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<tr>
<td>AAA</td>
<td>American Arbitration Association</td>
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<td>CP</td>
<td>Community Patent</td>
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<td>EC</td>
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<td>ECJ</td>
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<td>European and EU Patents Court</td>
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<td>EPC</td>
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<td>EPLAW</td>
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<td>EPO</td>
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<td>ICC</td>
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<td>TFEU</td>
<td>Treaty on the Functioning of the European Union</td>
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<td>TRIPS</td>
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0. Abstract

Litigation or arbitration? The EU is yet to decide upon a new and unifying patent litigation system. This thesis explains and discusses the draft of an European patent litigation system declined by the ECJ on March, 8th 2011, with regard to its respective merits. Thereafter, typical patent infringement disputes and patent arbitration cases are explicated and exemplary procedural and institutional rules for an EU patent arbitration procedure, in accordance with the WIPO Arbitration Rules and the Patent Arbitration Rules by the AAA, are drafted and criticised. The paper will then compare the patent arbitration and patent litigation models to one another under aspects such as costs, duration of the proceeding, publicity and relationship of the parties, to conclude with an outlook on the topic of how to solve patent infringement disputes in the EU in the future.

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1. Introduction

Today, arbitration is widely regarded as a valid counterpart to litigating cases in national or supranational courts as it offers a broader and more flexible approach to solving disputes with the exclusion of the public; this is an issue of particular interest in patent infringement disputes. Nevertheless, for many lawyers the field of arbitration is unfamiliar territory especially with respect to patent arbitration, a contentious area where the question of arbitrability is concerned. Aside from issues of arbitrability, patent arbitration is a useful means by which patent infringement disputes can be solved, as it provides a much faster, more efficient solution, tailored to parties’ particular needs. With regard to the EU, the establishment of a patent arbitration institution might become a fair opponent to the recently published draft of a European patent litigation system. This shall be discussed in the thesis at hand.

1.1 Patent Infringement Disputes in the EU

For more than 30 years, the member states of the EU have been discussing possibilities of how to create a comprehensive European Patent (EP) and a feasible system of European patent dispute resolution. Various proposals have been handed to the ECJ by EPLAW and the EC and it is generally understood: an effective solution is desperately needed. Today, patents can be filed for at the European Patent Organisation (EPO). The EPO is enabled to grant EPs, consisting of a bundle

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1 (Field Jr., 1983, p. 235).
of national and nationally enforceable patents within the EU. With the number of EU member states continuing to grow, this process has become costly and complex leading to a solution in the form of a European Patent (EEUPC) being continuously sought after. In contrast to patents currently available, the EEUPC would allow the legal or natural person filing for a patent to be granted a supra-national patent on EU level which offers protection in every EU member state with a single registration and a single patent granted.\(^6\) Judging from the recent state of the negotiations, the realization of a supra-national patent, introducing a supra-national patent in form of an EP, would not only facilitate the recognition of patents on an EU-wide basis, but also allow for infringement disputes to be solved in front of an EPC. This would avoid the currently necessary annoyance of litigating in several national courts at the same time when settling disputes arising from EPs.

According to some of the EU member states,\(^7\) the implementation of the EEUPC is seen positively. They would even proceed with building up the EEUPC and testing it while leaving opposing member states behind.\(^8\)

This thesis is based on the assumption that the EEUPC, together with an EU Patent Court, will be introduced shortly, building the basis of a new substantive law concerning patent matters in the EU.

In an international context, disputes are not only solved by litigation, rather an increasing trend towards dispute resolution in arbitral tribunals can be observed. Arbitration offers various advantages, in particular, faster proceedings and lower expenses. It is a popular recourse for dispute resolution in many legal areas.\(^9\) However, where patent infringement disputes are concerned, arbitration has long been viewed with scepticism. This said, in current society where saving on time and costs are of considerable importance, patent arbitration has become an emerging favourable alternative to litigation. In the event that with the establishment of the EEUPC a new substantive law for EU patent disputes comes into existence, and considering that the area recently discussed merely concentrates on the traditional

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\(^6\) However, this does not currently exist and is merely in discussion.

\(^7\) (Taylor Wessing, 2010).

\(^8\) Ibid.

idea of litigating disputes, it may be of interest to give parties to patent disputes the chance to solve their disputes arising within the EU, in a supra-national EU level based arbitration proceeding as opposed to a system of EU patent litigation, which will assumedly be established by the EEUPC. The idea of being able to build an EU patent arbitration system is based on the hypothesis of EU Patent Law being unified, so that an actual EU-wide patent law exists. According to the so-called subsidiarity principle\textsuperscript{10} of the EU,\textsuperscript{11} an institution and a set of rules may only be set up on EU level if the member states are not able to solve a certain issue on national levels.\textsuperscript{12}

1.2 Aim and Structure of the Thesis

The purpose of this master thesis is to determine the validity of the hypothesis that an EU patent arbitration model would facilitate the resolution of patent infringement disputes in the EU. The author will focus on the field of patent infringement dispute resolution procedures in this thesis. This will be achieved by giving an insight into most recent developments of dispute resolution of the EP at EU level whilst addressing advantages and disadvantages of the rejected draft of a European patent litigation system.

Although the draft has been rejected by the ECJ in the current year,\textsuperscript{13} it will be assumed in this thesis, that the recent draft most likely has a strong impact on future drafts and for this it will be used as a stable basis for the author’s reasoning. Furthermore, the paper will explicate the possibility of patent arbitration and formulate procedural rules for an EU patent arbitration system, determine the advantages and disadvantages of this new model and make a final comparison of the systems of EU patent litigation and EU patent arbitration. The paper will close by discussing the achieved results and offer a critique of the systems analyzed.

\textsuperscript{10} “The subsidiarity principle is one of the central principles in the EU context, laying down that political decisions in the EU must always be taken at the lowest possible administrative and political level, and as close to the citizens as possible.” (euo.dk, 2008).

\textsuperscript{11} (Hrbek, 2010, p. 127ff).

\textsuperscript{12} Such as this would be the case in the event of an unifying EU Patent Law and patent litigation / arbitration system.

\textsuperscript{13} As it does not comply with the treaties of the EU.
1.3 Definitions

In the following, terms frequently used in the thesis shall be defined.

Intellectual Property is a generic term that describes a number of different rights summarized under the term Intellectual Property Rights (IPRs). According to Cook and Garcia, “(M)ost, but not all, of these IPRs have certain features that are characteristic of property rights, in that they can for example be bought and sold, or alternatively licensed, giving scope for creation of a market in them and constituting something identifiable for potential financial backers.”

According to TRIPS, Intellectual Property includes copyright and related rights, trademarks, geographical indications, industrial designs, patents, topographies of integrated circuits, protection of undisclosed information and control of anti-competitive practices in contractual licenses. IPRs are “negative rights” that, according to Trevor and Garcia “provide their owner with a right to stop others doing something” but do not give their owners “a positive right to do something that they could not otherwise do.” A huge advantage of IPRs is that unlike contractual advantages, IPRs are “effective against all persons and organizations in the country in which (it) they exist(s).”

A patent is described as “a statutory right granted to an inventor or the inventor’s assignee by a national government to exclude other individuals from misappropriating the invention disclosed and claimed in the patent specification” and resembles a bargain between the state and the inventor in which the inventor is rewarded by the state with a monopoly on creating and producing its invention in the country for disclosing the details of the invention to the state. Once the inventor is granted the patent, it may engage in a so called license agreement. Those agreements give a third party the right to use the patent or parts of the rights.

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14 (Cook & Garcia, 2010, p. 5).
16 (WTO, 1994).
17 (Cook & Garcia, 2010, p. 7).
18 Ibid. p. 7; (Shearman & Sterlin LLP, 2010, p. 2).
19 as the special IPR on which this paper will focus.
21 In Germany for a duration of 20 years (§16 PatG).
22 see (Fisher, 2007, pp. 68-73).
granted in the patent which would otherwise only be subject to the rights of the patent owner.\textsuperscript{23}

The essential dictionary of law states that the verb “to infringe”, is defined as “to encroach or trespass on something; to violate the terms of a contract, right, or law; to violate a copyright, patent, or trademark by using it without permission or payment to the owner.”\textsuperscript{24} An infringement of patents is thus to be seen as the act of doing the above defined in a legal context, or more precisely stated, violating the terms of a license contract or acting as if under a license agreement where none exists, by making use of rights which are held by a third party in a monopoly.\textsuperscript{25}


\textsuperscript{23} Sometimes the use of these rights is also granted to a certain field or a certain part of the market.
\textsuperscript{24} (Blackwell, 2008, p. 247).
\textsuperscript{25} Patent Law in the EU distinguishes moreover between direct and indirect Patent infringement. Direct infringement includes literal and equivalent infringement. Literal infringement is given, if every feature of a patent claim is fulfilled in its literal sense, whereas equivalent patent infringement describes the fact that one or more features of the patent claim is/are fulfilled by other – but technically equivalent – means than those defined in the claim. As an example of a EU member state: Indirect Patent infringement is articulated in the German Patent Act in § 10 and can be found similarly expressed in statutes throughout the EU. Claims arising out of § 10 PatG “are directed against those who supply or offer “means” related to an essential element of the invention allowing it to be put into effect in Germany.” “Means” is generally interpreted broadly\textsuperscript{25}, and as such does not have to be a direct element of the method claimed but be merely a minor detail which interacts with an “essential element of the invention.” According to the German Supreme Court, an essential element of the invention is to be seen generally as any claim element of the invention. The Quinn Emanuel Urquart & Sullivan LLP law firm publication offers further clarification, stating, “(T)he special statutory category of “indirect infringement” differs from the general tort liability to which those who contribute to the infringement by a third party are subject. It is thus analogous to contributory infringement.” Germany follows a very strict approach with regards to patent protection. By way of example, even if suppliers deliver a part to a manufacturer that is then built into, for instance a car, and made available on the German market, the supplier faces claims for Direct Patent infringement.
The typical legal stages in Patent Law begin with the challenge of determining patentability, followed by the process of filing for a patent. Only at a later stage, patent infringements might arise and needs to be analyzed. When speaking of patent infringement disputes, not only an infringement and the consequences of this infringement, such as injunctions or damages, need to be mentioned, but some attention should also be drawn to the crucial question of the scope of the patent protection and a possible annulment of a patent. This is mainly an issue in the EU, where different member states have different procedural approaches to resolving patent infringement disputes. In Germany, for instance, the issue of infringing a patent is usually not tried together with the question of annulment or the scope of protection of a patent in one court, whereas in most other European member states the usual procedure would be to discuss the issue of scope of protection and a possible annulment before the question of infringement. In order to achieve harmonization on an EU level in terms of Patent Law, the procedural aspects mentioned would have to be agreed on. This might be very difficult due to highly different practices in EU member states in recent years. Most likely, an unification could be easier achieved in arbitration due to the strong effect of party autonomy.

