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Skipping Court: The Benefits of Using ADR for the Swift Resolution of IP and Technology Disputes in Australia and New Zealand

Ella Callanan[1]

Traditionally used in Australia and New Zealand as the preferred method for resolving disputes in the construction and infrastructure sectors,[2] today, alternative dispute resolution ("ADR") mechanisms are being explored in the region for the swift resolution of intellectual property disputes.[3] Based on party autonomy, ADR offers parties in intellectual property ("IP") and technology disputes greater control over the resolution process, facilitating a faster outcome compared to traditional court litigation. The versatile, confidential, and flexible nature of ADR mechanisms allows parties to tailor the process to suit their specific needs, thereby reducing both time and costs while promoting a faster resolution.

WIPO's Role in ADR for IP Disputes

Since its establishment in 1994, the World Intellectual Property Organization ("WIPO") Arbitration and Mediation Center ("WIPO Center") has played a key role in establishing ADR mechanisms and providing services to facilitate the resolution of IP and technology disputes globally. Headquartered in Geneva, Switzerland, with an additional office in Singapore, the WIPO Center was established to offer ADR options for private parties involved in IP or technology-related disputes. Its arbitration, mediation, and expert determination procedures focus on efficient time and cost management to deliver swift resolutions.[4] This approach is further supported by the WIPO Rules, which allow parties to tailor the process to the specific needs of their dispute, ensuring a streamlined and effective resolution.[5]

Over the past five years, the WIPO Center's ADR caseload has grown by 371 per cent,[6] reflecting an increasing reliance on ADR procedures for resolving IP and technology disputes. Of the cases handled by the WIPO Center in 2024, 48 per cent of cases were related to copyright, 29 per cent to trade marks, and 10 per cent to patents, including SEPs/FRAND, life sciences and green technology disputes.[7] Notably, 50 per cent of the WIPO Center's caseload involved Small and Medium-Sized Enterprises ("SMEs") as parties.[8]

WIPO Mediation and Arbitration cases have involved disputes with amounts up to US$1 billion, with remedies including damages, infringement declarations, and specific performance. These remedies encompassed declarations of non-performance or rights infringement, safeguards for preserving confidentiality of evidence, security provisions, data production, goods delivery, and the negotiation of new contracts, including the determination of licensing terms. WIPO ADR cases were based on contract clauses as well as submission agreements made after the dispute had arisen, with several of these cases following WIPO Good Offices services.[9]

To support dispute resolution, the WIPO Center offers procedural assistance, guidance on ADR options, and online case management tools, including a specialised eADR platform for case management. This platform provides a secure, centralised portal for all parties –including mediators, arbitrators, and experts – to easily share and access case materials. It also facilitates online meetings and hearings, streamlining the process and benefiting parties who prefer not to travel. The WIPO Center customised this platform for the America's Cup Arbitration Panel during the 36th edition in Auckland in March 2021 and continues to support it, with the platform being successfully used in the 37th edition in Barcelona.

IP & ADR in Australia and New Zealand

Australia has recently witnessed rapid growth in green technology and energy storage patent filings, accompanied by a significant increase in filings from SMEs. [10] Over the past 20 years, the number of SMEs registering patents has grown five times faster than the overall number of SMEs in the Australian economy. [11] Clean technology has emerged as a major sector for patent filings, with Australia now ranking as the second fastest-growing destination for clean energy patents among the 19 largest global economies.[12] With this, Australia has experienced significant growth in patents for electrical machinery, while Chinese design filings within Australia for electrical equipment have nearly doubled. Growth in international patent filings in Australia continues in technologies where Australia is a key destination market, as seen in the industry of clean energy technology.[13]

Australia's research and development ("R&D") knowledge-sharing ecosystem is fuelling innovation and growth, which is likely to lead to an increase in patent filings. The R&D landscape in Australia is a dynamic network connecting universities, startups, and larger companies. Universities and startups play a key role in developing new technologies, while larger companies often commercialise these innovations, either acquired from startups or

developed through collaboration with universities.[14] With the rapid growth of the green technology sector, continued advancements in R&D and knowledge-sharing are expected to drive further patent development across the country.

New Zealand's IP ecosystem experiences a high volume of foreign patent filings, particularly in the biotech sector, which accounts for nearly half of all applications submitted to the IP Office New Zealand ("IPONZ"). Domestic patent applicants are primarily concentrated in agriculture and food, industrial engineering, and civil engineering, with a focus on building materials. [15] R&D initiatives also rank among the top patent filers in New Zealand, with strong domestic patent activity coming from the Universities of Auckland and Waikato, as well as institutions like AgResearch and Industrial Research Limited.[16] The R&D research in New Zealand is also strongly focused on biotech and industry.

