in the earlier article and supported by WIPO findings, hybrid mediations are increasingly popular, not least due to easy international enforceability of the final outcome. For example, an in-house counsel of a German company in electronics, energy, mechanical and transportation with staff of more than 10,000 described using a binding internal dispute resolution policy that includes clauses providing for negotiation as first step, an ADR mechanism such as mediation or expert determination as second step, and arbitration as final step.

When involved in court proceedings related to contractual IP issues, 29% of WIPO Survey respondents indicated that they had submitted a dispute to mediation before or during such proceedings. Similarly, in non-contractual IP disputes, 23% of respondents indicated that they had submitted a dispute to mediation.

Settlement rates in hybrid mediations are also on a rise. A selection of respondents said that of those disputes submitted to mediation before or in the course of court proceedings, more than 60% resulted in settlement, with 89% of respondents indicating that at least one such mediation reached that result. WIPO mediation reports a 69% settlement rate.

Overall, WIPO survey respondents signalled an increased use of mediation, either by itself or in combination with direct negotiations, (expedited) arbitration or court litigation and respondents perceive this mechanism for dispute resolution as particularly cost- and time-efficient.

The WIPO survey results support the conclusion that the time has come to consider the use of mediation and other ADR mechanisms for the resolution of modern IP disputes for IP-focussed businesses. Those which are eager to preserve client relationships and find cost-effective ways of dealing with disputes in a timely manner, allowing them to concentrate on their core business.

The full text of the report is available at www.wipo.int/amc/en/center/survey/results.html. All graphs and figures are sourced from WIPO Arbitration and Mediation Center, International Survey on Dispute Resolution in Technology Transactions.

Author

Jane Player is a partner in King & Spalding's disputes group and specialises in high value commercial claims often with an international client base.
Jane is also an accredited mediator and has been involved in a large number of mediations both domestic and international, particularly for the energy, IT/telecoms and life science sectors.