Arbitration is commonly seen as offering various advantages over litigation. Among these are the benefits of a faster and cheaper dispute solution. Arbitration offers a more convenient and personal system, through parties’ ability to appoint their own arbitrators to handle their matters in a non-public dispute resolution mechanism performed by an arbitral tribunal. Where patent matters, requiring ad-hoc dispute resolution, in order to not hold back the patent holder from being able to use the patent before its expiring date, are concerned, arbitration certainly seems like a perfect dispute resolution method at a first glance due to its wide benefits and flexibility.

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26 Once the patent has been granted.
27 This is where patent infringement dispute resolution begins.
28 (Urbanchuk & Tumbridge, 2008).
30 (Wei-Hua, 2011, p. 386).
31 (Lionnet & Lionnet, 2005, S. 79ff); (Laturno, 1996, p. 80).
32 (Lionnet & Lionnet, 2005, S. 76ff); Moses, 2008, S. 3f); (Born, 2001, S. 1f); (Laturno, 1996, p. 369ff).
Thus, patent arbitration appears capable of bringing about a long sought-after facilitation of patent dispute resolution processes, which those EU-wide discussions surrounding an EU patent litigation system have yet been unable to create. Whilst patent arbitration could lead to facilitating EU patent infringement dispute resolution on a supranational level, the prerequisite for this would be an EU-wide unified patent system.

In order to be able to answer the question of whether patent arbitration would better fulfil the aspirations that the current EU patent litigation system seeks to satisfy, it is paramount to fully understand possible systems of EU patent litigation and analyze their advantages and disadvantages.

2.1 EU Patent Litigation

In this part of the chapter, an overview of EU patent litigation will be given and the latest draft of a patent litigation system will be discussed. Benefits and risks of this possible patent litigation system of the EU will be discussed and a conclusion on how feasible the system is will be drawn.

2.1.1 Literature Review: EU Patent Litigation

In order to discuss litigation procedures, it is necessary to understand the system that is prefixed the litigation system, namely the process of granting a patent in the EU. At the moment, patents in the EU are protected by the member states by which they had been granted or by the EPO in case of EPs. When the EPO grants an EP, this must be validated in all member states in which protection is strived for.
The current system shows a strongly decentralized approach to dealing with the granting of patents.\textsuperscript{34} In 2000 the EC proposed a Community Patent (CP) to be granted by the EPO, existing next to national patents on an EU level and giving the applicant the chance to choose the right patent for their needs of patent protection and depicting a very centralized patent litigation system. The discussion about the CP in various alternatives has persisted under several EU presidencies but a definite solution has not been decided upon, as it requires unanimous acceptance. In 2010 some of the member states agreed to closely work together in solving the problem of an EU patent in the so called “enhanced cooperation”, which allows them to proceed in drafting an EP, regardless of whether all 27 member states have agreed upon the group’s proposal.\textsuperscript{35} One of the major issues in this process is the 23 languages existing in the EU today.\textsuperscript{36} This makes it easy to understand that the costs for granting an EP are extremely high, compared to a patent granted in the US. According to the EC, “(A)n European patent validated in 13 countries costs as much as 20 000 EUR, of which nearly 14 000 EUR arises from translations alone. This makes an European Patent more than 10 times more expensive than a US patent costing about 1 850 EUR”\textsuperscript{37}

The official languages of the EU are English, French and German. Discussions have arisen in the EU as to whether in the new patent system patents should be granted merely in English language or in all three official languages or, like formerly, in every language existing in the EU.\textsuperscript{38} Discussions have not yet reached the stage of a final decision. This is also due to the fact that in terms of concision, French apparently is the most precise language used in law in the EU\textsuperscript{39}, in comparison to the allegedly less precise English. Most likely, however, it would be fruitful to choose a language as the main language already today spoken in every EU country for patent matters. This language seems to rather be English than any other language. French bears, next to being less popular and wide-spread in the EU, the problem of being more complex in its structure than for instance English.

\textsuperscript{34} (Cannon, 2003, p. 417).
\textsuperscript{35} (European Commission, 2010), this results, of course, only an nonbinding agreement.
\textsuperscript{36} And languages spoken within the EU increase in number with the increase of member states.
\textsuperscript{37} (European Commission, 2010).
\textsuperscript{38} (European Commission, 2010, p. 2).
\textsuperscript{39} (Céline, 2004).
However: a cheaper and faster method of granting a patent for all EU member states is needed. This necessity particularly affects small and medium-sized enterprises (SMEs) who cannot bear the high costs incurred under the current system, but who need patents in order to be able to operate competitively on the European market. SMEs can be seen as the core of Europe’s economy, hence delivering these enterprises with a system which facilitates their European competitiveness, is a top priority.\textsuperscript{40} The complexity of the system of obtaining an EP, destroys competitiveness and flexibility on the internal market, derailing one of the most important aims of the EU.\textsuperscript{41}

In this context it is relevant to consider the Treaty of Lisbon\textsuperscript{42} which amended the TFEU and laid the groundwork for the creation of European IPRs and their protection all over the EU in Art. 118 TFEU.\textsuperscript{43} Art. 118 establishes a legal basis for language arrangements within the EU and thus clearly shows that this issue needs to be overcome if a functioning EU patent system shall exist.\textsuperscript{44} The problem of the non-existent unified European Patent goes hand in hand with the grave issue of the lack of an all-embracing EPC.

With respect to the actual system of litigating patent disputes, EPLAW\textsuperscript{45}; a group of experts, lawyers and judges in the field of patent litigation gathered in 2003 to work on another proposal for an EP, that, not to be confused with the idea of the CP, should establish an European Court entitled to rule on all the cases related to a

\textsuperscript{40} As they represent 99% of Europe’s enterprises (European Commission, 2011); However, one should keep in mind that even if SMEs make up the largest number of enterprises in the EU, one should also take into account the number of patents granted per company. Unfortunately, no recent studies could be found to support this estimate, but it is likely, that large companies, such as corporate groups file for a number of patents which exceeds the number of patents filed by small companies by far.

\textsuperscript{41} See Art. 119 (1) TFEU.

\textsuperscript{42} Entered into force on December 1st, 2009.

\textsuperscript{43} (Journal of the European Union, 2008): “Article 118 In the context of the establishment and functioning of the internal market, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish measures for the creation of European intellectual property rights to provide uniform protection of intellectual property rights throughout the Union and for the setting up of centralised Union-wide authorisation, coordination and supervision arrangements. The Council, acting in accordance with a special legislative procedure, shall by means of regulations establish language arrangements for the European intellectual property rights. The Council shall act unanimously after consulting the European Parliament.”.

\textsuperscript{44} (European Commission, 2010).

\textsuperscript{45} Set up in 1999 at the Paris Intergovernmental Conference and confirmed in 2000 by the London Intergovernmental Conference (EPO, 2009), formerly EPLA.
patent granted on EU level in Europe and which would make national patent courts obsolete.

The proposal was to not only create the EPC, but also to install regional patent courts instead of having national patent courts in every member state and to test the practicability of this draft with only a handful of member states.\textsuperscript{46} The recent draft, called European Patent Litigation Agreement, handed in by the EC, was rejected by the ECJ on March, 8th 2011. Working groups have discussed a suitable proposal on how to handle patent litigation in Europe for decades, and there have been continuous developmental proposals put forward in this time. Therefore this paper will focus on the latest proposal that was rejected in March 2011 and will disregard any further developments made in the progress of the writing of this thesis to ensure a stable basis for the discussion aimed at in the paper at hand.

2.1.2 Cornerstones of EEUPC

EPLAW\textsuperscript{47} drafted a valuable proposal for an EU patent system, but was curtailed by European politics. Following EPLAW, a Council Working Party on Intellectual Property is now trying to reach a unified patent litigation system in Europe in close cooperation with the EC.\textsuperscript{48}

EEUPC’s main pillars

The EEUPC System, according to the recent draft, consists of a Court of First Instance as a central division for patent matters, as well as regional and local

\textsuperscript{46} (Pagenberg, 2007, p. 7).

\textsuperscript{47} The purpose of the EPLAW is, according to their articles of incorporation from 2002: “to promote the equitable and efficacious handling of patent disputes in Europe and to strengthen the links between lawyers having relevant litigious experience in patent law in Europe”.