While New Zealand's key patent ties remain with Australia, the United States of America, and the United Kingdom, there has been a recent surge in patent applications from China, Indonesia, Viet Nam, and the Philippines.[17]

Given these rapid developments in Australia's and New Zealand's IP ecosystems and the globalising nature of IP and technology, IP disputes in the region may become more common and ADR options can be a valuable dispute resolution tool for parties to explore, particularly when it comes to resolving disputes of an international nature.

Mediation

Mediation fosters a collaborative approach, seeking resolutions based on shared goals, which, in some cases, helps preserve business relationships after the dispute has been resolved.[18] Mediation is typically the preferred method for dispute resolution at the WIPO Center, with 70 per cent of cases resulting in a full and final mediated settlement agreement.[19]

Mediation, like all ADR methods, requires party consent, though under the WIPO Rules, a unilateral request can be made, and is often done so by an individual party. Upon receiving such a request, the WIPO Center contacts the other party to explain the request and explore how mediation could help both sides resolve the issue while avoiding court proceedings.

Prioritising the needs of disputing parties, the WIPO Mediation Rules offer autonomy and flexibility, allowing parties to maintain control over the mediation process. Designed for adaptability, these rules can be customised to address the unique needs of each party involved.[20] In this regard, parties can choose their preferred mediator, typically considering factors such as area of expertise, governing law, and jurisdiction. Alternatively, WIPO can assist parties in selecting a mediator from its database of more than 2,500 neutrals, including specialists from Australia and New Zealand. This ensures that the parties are paired with a mediator whose expertise best aligns with the specific needs of the dispute, as the quality of the neutral is crucial to the success of any ADR process.

The WIPO Center has also observed a growing trend of courts increasingly referring cases to mediation. Recently, the High Court of England and Wales (Chancery Division) referred to the benefits of mediation with a ruling from November 2024 ordering parties in a trade mark dispute to engage in mediation.[21]

The Court referenced findings from the Civil Justice Council ADR Working Group, which noted that mediation had proven successful in complex and entrenched disputes[22] – often even when the likelihood of success seemed low, or when one party felt confident in their prospects of success in court, underscoring the potential of mediation to resolve disputes where other methods have faltered.

Mediation helps parties to "focus on possible solutions rather than raking over historical grievances".[23] Prolonging litigation and dwelling on historical issues not only fails to serve the parties but also unduly burdens the court system.

The Court noted that "[e]xperience shows that mediation is capable of cracking even the hardest nuts",[24] emphasising that mediation is a "short and sharp"[25] option for resolving disputes.

In this context, Deal Mediation has also become an increasingly valuable tool at the WIPO Center for facilitating the entry into or renewal of commercial agreements. The appointed mediator assists parties in exploring solutions to finalise deals, shifting the neutral's role from managing disputes to preventing them.

Given the contractual obligations inherent in mediated settlement agreements, the parties are legally bound to the agreement. The WIPO Center has consistently observed that parties who submit their disputes to WIPO mediation are committed to upholding the resulting settlement agreements, as these resolutions typically align with their interests and reflect their mutual control over the resolution process. Nevertheless, it is noteworthy that a mediated settlement may also benefit from the support of the Singapore Convention on Mediation (Australia signed the Singapore Convention on Mediation in 2021).[26] This relatively recent international framework ensures the enforcement of mediated settlement agreements across signatory states, similar to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the New York Convention").[27]

Arbitration

While mediation is widely regarded as a valuable and generally successful IP dispute resolution option, arbitration has gained global appeal owing to its finality and relative ease of enforcing awards both domestically and internationally.

In arbitration, parties agree to submit their dispute to an arbitral tribunal, which may consist of a sole arbitrator or a panel of three, chosen by the parties. Parties can select arbitrators with expertise in the specific area of IP or technology relevant to their dispute. The WIPO Center maintains a comprehensive list of neutrals, including experts from Australia and New Zealand in ADR, IP, and technology,[28] helping parties to select the most suitable tribunal for efficient resolution, reducing the need for lengthy explanations and expert evidence.

Ultimately, with the aid of an experienced and neutral arbitrator, arbitration provides the parties with the opportunity to shape the procedure in accordance with their requirements, ensuring a tailored, efficient, and flexible resolution process.

Parties also benefit from confidentiality protections, allowing them to control the exposure of their proprietary information and safeguard their interests. The WIPO Arbitration, Expedited Arbitration, Mediation, and Expert Determination Rules all uphold rigorous confidentiality standards. These protections extend to the existence of the arbitration, information disclosed during the process, and the final award, unless the parties agree otherwise, or disclosure is required by law.[29]

The nature of arbitration is such that arbitral awards are intended to be final and binding, with courts generally reluctant to hear appeals. With the widespread adoption of the New York Convention, parties cannot avoid obligations under an arbitral award.[30] The restricted grounds for refusing to implement an award under the New York Convention, combined with the challenges of enforcing foreign court judgments, enhance the appeal of arbitration for multi-jurisdictional IP disputes by ensuring binding decisions and predictable enforcement.