\textsuperscript{48} To date, the following documents have been drafted in relation to a so-called unitary patent: “(a) a draft Agreement on the European and Community Patents Court (ECPC, now called the “European and European Union Patents Court” or EEUPC) (b) a draft Statute of the Court (c) (non-official) working paper from the Advisory Work group on the draft Rules of Procedure for a Unified Patent litigation system (October 16, 2010) (d) an EU Council document authorising enhanced cooperation creating a Unitary Patent (e) an EU Council document on translation arrangements for the European Patent”

The draft Agreement is essentially built on the former EPLA proposal in combination with EU legal order and aims at giving the non EU members, who are nonetheless signatories to the EPC, a chance to participate in and contribute to the new EU Patent litigation system.
divisions. It would consist of three to four judges per panel, one being a judge with technical knowledge, and all judges are required to be of different nationalities. Furthermore the system includes a central Court of Appeal, consisting of five judges, two of whom have technical knowledge, as well as a Registry. Judges are recruited from a multinational pool. They would receive special training in newly built training facilities.

Infringements can either be tried in the same proceeding or in a bifurcated system\(^{49}\), such as the one currently used in Germany. A 7-year transition period, during which the EEUPC will exist as a parallel structure next to the national court structures, will give claimants the possibility of choosing which courts they want to turn to.

The proceedings will consist of a written phase, an interim phase and one single oral hearing\(^{50}\) and shall be completed within less than one year.\(^{51}\) With regards to complexities surrounding the multitude of languages within the EU, it has been agreed, that the language at the Court of Appeal and the Court of First Instance shall be the language in which the patent was originally granted.\(^{52}\)

On March, 8th 2011, the ECJ\(^{53}\) came down with an opinion for which it was asked by the Council of the European Union concerning the question whether “the envisaged agreement creating a Unified Patent litigation system\(^{54}\) (is) compatible with the provisions of the Treaty establishing the European Community\(^{55}\).

\(^{49}\) The term bifurcation may refer in general to any agreement of the parties to have certain issues resolved before the making of a final award. The term bifurcation may quite often refer to the agreement of the parties to split the conduct of the proceedings into liability and quantum phases. In the first phase, the tribunal determines whether the respondent [...] is liable under the causes of action asserted in the proceedings. In the second [...] phase, the tribunal renders an award determining the amount of damages to be granted to the claimant. (Cook & Garcia, 2010, p. 178).

\(^{50}\) In which oral testimony and cross-examination will be limited to a minimum to ensure a fast trial.

\(^{51}\) Once the system is installed.

\(^{52}\) (IPEG Consultancy BV, 2011, p. 3); (Morton, 2009).

\(^{53}\) Based in Luxemburg.

\(^{54}\) Currently named European and Community Patents Court.

\(^{55}\) (2011, p. 4); The ECJ thereby based its ruling on: the Council document on a revised proposal for a Council Regulation on the Community patent, the Council Document on a revised Presidency text of the draft agreement on the European and Community Patents Court and the draft of the statutes of that court as well as a Council Document concerning a recommendation from the Commission to the Council to authorise the Commission to open negotiations for the adoption of an international agreement “creating a Unified Patent System” at European Community level.
In short and as the question of why the recent draft was rejected by the ECJ is not the core of this thesis, the ECJ reasons that:

“consequently, the envisaged agreement, by conferring on an international court which is outside the institutional and judicial framework of the European Union an exclusive jurisdiction to hear a significant number of actions brought by individuals in the field of the Community Patent and to interpret and apply European Union law in that field, would deprive courts of Member States of their powers in relation to the interpretation and application of the European Union law and the Court of its powers to reply, by preliminary ruling, to questions referred by those courts and, consequently, would alter essential character of the powers which the Treaties confer on the institutions of the European Union and on the Member States and which are indispensable to the preservation of the very nature of European Union law.”

The ECJ comes to the conclusion that the new court system, which is to be considered as an institution under international law outside of the EU judicial and institutional system, nevertheless interpreting and applying EU law, would deprive the national courts of EU member states of their powers and would for this reason violate agreements made between the member states in the TEU. For this, the ECJ overruled the draft agreement and declared it incompatible with the EU Treaties.

Although the draft requires revision before further progress can be made, it may be fair to assume, that it may have a certain impact on the next draft that will be analysed by the ECJ and will thus serve as a basis for the author’s analysis of benefits and risks of such an EU patent litigation system. It shall furthermore clearly be assumed for the following parts of this paper, that an unified EU patent law system exists that creates a foundation for litigation or arbitration procedures on EU level.

2.1.3 Advantages of the drafted EU Patent Litigation system

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56 (2011, p. 20).
57 Prior to the ECJ’s decision, the EU member states Ireland, Greece, Spain, Italy, Cyprus, Lithuania and Luxemburg considered the draft agreement to be incompatible with the EU Treaties and submitted their arguments to the ECJ, referring to Articles 19 and 344 TFEU. Whereas the Belgian and French governments as well as the EU Commission request for changes to be implemented into the draft in order to ensure compatibility with the Treaty. The Czech Republic, Denmark, Germany, Estonia, the Netherlands, Poland, Portugal, Romania, Slovenia, Finland, Sweden and UK agree that the draft agreement is compatible with the Treaties by quoting articles 81, 114, 218 (11), 257, 262, and 352 TFEU to support their arguments.
58 (Osterrieth, 2011).
59 This could be achieved by passing an EU regulation.
First, the new EU patent system strives for a harmonization of patents and in like manner of standards and judgements in EU patent infringement disputes. More fairness and equality would be created, as an EPC could solve disputes on a supranational level and could thus eliminate differences existing in national legislations amongst member states. This would also erase the disadvantages arising for patent owners out of different national courts and their experience in dealing with European patent infringements. Moreover, the large effect of forum-shopping\textsuperscript{60} would be reduced by harmonizing Patent Law throughout the EU\textsuperscript{61} and national courts could be disencumbered from their burden of having to deal with many lengthy and complicated EU patent infringement matters. With the relocation of such patent infringement disputes to one Court of First Instance at EU level, higher legal certainty could be achieved and rulings might be more just as the court system has a larger distance to the patent owner or the patent infringer and might deal with cases in a more neutral way and with more international experience in handling such cases.

Had the draft discussed been successfully implemented, patents within the EU could have been granted by one authority for all member states and the patent would be interpreted in one single way, especially in case of infringements. This would foster greater uniformity throughout the EU hand in hand with more certainty, transparency and clarity.

A more centralized structure of the EU patent system would lead to a stronger order and better control of the different powers. Through strong education of judges working in international teams, a more experienced handling of the cases could be ensured and more certain case law could be generated in a short amount of time. The international judge panels would also offer the possibility to include at

\textsuperscript{60} Forum-shopping is defined as: „the process by which a plaintiff chooses among two or more courts that have the power—technically, the correct jurisdiction and venue—to consider his case. This decision is based on which court is likely to consider the case most favourably. In some instances, a case can properly be filed in two or more federal district courts as well as in the trial courts of several states—and this makes forum shopping a complicated business. It often involves weighing a number of factors, including proximity to the court, the reputation of the judge in the particular legal area, the likely type of available jurors and subtle differences in governing law and procedure.” (Worldpress, 2006).

\textsuperscript{61} Which is a prerequisite for establishing an EU patent litigation system.
least one technical judge having some experience in the particular field from which
the case at hand stems.

The system would clearly be more effective through aspects of centralization and
tougher organization. More importantly however, is the reduction of costs that such
a system would stand to create. First of all, with one court on EU level to hear all EU
patent infringement cases, fewer judges would be needed in national courts and
the judges appointed for the Court of First Instance would be highly experienced
and able to solve complicated cases at the EU level in a short period of time.

Second, with a more centralized organization, less transaction costs would arise
through less communication between different legislations and national courts.
Third and especially important in the multilingual setting of the EU: the patent
granted would be tried in the original language in which the patent was filed for.
This would lead to a more precise and direct interpretation without getting lost in
translation. Most of all, this would lead to enormous cost savings as the patent
would not have to be translated in various languages and also evidence and
documents with regard to the patent would not have to be translated. A European
Patent most likely will reduce costs from translating patents by 80% compared to
current costs in translation occurring when filing for a bundle of national patents in
the EU.\textsuperscript{62} The process of dealing with the patent as such would be more effective
and straight forward. Making English the language in which trials would be held and
s would be granted, would probably in the long run lead to a more Anglophone
Europe in which English sooner or later becomes the most important language.\textsuperscript{63}

The decrease of costs occurring would also make it easier for SMEs, the core of the
European economy, to participate in European patents and protect their inventions
and innovations adequately in order to remain competitive on the flexible EU
market. More patents would be filed for and granted due to limited costs. Renewal
costs would decrease due to less complicated processes and due to the lack of

\textsuperscript{62} (Lawrence, 2011).
\textsuperscript{63} It is known that many European states shifted from speaking their native language to also speaking
English fluently. Today, for instance Scandinavian countries performed best at an online English test
further translation of the documents. More patents would help the EU to further enhance their level of technology and innovation, a paramount basis of a growing and competitive economic market. Costs are expected to not only decrease for the users of the patent system, but also for the bodies of the EU related to the patent system due to declining transaction costs.

In general, cases would be solved cheaper and faster with greater expertise. The newly drafted EU patent litigation system can thus be seen as a step towards harmonizing different standards within the EU concerning the procedure, speed, experience of judges involved, sanctions, evidence, experts’ role in the trial and costs of patent infringement dispute resolution.64

2.1.4 Disadvantages of the drafted EU Patent Litigation System

Firstly, the new court system on an EU level might be more neutral and centralized, but has the disadvantage of creating a large distance between the patent owner or patent infringer and the court system dealing with the case. By distance, it is meant, that the judges ruling on the case are most likely not from the same national background as the parties to the dispute and might also come from a different cultural and language background. It is more difficult for a judge in a centralized EU litigation system to understand exactly the situation of the claimant and the defendant in terms of knowing their day-to-day life in their respective country in terms of educational system, habits, traditions, trade customs etc. This might lead to difficulties in understanding under which circumstances the dispute may have arisen. Although a supra-national court would potentially offer greater neutrality through a greater distance held between the patent holder and the court itself, such distance may also create disadvantage through misunderstandings. There may be risk of unjust rulings due to increased efforts needed for judges to put themselves in the patent owner or patent infringer’s position and to understand the cultural aspects and backgrounds of the persons involved. Such as, if for instance a German judge is to reason on a patent infringement case between a Romanian

64 (Brinkhof, 1999-2000).
employee who has made an invention in a Romanian subsidiary of an Italian company and claims patent infringement by the Italian employer. For the German judge, despite obtaining the very specific knowledge needed to understand the patent, it might be very difficult to understand the situation of the Romanian employee on the one hand and of the Italian company on the other hand.

Today, there might as well be a certain distance and difference between the parties to the dispute, but due to the opportunity of forum-shopping, parties have the possibility to go to their national courts to litigate a patent infringement dispute and search for a court that best represents their interests. Most likely, this might be given, if they take the case to their own national court.

Secondly, by building up an EU patent litigation system on EU level, flexibility from coexisting patent systems under different legislations would be lost on the way. Perhaps a system of forum-shopping and national and cultural and legislative differences amongst different member states might even be more just in a way than a very neutral and centralized system of dispute resolution power, as judges know the local situations and can easily understand the notion of the cases and why the parties involved acted in a certain manner. Whereas today, the sample case discussed in the paragraph above, could be tried in a Romanian and an Italian court at the same time, and the judges might come to different conclusions, with an unified EU patent system and patent law, no longer the advantages of both legislations could be used on the parties, but EU legislation would be a harmonized law not specifically made for slightly different cultural backgrounds of the different member states.

Thirdly, once the Court of First Instance is established, regulations need to be passed to ensure that the ECJ and the Court of First Instance will not conflict with one another concerning their legislative power and case law. The competences of the various courts are strictly lined out and defined so that no competition or infringement arises between the two high courts. It would probably take a lot of effort and time to ensure that the two courts exist in a parallel structure without
Furthermore, as the ECJ is in charge of cases arising from EU member states, in contrary, the Court of First Instance would be handling cases derived from the EPC and its signatories which include next to the member states of the EU, also Norway, Switzerland and Turkey, thus special laws and regulations would have to be passed to ensure a non-conflicting and fair dealing with cases from both member states and non-EU EPC signatories at the same time.

In spite of the obvious benefits of the strict order system and direct communication found in centralized court systems, giving power to a single entity bears a possible risk of corruption or abuse of power despite the existence of a system of checks and balances in the EU. Such a system would require frequent investigation as to whether or not abuse of power could occur.\textsuperscript{65} If current regulations do not ensure a possible abuse of power by a court, new regulations need to be drafted and signed by all EU member states in order to create a stronger system of checks and balances together with some means of control.

The counter argument to the savings that an EU litigation system would bring about is also important to consider. Although a new EU patent litigation system would decrease costs in the long term, the cost of establishing the necessary court to support the system would be tremendously high, as it would require a complete transformation of the entire system, during a transition period in which the national courts would still remain in power of European patent disputes. Judges would have to be educated distinctly in order to be able to work at the new European court, procedures would have to be established, a court would have to be built and communication channels for claimants and plaintiffs would have to be established, the citizens and EPC signatories would have to be informed about the new system and it would require a lot of patience, trial and error and time to ensure that the new system put in place is working.\textsuperscript{66}

\textsuperscript{65} A fear rooted deeply in post World War II Europe.

\textsuperscript{66} (Cannon, 2003).
As mentioned above under 2., it is more complicated and will most likely lead to many lengthy discussions before a compromise between the very different approaches of the member states concerning the scope of protection of a patent and a single procedure of determining damages is found. If this could not be implemented in an all-embracing EU Patent Law\(^67\), this issue would have to be discussed in every single patent infringement dispute on EU level for each of the nations involved in the dispute which would not be very satisfying and would slow down the procedure enormously. In this respect, it might be easier to come to a conclusion in terms of damages and scope of protection in an arbitration procedure.

2.1.5 Conclusion

From the aforementioned, the conclusion is: an EU-wide patent litigation system is urgently needed. The proposed system would bring along a lot of improvements in the EU patent system, such as the elimination of forum-shopping, a less expensive, faster and more neutral ruling by the court that would be equipped with more experienced judges in the matters at hand, and might lead to a development towards a single official language within the EU. A more centralized system also means more distance to the parties involved in the dispute, it might lack flexibility and strongly centralized power might be easily abused.

It can be agreed, that the drafted EU patent litigation system is long sought for and would bring a lot of highly positive changes to the EU patent system but is not yet the most optimal draft for all parties involved.

The disunity in opinions of the different parties working on an EU patent litigation system proposal is a crucial factor that makes it complicated to find a solution for all the EU member states involved. The implementation of the concepts embodied in the draft hinges upon creating a document compliant with all EU regulations and aligned with the EU legal framework. A way has to be found to align the Treaties of the EU with the draft of the EU patent litigation system and to find a solution in

\(^{67}\) (Adam, 2003, p. 198f).
order to establish a Court of First Instance specifically in charge of patent infringement disputes which complies with the ECJ or is maybe directly controlled or set up by the ECJ.

Likewise, in the new EU patent litigation system a trade-off and an agreement needs to be made between the signatories to the EPC and the EU member states, both of which are possible parties to a patent infringement dispute in front of the new patent court system.

### 2.2 Types of Cases occurring in EU Patent Infringement Dispute Resolution

Within the EU, patent infringements are currently dealt with in national courts. Given the description of a patent infringement provided in those cases typical within the EU that would likely come before the EPC or an EU Patent Arbitral Tribunal, were they to exist, shall now be discussed. This section would logically precede the main part on patent litigation and patent arbitration. However, as the litigation system discussed is based on a draft and shall be assumed to be coherent in itself, the author cannot know which assumption in terms of typical possible cases preceded the creation of the draft. This section is explicitly put in anticipation of the section on patent arbitration as in this part of the thesis the author intends to create a system of procedural rules for a feasible system of patent infringement dispute arbitration in the EU, which depend on the different types of cases occurring in patent infringement disputes.

Patent infringement disputes may arise out of four different situations:

1. Contractual Disputes, arising out of license agreements that imply a certain duty of payment on the licensee
2. Disputes that may go beyond the protection given by the patent to the patent owner and which enforce the need for determination whether the dispute matter is infringing the patent rights
(3) Disputes on the ownership of patents\textsuperscript{68}

(4) Dispute on the effectiveness or virtue of the patent\textsuperscript{69}

All of these aspects may arise in patent litigation and patent arbitration, while in some parts of the world, it is prohibited to try patent effectiveness disputes in front of an arbitration tribunal. This is an issue that needs to be solved and harmonized for the EU before establishing an EU patent arbitration system.

Before verifying the types of different infringements of a patent, it is necessary to decide upon the actual scope of protection of a patent\textsuperscript{70} and to find out whether this is given in the current case. In case of an EEUPC,\textsuperscript{71} the scope should be clearly defined for all EEUPCs as they will all be granted by the EPO on EU level although filed for by different member states’ natural and legal persons.

Furthermore, an issue when resolving a patent infringement dispute in the EU should be a possible annulment procedure of a patent. Usually, this might be sought after in a dispute arising between competitors. The claimant has the right to ask the court or the arbitral tribunal to analyse, whether the patent was rightfully granted and if not, might claim for the annulment of the patent.\textsuperscript{72} This occurs frequently. In Germany, for instance, in 2001, 379 annulment procedures were started of which 40 patents were eliminated in the end.\textsuperscript{73} Due to the EPO’s interest in rapidly granting new patents, not every aspect of a patent which is to be granted can be analysed. For this, patents might be in existence that should not have been granted according to the ordinary rules. Without doubt, the process of annulment needs to be rethought with setting up the new patent system in the EU. It would be eligible to achieve an unifying agreement in this aspect on EU level.

In case that the patent is not annulled but is found to have been infringed, it is necessary to also establish rules that deal with the procedure of filing for an injunction and for deciding for the correct amount of damages to be paid as a consequence of such infringement. In like manner as discussed before with

\textsuperscript{68} This might occur as a result of mergers and acquisitions.
\textsuperscript{69} (Shearman & Sterlin LLP, 2010, p. 2).
\textsuperscript{70} See Art. 69 EPC; (Nieder, 2004).
\textsuperscript{71} On which’s existence the findings of this thesis are based.
\textsuperscript{72} (Lunze, 2007, p. 22).
\textsuperscript{73} Ibd. p.23.
annulment and scope of protection, there are several different methods used among the EU member states to calculate damages.\textsuperscript{74} Unless a compromise is achieved between the EU member states, a decision on a certain scheme to determinate the appropriate amount of damages in litigation is hard to achieve and could be easier decided upon in an arbitral setting, by including a calculation scheme for damages into the procedural rules of the EU patent arbitration institution.

Basically the same is valid for injunctions in the different member states.\textsuperscript{75} The possibility of receiving injunctive relief is most relevant to the infringed party when it comes to patent infringement disputes in order to stop the infringer from actively infringing the patent and to have a secure basis for starting dispute resolution. For this aspect it is also necessary to find a compromise between all the different member states, which in part allow for and in part prohibit an ad-hoc injunction in patent infringement matters in order to achieve one rule for dealing with patent infringement injunctions on EU level and concerning EPs.