This was further reflected in the case of *Larkden Pty Limited v. Lloyd Energy Systems Pty Limited*,[31] illustrating Australian judicial support for ADR in IP disputes. In this case, Larkden challenged the arbitral tribunal's authority over a patent entitlement, arguing that IP Australia had exclusive jurisdiction. The New South Wales Supreme Court, however, affirmed the modern trend to promote arbitration and minimise judicial intervention, stating that by agreeing to arbitration, parties accept the tribunal's award as final and binding.

Expedited Arbitration

Under the WIPO Expedited Arbitration Rules, proceedings are fast-tracked with shorter time frames, a single exchange of pleadings, and a sole arbitrator. As a result, final awards are typically issued within six to seven months from the request, making this process ideal for **less complex cases where time and exposure are critical.**

Expert Determination

Taking benefits from both mediation and arbitration, expert determination offers a swift and informal resolution process where parties jointly select an expert to make a determination on technical matters, such as IP asset valuation, patent claims, or licensing rights.[32] This flexible approach can be used on a standalone basis or incorporated into mediation or arbitration processes, delivering quick and effective outcomes.[33]

WIPO ADR Collaborations with IP Offices and Courts in the Region

Since 2017, IP Australia and the WIPO Center have collaborated to promote ADR options for resolving IP and technology disputes in Australia, offering Australian parties streamlined access to mediation, arbitration, and expert determination for international disputes in a cost- and time-efficient manner. In 2023, the WIPO Center expanded its collaboration to include IPONZ, partnering to raise awareness of ADR options among IP stakeholders in New Zealand.

In addition, Australia's Higher Education Research Commercialisation IP Framework Model Licence and Research Agreements,[34] recommends resolving research and development sector disputes through mediation, followed by court proceedings or WIPO Arbitration. In collaborative sectors like research projects, ADR can be crucial in preserving ongoing working relationships after a dispute is resolved. The WIPO Center continues its collaboration with IP Australia to provide ongoing support for Australian parties.

Australia and New Zealand have seen an increase in IP and technology licensing and other transactions from the Asia Pacific region.[35] In this context, the WIPO Center Office in Singapore is well positioned to assist with such disputes.

The WIPO ASEAN Mediation Program ("AMP+") is available in the region by offering funding for parties involved in IP and technology disputes.[36] Parties are eligible for AMP+ benefits when submitting disputes to the WIPO Singapore Center for mediation or deal mediation, provided that at least one party is from an ASEAN member state.

The WIPO Center has also strengthened its role in the Asia-Pacific region with the WIPO Arbitration and Mediation Shanghai Service ("Shanghai Service"). Established in the China (Shanghai) Pilot Free Trade Zone in October 2019, it is accredited by the Ministry of Justice of China to conduct arbitration and mediation for foreign-related IP disputes within China. The Shanghai Service has established a cooperation mechanism for court-referred mediation

of foreign-related IP disputes with courts in Shanghai, Fujian, Hainan, Guangdong, Chongqing and Sichuan. So far, it has administered more than 150 IP mediation cases referred by courts in China, with a settlement rate of approximately 60 per cent where a mediator was appointed.[37] These referrals, supported by both Chinese and foreign parties – including from Australia and New Zealand – have proven ADR to be an effective avenue for resolving IP and technology disputes out-of-court.

ADR mechanisms such as mediation and arbitration are becoming increasingly valuable globally for resolving IP disputes and are likely to become more relevant as IP and technology continues to globalise and develop at rapid rates. Focusing on party autonomy, cost efficiency, and speed, ADR can offer a single streamlined procedure which can eliminate the need for multiple court actions across different jurisdictions, providing a viable alternative to traditional litigation. Its growing adoption in IP disputes highlights its ability to deliver swift, cost-effective, and confidential outcomes, with the added benefit of a global reach. Parties also benefit from autonomy in selecting the neutral, applicable law, procedure, location, and language of the proceedings. ADR processes are conducted under strict confidentiality, and the rules can be tailored to address the unique aspects of the disputing Parties. Given the growth of industries in Australia and New Zealand that rely on IP assets, parties in the region may increasingly turn to ADR as an efficient and effective means of resolving disputes, with the WIPO Singapore office well positioned to support the Asia Pacific region.

1 Legal Officer, IP Disputes Section, WIPO Arbitration and Mediation Center. The WIPO Center is available to all parties, big or small, international or domestic, and can be contacted directly for procedural advice at arbiter.mail@wipo.int.

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