Within the EU, several factors are to be considered when dealing with patent cases: with regard to nationality, cases may arise between two EU nationals or an EU national and a non-EU national. Non-EU nationals could either be signatories to the EPC, such as Norway, Switzerland and Turkey or a natural or legal person from outside of the EU who is not a signatory to the EPC. Where a dispute arises between a non-EU national and an EU national, the court or tribunal analyses not only EU law, but also the law of the country in which the infringer or patent owner is registered.

Furthermore, disputes arising might be between a legal entity and a natural person or between two legal entities of different size and dominance in the market. In those cases it is paramount to give protection to the weaker party while being fair and neutral concerning the matters at hand.\textsuperscript{76}

\textsuperscript{74} (Urbanchuk & Tumbridge, 2008).
\textsuperscript{75} (ipeg, 2010).
\textsuperscript{76} A common case which might be found is a dispute arising out of the “work for hire” principle where a natural person automatically grants all the rights of the patent made on an invention to the company on which behalf the invention was created (See \$6 ArbnErfG). In Germany, for instance, in
Also, in some cases, the infringer will not necessarily be in the same branch or industry as the patent owner, this might lead to large differences between the parties in terms of size, market dominance and financial power.

Identically, these differences might occur in the case that two companies within the same industry engage in a patent infringement dispute, whereas one of the parties is a large company and the other party is a small company with a low market share and only few financial means. Patent infringement disputes may occur in any branch, though highly technological branches are more likely to be found in patent infringement disputes such as pharmaceuticals, automotive, machinery, technical devices such as televisions, notebooks, cameras, chips to name only a few.

It is necessary to outline possible cases occurring in patent arbitration or patent litigation when discussing the design of a new patent infringement dispute resolution system for the EU.

### 2.3 EU Patent Arbitration

Historically, arbitration was used solely by parties under a contract who had agreed to arbitrate in the event of a dispute arising. Arbitration today is also a means by which patent infringement disputes can be solved, if so wished by the parties. Parties thus can also agree to arbitrate once the dispute has arisen. Arbitration is a method of Alternative Dispute Resolution which gives parties the opportunity to solve disputes in front of an arbitral tribunal outside the courts. This chapter of the paper deals with EU patent arbitration: commencing by giving an overview of the idea of patent arbitration in literature, then focusing on EU patent arbitration by highlighting the current state of patent arbitration in the EU and finally determining factors which influence patent arbitration. Additionally, Procedural Rules for a possible EU patent arbitration system will be drafted, advantages and disadvantages of the system will be evaluated. It is necessary to outline possible cases occurring in patent arbitration or patent litigation when discussing the design of a new patent infringement dispute resolution system for the EU.

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77 See also (Nokia OYJ v IPCOM GmbH & Co KG, 2011).
78 All these cases need to be kept in mind, when establishing institutions on a supra-national level and when creating procedural rules for patent arbitration. Patent infringement Cases, as seen above, can differ widely in their nature. It is for this, that rules and frameworks need to be flexible when dealing with patent infringement disputes in order to find the best solution for each case at dispute.
disadvantages of this procedure will be discussed and a conclusion will be drawn. Due to limitations in time and words, this paper will merely focus on the issue of patent infringement arbitration and will not discuss topics typically addressed in connection with arbitration, such as arbitrability and the arbitration agreement as well as rendering and challenging arbitral awards and their enforcement under different jurisdictions.

2.3.1 Literature Review: Patent Arbitration

Arbitration is a form of Alternative Dispute Resolution on which the parties need to agree. If the parties agree to arbitrate, they usually add an arbitration clause in the contract that shows their consent to arbitrate, names certain procedural rules and the place of the arbitration and the number of arbitrators in the arbitral tribunal. Arbitrators are neutral, non-governmental decision makers chosen by the parties to the dispute and not necessarily required to be lawyers but rather experts in the field from which the case stems. Arbitration is a less formal and more flexible procedure in comparison to litigation and creates a final and binding award on the parties to the arbitration.\(^\text{79}\) The most common form of arbitration which depicts a well-used counterpart to litigation is commercial arbitration.

Patent arbitration is seen as “a commercial arbitration that deals with some issues of substantive patent law.”\(^\text{80}\) Patent arbitration in this paper shall only be related to patent infringement disputes and shall not reflect upon issues of patent validity which, according to Dessemontet\(^\text{81}\) “under many European laws be conducted only as a preliminary issue, prior to the arbitration proper dwelling on contractual issues of a licensing or joint-venture agreement”.\(^\text{82}\)

The only way in which patent infringement disputes can arise out of contractual relationships is in cases of license agreements determining a commercial relationship of the parties that were based on the agreement to arbitrate. If this is

\(^\text{79}\) (Field Jr., 1983, p. 238f).
\(^\text{80}\) (Smith, et al., 2006, p. 304); (Wei-Hua, 2011, p. 388).
\(^\text{81}\) (Dessemontet, 1990).
\(^\text{82}\) Ibid. p.3.
not the case, parties can agree voluntarily to arbitration once the dispute has arisen.

In 2007, 39 cases involving IP disputes\(^\text{83}\) were filed at the ICC. This shows that not many patent infringement cases are submitted to arbitration. Moreover, some jurisdictions do not allow patent infringement disputes to be solved by an arbitral tribunal as they believe it is a matter purely made for resolution in court\(^\text{84}\). On the contrary, the WIPO Mediation and Arbitration Center which was opened in 1994, stated it had most of the cases it dealt with, within the last five years\(^\text{85}\), showing that IP arbitration is an emerging trend. Arbitration is much more flexible and time-saving as compared to litigation, as an arbitral tribunal renders one final and binding award that is binding only on the parties involved, and for this, cases can be solved very individually and undisclosed to the public in a short period of time.\(^\text{86}\)

Worldwide, there are vast differences in how patent arbitration is perceived. The US is a leader in the field with the only country that has support of patent arbitration within its statute.\(^\text{87}\) The WIPO, as an agency of the UN, has established an Arbitration and Mediation Center which deals with patent cases.\(^\text{88}\)

\subsection{2.3.2 Patent Arbitration in the EU}

It has been shown that patent arbitration is a topic widely discussed by scholars and specialized enough to not be found in every jurisdiction. It was found that patent arbitration gains the strongest support in the US. For this, in the following part of the thesis, the focus shall be on patent arbitration in the EU closely pointing out the status quo before determining factors that influence patent arbitration.

\subsubsection{2.3.2.1 Status quo}

Europe has a European Court of Arbitration, a private institution located in Strasbourg, which has not yet dealt with a single case in patent arbitration.\(^\text{89}\)

\begin{itemize}
  \item \(^\text{83}\) Mainly arising out of license agreements.
  \item \(^\text{84}\) Such as, for instance in South Africa (Shearman & Sterlin LLP, 2010, p. 5).
  \item \(^\text{85}\) (Shearman & Sterlin LLP, 2010, p. 1).
  \item \(^\text{86}\) (Schimmel & Kapoor, 2009).
  \item \(^\text{87}\) 25 U.S.C. §§ 135 (d), 294.
  \item \(^\text{88}\) (WIPO Arbitration and Mediation Centre, 2011).
\end{itemize}
Although it is noteworthy that if one consults the website,\textsuperscript{89} one may say that it does not seem to be used as frequently for arbitration cases. However, if one takes Germany as an example; Germany used to have an institution for patent arbitration which was also not used very frequently and has consequently ceased to exist, indicating the lack of patent arbitration taking place.\textsuperscript{90} The EU also has a European Arbitration Chamber, located in Brussels, which has set its main task to the “unification and development of the international arbitration in the Eastern and Western Europe”\textsuperscript{91} and which “has been founded on the initiative of the European Union”\textsuperscript{92}. Nevertheless, this Chamber has not grown to a well-known arbitration institution yet. It can be summarized, that Europe does not have any system of arbitration, not to mention patent arbitration on EU level, which successfully solves cases on a regular basis. Nevertheless, the European Convention on International Commercial Arbitration was signed in 1961 in Geneva\textsuperscript{93} and thus the EU is open to arbitration in “disputes arising from international trade”\textsuperscript{94} based on an arbitration agreement. Unfortunately, under a narrow interpretation, this might exclude patent arbitration, as often times, patent infringement disputes do not arise from the basis of an arbitration agreement.

Recent discussions on the draft of an EU patent litigation system show how necessary it is to establish institutions and rules to solve patent infringement disputes within the EU on a supra-national level, following an envisaged harmonization of EU Patent Law. A comprehensive patent arbitration system on EU level could be a long sought for alternative to traditional litigation and rapidly could make ends meet in terms of establishment of a new system for patent infringement disputes. The patent arbitration Institution, created by the author, which should be established in the EU, is to be seen as a counterpart to the EU patent litigation system which according to the author will definitely be established in a means more or less different from the recently rejected draft within the following years.

\textsuperscript{89} (CEA, 2009).
\textsuperscript{90} (HG.org legal directories, 2011).
\textsuperscript{91} (European Arbitration Chamber, 2011).
\textsuperscript{92} (European Arbitration Chamber, 2011).
\textsuperscript{93} (European Commission for Europe, 1993).
\textsuperscript{94} Ibid.
The patent arbitration institution is not to be seen as a competitive institution to, for instance, the WIPO Arbitration and Mediation Centre, but as an EU institution specifically tailored to the needs of EU member states. For parties to a patent infringement dispute who decide to submit their dispute to an arbitral tribunal on EU level, instead of bringing it to the EU Patent Court, assuming that this court would already be available to the parties at the current date.

2.3.2.2 Factors with influence on EU Patent Arbitration

It is important to understand, why patent arbitration is not the favoured means of solving patent infringement disputes in most EU member states at the time being.

There are several reasons for this. From a legal perspective, in some jurisdictions, patent disputes were or are not yet allowed to be submitted to arbitration and are thought to be a matter that should be dealt with only by the courts. In order to overcome this issue and to create a basis for a new EU patent arbitration institution, it is at first necessary that an EU Patent Law is established which ensures that one set of rules is used for every kind of patent dispute arising in the EU and that supra-national patent laws overrule national patent rules within the EU. If this is not granted with respect to substantive law, the establishment of procedural rules for EU patent arbitration would be useless as such institution would lack power. This calls for the harmonization of regulations in EU Patent Law and also above all concerning annulment and injunction proceedings as well damages with which this paper will not be dealing in detail. It shall merely be assumed that this prerequisite for a patent arbitration system is met within the EU.

Perhaps, from a political perspective, courts are supported more effectively by the state than arbitration institutions or arbitral tribunals. Furthermore, it has been proven to be very difficult to agree on arbitration once a dispute has arisen which is mostly the case in patent infringement disputes as contrary to standard cases in commercial arbitration, they are not based on a contract that might include an arbitration clause and thus ask for the parties to submit their dispute to arbitration,
once the dispute has arisen. Unfortunately, there is no recent study available as to which percentage of claims in a patent infringement dispute setting arise from license agreements and which percentage can be allotted to dispute situations arising from non-contractual relationships between parties such as for instance between two competitors.

From a cultural perspective it can be argued that whether nations prefer submitting disputes to arbitration or to litigation is a matter of mentality and culture. Strong hierarchic cultures with large imbalances in power might trust more in traditional systems such as litigation where a lot of publicly accessible case law exists whereas cultures with a strong sense of equality might find it easier to submit their dispute matters to arbitration. Especially in disputes arising out of patent infringements, it might be necessary to consult experts in a very technical or scientific field in which the patents are used to determine if an infringement is at hand or not. It might be cheaper and easier to have those experts sit in the tribunal in arbitration, than it would be to get hold of them in litigation, which is a field strongly and mainly dominated by lawyers.

The decision to arbitrate is based on the principle of party autonomy. In the patent arbitration institution set up in this thesis for the EU, parties shall have the right to submit their disputes to arbitration. In this case, the EU patent arbitration institution clearly has jurisdiction over the case at dispute. The institution is not meant to be in direct competition to the patent litigation system, meaning that the institution is not approved of having the right to hear the parties or to have jurisdiction, unless the parties unanimously and unmistakably decide to arbitrate. Once the parties submitted their dispute to arbitration according to an agreement made by the parties, the so-called arbitration agreement, the parties waive their right to take this case to court.95

95 The possible types of cases mentioned shall be kept in mind when rethinking the system of Patent infringement Dispute resolution in the EU.

Primarily, arbitrations are regulated by many different layers of norms, laws and regulations, such as "(a) mandatory rules [...] (b) the parties´ agreement; (c) chosen rules of arbitration (if any); (d) international arbitration practice; and (e) applicable law or rules of law."\(^96\)

Mandatory rules are rules subject to public policy issues which cannot be circumvented by party autonomy. In the case that parties decide to submit their dispute to institutional arbitration, the institutional rules will govern most of the aspects mentioned above. For the purposes of this chapter, also due to limitations in time and words in this thesis, it shall be assumed that a patent infringement dispute in the EU shall be brought to an EU patent arbitration Institution which has its own institutional rules for the arbitration procedure. Arbitration rules, according to Petrochilos must: "be self-referential, in other words continue to assume that they express the agreement of the parties on the conduct of the proceedings on all points dealt with by such rules".\(^97\) In this case these rules are based on the rules published by the WIPO Mediation and Arbitration Center which will be amended in order to fit the needs of an EU patent arbitration. For this, the AAA Patent Arbitration Rules\(^98\) shall also be taken into account and used as an example of EU patent arbitration rules.

The WIPO Arbitration Rules for IP disputes seem to be the only set of procedural institutional rules that achieved to become successful and is used fairly often in its respective field. One may ask why, on the contrary, the AAA abolished the use of its Patent Arbitration Rules which were only set up in 2005. Unfortunately, no further studies could be found regarding this issue. However, a likely reason for this incidence might be, that the US are in the rare situation that according to the US

\(^{96}\) (Cook & Garcia, 2010, p. 77).
\(^{97}\) (Petrochilos, Procedural Law in International Arbitration, 2004, p. 172).
\(^{98}\) Effective as of September 2005, but no longer in effect today.
Code, arbitration and specifically patent arbitration are bound to the code.\textsuperscript{99} This puts parties to arbitration in the US in a very strong position and perhaps, this unburdens the arbitration institutions from having to enforce strong specific procedural rules for different fields of dispute.

Furthermore one may argue, that the AAA is mainly represented and consulted throughout the American continent, whereas the WIPO as an UN agency is an institution that is strongly consulted by parties throughout the world. In light of the amount of the articles in the respective rules, the WIPO offers much more predetermined content in 78 articles in 8 sections, whereas the AAA Patent Arbitration Rules only consisted of 51 articles. Nevertheless, it must be taken into account that the WIPO rules try aim at serving all kinds of intellectual property disputes, whereas the AAA were drafted for patent disputes only.

It shall thus be assumed, that the parties agree to arbitrate and that the parties may furthermore decide upon the seat of the arbitration. In case they fail to do so, this shall be decided upon by the arbitrators. The law underlying the dispute shall be the law, respectively the patent law of the EU as well as the procedural rules of the arbitration institution.

One might wonder if it is necessary to set up procedural rules for patent arbitration on EU level, while parties might also submit their European patent infringement disputes to the WIPO Arbitration and Mediation Centre for IP Disputes.

First of all, it is envisaged in this thesis to establish an institution which can be directly compared on the same level to the EU patent litigation system, which is assumed to be established in order to give EU parties the possibility to choose more directly between arbitrating and litigating their patent disputes.

Secondly, it is assumed, that parties would want a procedure which is specifically made for their needs in patent dispute questions, which the WIPO does not exactly offer as the WIPO rules are designed for the procedure of all IP disputes.

\textsuperscript{99} Title 9 and 25 U.S.C. §§ 135 (d), 294.
Thirdly, WIPO arbitration is said to be expensive.\textsuperscript{100} This is an important aspect especially for SMEs for which the EU patent arbitration shall be a system enabling them to compete on the European market by obtaining patents and being able to take part in patent infringement disputes at minimum cost. It is thus deemed to be necessary to set up an EU patent arbitration system, notwithstanding the fact, that worldwide private institutions for IP arbitration are already in existence.

Furthermore where parties agree to arbitrate, the parties waive their right to present their case to a national court or to a possible EPC. Issues relating to substantive law shall also not be discussed within this thesis, as rules such as the WIPO rules, enable the tribunal to directly apply the substantive law which it deems to be appropriate.\textsuperscript{101} According to the WIPO, Intellectual Property Dispute Cases are found to be very international, involving many technical issues, are urgent in most cases as patents are only granted for 20 years, require finality and should be kept strictly confidential in order to ensure for both parties that they keep their trade secrets and reputation.\textsuperscript{102} This distinguishes Intellectual Property Disputes from cases in normal commercial arbitration. The WIPO thus has set up rules for arbitration specifically related to Intellectual Property Disputes: the WIPO Arbitration Rules and the WIPO Expedited Arbitration Rules, for IP Cases in which the parties consider time to be of the essence and are willing “to accept marginal reduction in legal security for greater speed and lower costs”.\textsuperscript{103} Both sets of rules were made taking into account common law and civil law countries and were designed to solve IP disputes worldwide.\textsuperscript{104} The main difference between the two sets of rules is, that in the Expedited Arbitration there is only one arbitrator opposed to three arbitrators in the standard arbitration of IP disputes.\textsuperscript{105}

Although the WIPO Rules were drafted specifically for IP Disputes, they are seen as being very generic and broad. According toLaturno,\textsuperscript{106} they “could be used to

\textsuperscript{100} Registration fee: $ 2000, administration fees between $ 2000 and $ 10000 according to the amount of the dispute and arbitrator fees between $ 300 and $ 600 per hour.

\textsuperscript{101} Art. 59(a) WIPO Arbitration Rules.

\textsuperscript{102} (WIPO, 2011).

\textsuperscript{103} (Paulsson, 1995, p. 3).

\textsuperscript{104} (Kaboth, 2000, p. 65).

\textsuperscript{105} (WIPO, 2011).

\textsuperscript{106} (Laturno, 1996, p. 379).
arbitrate any general business or investment dispute. This should not be considered as a disadvantage, as this makes them fitting for many different possible cases brought under IP arbitration. Accordingly, in the following pages, the WIPO Arbitration Rules will serve as a generic basis for determining a few rules tailored for patent arbitration.

The WIPO Arbitration Rules contain the following sections: General Provisions, Commencement of Arbitration, Composition and Establishment of the Tribunal, Conduct of the Arbitration, Awards and other Decisions, Fees and Costs, Confidentiality and Miscellaneous. These shall be substantiated, amended and some provisions will be added in the sections Composition and Establishment of the Tribunal, Conduct of the Arbitration, Awards and other Decisions and Confidentiality. Due to restrictions in time and words in this thesis, the other Rules set up by the WIPO shall be borrowed and accepted. Before agreeing with the General Provision Part of the arbitration rules, it shall be pointed out, that one of the most important foundations of those arbitration rules is the fact that Article 1 states: “all or certain disputes which have arisen or which may arise may be brought to arbitration.”

For patent matters, especially, it is paramount to give the parties the possibility of submitting their disputes to arbitration once the dispute has already arisen, as many parties to such dispute do not have a contractual relationship as a basis, notwithstanding disputes arising out of license agreements.

Under Art. 13, it is stated that parties to the arbitration may be represented at any time by a person of their choice. As put in the AAA Rules for patent arbitration, this representation shall be notified to the other party and the tribunal “at least three days prior to the date set for the hearing at which that person is first to appear.”

This should be added to Art. 13 of the WIPO Arbitration Rules to ensure a certain

107 Ibid. p. 379.
108 Issues such as arbitrability, the arbitrators, the seat of arbitration, witnesses, waivers and awards will not be considered in those rules as they aim at creating procedural rules for the resolution of patent infringement disputes in the EU only rather than basic elements of arbitration in general.
109 (WIPO Arbitration and Mediation Centre, 2011).
110 The WIPO Expedited Arbitration Rules shall be disregarded in the following.
111 (WIPO Arbitration and Mediation Centre, 2011, p. 22).
order and deadline for choosing representatives.

To the section “Composition and Establishment of the Tribunal”, it should be added to Art. 14 (a) keeping in mind that patent disputes, due to the short duration of a patent, should be resolved rapidly and that it is easier to make a decision in a team with an uneven amount of members: The number of arbitrators chosen shall be an uneven number.

Furthermore, a new article should be added following Article 20 under the Title “Field of Expertise of the Arbitrators appointed” Article 21: “If the number of arbitrators appointed exceeds 1, at least one of the arbitrators appointed shall be an expert in the field of one of the main aspects of the dispute.” A prerequisite for this is, that the EU patent arbitration Institution contains an administrative office in charge of proving through verification documents that the expert appointed undoubtedly is an expert in the respective field and not merely pretends so. Having the chance or even the duty of having an expert in the field of dispute as part of the tribunal is considered to be a strong advantage of arbitrating patent infringement disputes, it shall thus be considered an obligation to the parties to appoint an expert in their field of patent dispute to be part of the arbitral tribunal. Or as Cook and Garcia put it: “Parties would be able to appoint experts in particular fields, including individuals who possess a specific technical background and IP expertise. Even more, parties may appoint non-lawyers as arbitrators. As a result, depending on the parties’ choice, it is possible that the arbitrators themselves would be able to undertake the fact-finding and decision-making processes required to resolve highly complex disputes”\(^{113}\)

In the section “Conduct of the Arbitration”, in light of the different languages in the EU, Article 40 (a) should be changed to: “Unless otherwise agreed by the parties, the language of the arbitration shall be the language in which the patent was originally granted, or English.” (b) would then remain the same. Article 46 (a) allows for the tribunal to issue injunctions or interim measures if requested by one of the

\(^{113}\) (Cook & Garcia, 2010, p. 29).
parties. This is, especially for patent disputes, a very important article as many patent infringement disputes seek for an injunction more than for an award against the other party.

Article 51 under the headline “Agreed Primers and Models” is a paragraph immensely important also for patent arbitrations, but through the request for an expert in the arbitral tribunal, the aim pursued with the establishment of this article should in part be pursued already. Nevertheless, it is important to have such an article in rules specifically made for a topic as specialized as patent arbitration.

In the same section, it would be important to add an article similar to Art. 29 in the AAA Rules stating that “Unless the law provides to the contrary, the arbitration may proceed in the absence of any party or representative who, after due notice, fails to be present or fails to obtain a postponement. An award shall not be made solely on the default of a party. The arbitrator shall require the party who is present to submit such evidence as the arbitrator may require for the making of an award.” 114 This article is necessary to ensure the progress of the decision of the arbitral tribunal in case of one party submitting to arbitration and then refusing to participate at the hearings and in the process. The article cited would be established in order to finish the arbitration proceedings and to give the tribunal the power to render an award binding on the parties to the arbitration.

As to the section “Awards and other Decisions”, under “Currency and Interest” Article 60 (a) needs to be limited to the Euro, the currency of the Euro Zone and thus of most 115 EU member states: Monetary amounts in the awards shall be expressed in Euro. In the section headed “Confidentiality”, it could not be found any article relating to a possible breach of confidentiality by one of the arbitrators.

Pertaining to Art. 77 in the Section “Miscellaneous”, this is a point the drafters of an EU patent arbitration model might want to consider. They might strive to include an article specifically referring to the duty of confidentiality of the arbitrators, especially if they are experts in the field and make use of trade secrets and

115 Namely 17.
confidential information disclosed by the parties in the dispute, which refers to Art. 77, inflicting a certain liability for breach of confidentiality on the arbitrator. What in the author’s opinion is very interesting and should be mentioned as a speciality of WIPO Arbitration Rules, is that according to Art. 73 (a) of the WIPO Arbitration Rules, the parties are supposed to keep confidential the existence of the arbitration and thus also of the materials used and produced through arbitration as well as the arbitral award. This is not usually the case under different institutional rules and is especially useful and necessary in arbitrating patent matters.

As mentioned before, arbitration offers a practical means to decide on a certain method of dealing with injunctions and damages in patent infringement disputes in the EU. This should be clearly implemented when drafting EU patent arbitration rules. More precisely, injunctions shall be made possible in EU patent infringement disputes in an ad-hoc proceeding. Also, a detailed scheme of how to calculate damages for EU patent infringement dispute cases shall be included and shall be officially part of the EU patent arbitration rules set up in this thesis. It will, however, not be written out in detail and shall just be mentioned here briefly, due to restrictions in words and time of this thesis.

2.3.4 Advantages of exemplary EU Patent Arbitration Model

According to Casey, the main arguments for going to arbitration in patent infringement disputes, are if a business wants to keep the reputation of being fair, if there is a long-term business relationship between the patent owner and the infringer, if none of the companies involved are dominant on the market or if the case might be publicly embarrassing for any of the parties involved.

An EU patent arbitration model with an EU patent arbitration institution could provide for a fast and confidential one-stop procedure, to resolve patent infringement disputes within the EU in a fair and neutral procedure on EU level.

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116 Art. 75, Art. 76 (a) WIPO Arbitration Rules.
117 (Casey, 1993).
Arbitration has the ability to solve parallel disputes in several jurisdictions, such as often seen in patent infringement disputes, within one hearing, which helps to solve the dispute faster and at lower costs due to less people involved and due to having witnesses and experts only give their evidence once in the trial for all parallel aspects involved. It must, however, be taken into account that due to the nature of the conflicts submitted to arbitration, it might be possible that one single hearing only is not always eligible. For instance, if in cases where the parties to the dispute first need to be designated or where third parties such as subsidiaries might also be parties involved in the dispute or in questions concerning arbitrability or for the purpose of fact-finding and discovery, more than one hearing might be fruitful.

Furthermore, arbitration gives large freedom to the parties to choose the arbitrators as well as institutional and procedural rules of the dispute.\(^{118}\) This gives the party the opportunity to not only rely on lawyers trained to interpret the law, but to engage experts in the trial, that have valuable expertise in the dispute matters at hand and which might substitute the adding of costly experts to the phase of evidence gathering and as witnesses in the hearing.\(^{119}\)

Arbitration might be the better means of creating a setting to clearly decide on damages or injunctive reliefs as in arbitration decisions can be made specifically for a certain dispute only. On the other hand, arbitration is most likely not suitable to decide the scope of protection or the annulment of a patent as this strongly refers to the EPO’s regulations on which the patent was granted.

Moreover, whereas litigation usually is a public procedure, arbitration in patent matters is mostly confidential. This bears the advantage that trade secrets and confidential business information revealed in the procedure will not be made available to the public. Also, arbitral awards are final and binding only on the parties to arbitration. In other words, a solution can be found, which creates a win-win-situation, specifically for the parties involved, and arbitrators need not be afraid of having a strong influence on further decisions through creating precedents, as the

\(^{118}\) (Born, International Arbitration and Forum Selection Agreements: Drafting and Enforcing, 2010, p. 2).

\(^{119}\) (Laturno, 1996, p. 369).
argumentation in patent arbitration usually is, even after the award was made, not made available to the public.

According to experts in the field, arbitration is very suitable if the parties engage in a long-term business relationship and want to come to a fair agreement. In order to further pursue a good and close business relationship, a so called standby arbitral tribunal, can be created. A standby arbitral tribunal\textsuperscript{120} has the benefit for the parties at hand that the chosen arbitrators will always remain available to the parties and will solve any disputes that further arise in the business relationship. This is advantageous, as trials may be solved much faster, if the arbitrators are already familiar with the situation and the parties involved.\textsuperscript{121}

In case of a standby tribunal, clear rules must be established as to the contact of the parties with the arbitrators in non-disputable situations, as the Impartiality and Independence of the arbitrators must be ensured.

Another reason for parties from different EU member states to submit their dispute to an EU Institution for patent arbitration would be the enormous flexibility which parties encounter in arbitration. When deciding to arbitrate, parties are free to “select arbitrators, or to adopt specialized procedures, appropriate for their particular transaction, industry, and other needs”.\textsuperscript{122} Whereas an EU patent litigation system also offers a procedure which is specifically created for the parties’ needs, in litigation the parties are not as free as to choose their own judges and procedural rules as well as the laws applicable to the dispute.

A patent arbitration system in the EU would have the advantage of delivering fast legal securities to the parties, most likely with only one hearing.\textsuperscript{123} Through fast process, patent disputes can be solved in a fairer manner\textsuperscript{124}, faster and cheaper and with less effort in terms of meeting, travelling and attending oral hearings than any litigation system might ever manage to achieve.

\textsuperscript{120} Meaning a static tribunal of arbitrators assigned to all disputes arising out of a certain business relationship.
\textsuperscript{121} (Cook & Garcia, 2010, p. 32).
\textsuperscript{122} (Born, International Arbitration and Forum Selection Agreements: Drafting and Enforcing, 2010, p. 2).
\textsuperscript{123} (Shearman & Sterlin LLP, 2010, p. 3).
\textsuperscript{124} Due to experts with more knowledge on the case involved.
For the EU, a patent arbitration would be a vast step towards the unification of the legal system of the EU and would be able to fulfil all the expectations towards the patent litigation in a more efficient, cost-saving, faster and fairer way, due to party-elected arbitrators, who are experts regarding the core of the dispute and the possibility of solving disputes much faster by arbitration than by litigation. When setting up a patent arbitration model, the EU may use the experiences made by the US arbitration system and also learn from the WIPO Mediation and Arbitration Center. With this expertise, it may create a system advanced to systems in practice today, by using existing procedural and institutional rules as a basis for its drafts, similar to the aforementioned suggestions.

2.3.5 Disadvantages of exemplary EU Patent Arbitration Model

It seems, arbitration is such a flexible system for any kind of dispute that there are hardly any disadvantages to be found.\(^\text{125}\)

Caron\(^\text{126}\) states that reasons to be sceptical about bringing patent infringement disputes to arbitration are that for companies, patents are like crown jewels that are very precious and need to be handled with care and thus companies might award greater trust to standardized proceedings such as litigation. Also, it lies within the legal culture of the country whether arbitration is supported or disputes are generally submitted to litigation.

Furthermore, according to Janicke\(^\text{127}\), a crucial aspect to patent infringement disputes is the need for an injunctive relief. This was not always possible to gain easily through patent arbitration. The problem here consisted mostly of the fact that there is not sanction if injunctions are not fulfilled. Probably, it can be argued, that the litigation system is more stable and has more power in terms of

\(^{125}\) Disadvantages in Arbitration seem to exist not in the procedure from the dispute to the rendering of an award, but the problems seem to occur in fields relevant to Arbitration, which are said to be excluded from the discussion in this paper, merely: in the discussion of validity and enforcement of the award and enforceability of the arbitral clause, validity of location of Arbitration. The disadvantage, however, specific to Patent arbitration seems to arise in relation to the specificity of Patent arbitral awards. As they might include highly technical issues for which it might be very difficult to find experienced judges to enforce the award appropriately.

\(^{126}\) (Caron, 2003).

\(^{127}\) (Janicke, 2002-2003, p. 706).
enforcement of awards or court decisions than an arbitral tribunal which is called for only for a certain time. Arbitration will most likely gain more power if it is operated more often and once it becomes the standard process for resolving patent infringement disputes in the EU.

Arbitration might not always be completely favourable for both parties to the dispute if it is agreed upon before a dispute arises as it has been unclear what the dispute will be like when the arbitration agreement was drafted and it thus contains many uncertainties and is not precisely the best agreement the parties could make. If the parties agree to arbitrate, once the dispute arises, as typical in patent infringement settings, a better agreement can be made that very well suits and takes into account the different factors of the dispute.

2.3.6 Conclusion

Although, today arbitration does not have the worldwide power to enforce any kind of award entirely without any problem – the EU requires a patent arbitration Institution which has the potential to solve patent infringement disputes under the special situation of the EU in a faster, more efficient and less expensive way than any draft of an EU patent litigation system might achieve. With setting up such an institution, the EU would make a vast step towards a strong worldwide system of international arbitration which would surely bring more flexibility and party autonomy to the legal world, as in arbitration, parties get to choose their arbitrators and have the chance to decide some of the aspects of how the dispute is to be solved.

2.4 Comparison of EU Patent Litigation and EU Patent Arbitration

No matter if in support of the arbitration or the litigation side, it can be agreed that at least one of the models in terms of unifying the EU patent system is needed and that both constitute a step towards stronger equality and fairness in the EU and would eliminate forum-shopping by unifying EU Patent Law and could or would
include experts in the decision-making team. Both procedures would be faster than the procedures used in the EU at the moment. In the following, the EU litigation and arbitration models shall be compared according to costs, duration of the proceedings, publicity of cases and relationship of the parties involved in the dispute.

2.4.1 Comparison of Costs

In terms of costs, which is one of the crucial arguments in the discussion of setting up a EPC or an EU patent arbitration institution, it can be said, that once centralized procedures are in place and working, this would generally lower costs. In order to establish an EU patent litigation system, this would afford the investment of a high sum, as the following institutions would have to be established: an EU Patents Court, a training centre for the judges working at the EPC as well as an information distribution system between the EPO, the EPC and the ECJ.

As for arbitration, merely an institution with an administration would have to be set up and arbitration procedures could take place anywhere close to the parties. Arbitrators would merely need to sign up for patent arbitration and would then be called by the parties if needed. In terms of previous investment and costs of establishment, setting up an EU patent arbitration institution would be less expensive than setting up an EU patent litigation system as litigation systems are subject to more regulations and rules and consist of an immobile court.

Once one of the systems would be in place, costs could be reduced through both systems. This would be achieved by cutting translation costs in both systems, by shortening trial durations due to a higher degree of experience of the arbitrators / judges involved and due to less travelling expenses.

One of the major arguments for both systems is the argument of reduction of translations. In both, the patent litigation and patent arbitration systems, less translations would have to be made compared to our current status in the EU. Arbitration in particular would require less translation work as it is requested to hold the arbitration in the language in which the patent, and also the evidence, is
made or, if so chosen by the parties, in English. Thus hardly any documents would have to be translated in the process of arbitrating whereas in litigation, at least two different EU member states’ languages could be involved and translation would still have to be used.

Research, as published in the PTC Research Report, further demonstrates the importance of cost. The Report suggests that the amount payable for the dispute resolution process influences the decision of whether to litigate or arbitrate. Out of 51 companies, 73% would arbitrate a patent infringement if the costs would stay below $100,000. As soon as the amount increased to $1,000,000, the percentage decreased to 14%. Two results could be found: (1) Firms prefer arbitration in infringement disputes over litigation in matters relating to validity or damages (2) Firms are less likely to choose an alternative to litigation as soon as the amount involved exceeds $500,000. These findings might also be valid for the European market. If the amount at stake gets too high, firms are less likely to choose a fair way of arbitrating; they rather rely on traditional methods such as litigation to make sure they know from the beginning which outcome of the dispute they might face. It is to be debated, if the figures found by the Franklin Pierce Law Center in 1980 are still valid, but current research has revealed no more recent studies on the topic, however this could be relevant.

2.4.2 Comparison of Duration of the Proceedings

In terms of the duration of the proceedings, both systems would mean a huge improvement to the current system of trials.

Although the EU patent litigation system aims at solving disputes within one year’s time, by making use of highly experienced judges and experts in the field, arbitration, would still be a faster means to overcome patent infringement disputes.

128 (Franklin Pierce Law Center, 1980).
In arbitration, disputes are usually finished within three to six months after the beginning of the process.129

Furthermore, arbitration could ensure, that the use of the patent would not be on hold for too long. Time is money, especially with respect to patents due to their very short validity period. In very urgent cases, this argument might convince parties to submit their dispute to arbitration, depending on their relationship and the reasons for the dispute, depending on whether they are willing to work together on a fair solution by making use of alternative dispute resolution, such as arbitration, or whether they do not want to cooperate and just want to win according to the facts at hand.

2.4.3 Comparison of Publicity of Cases

Usually, litigation is open to the public or at least, the court’s opinion will be made publicly available after the trial. This is a basic feature of litigation systems, as litigation tries to establish a lot of case law and precedents through which the correct interpretation of law in different cases can be made transparent. Arbitration, on the other hand, tries to find a unique resolution for a dispute arising between two parties. The final award is binding only on the parties to the dispute and usually, even third parties are excluded from the process and mostly, the arbitral tribunal’s reasoning is only made available to the parties themselves, but not even to the courts that might have to enforce the award in the end. Arbitration awards are, if not kept confidential, at least said to be kept private.

Arbitration thus is a means to resolve disputes privately, without having to fear trade secrets and internal processes being made available to any third party, competitors or the public. In litigation,130 parts of the hearings in some jurisdictions may also be made unavailable to the public, however, this often leads to greater interest of the press and the general public, which will most likely be able to reconstruct large parts of the hearings due to the information that necessarily has to be disclosed to the public.

129 According to the WIPO, these findings are realistic. The author of the thesis bases his argumentation on the WIPO’s estimates of duration of IP Arbitration Procedures.
130 Although not common.
The hiding of information from the public in arbitration may also however, be considered a disadvantage, as the non-existence of publications or precedents disallows for comparison, so parties going through similar proceedings to predecessors will be unable to feasibly assess how a tribunal might rule or indeed whether a ruling has been made fairly in accordance with previous rulings made.

Depending on the case, parties might choose arbitration over litigation or vice versa. It may be assumed though that in patent infringement disputes, it is paramount to the parties to not have to disclose contents of the patent or trade secrets to the public and they might thus opt for arbitration if deciding only according to this factor.

2.4.4 Comparison of Relationships of the Parties before and after the Dispute

Patent infringement disputes are a delicate topic in how they might change long-term business relationships. Often patent disputes arise out of license agreements or between competitors.

Litigation, although also perceived as very neutral and fair, often has the outcome that parties don’t talk to each other in person during and after the conflict. This might cause long-term damage to their relationship. Litigation If parties decide to submit their dispute to arbitration, usually they are willing to resolve the dispute\textsuperscript{131} on alternative, more smooth and direct ways, finding a solution that best suits both of the parties involved.

Sometimes, it might be better for a party to a dispute to suggest arbitration as a resolution solution, as it demonstrates a willingness to see through a fair trial and subsequently to continue with good business relations. However, this said, arbitration is no guarantee of a protected business relationship. Unlike litigation is always said to clearly end in an ongoing conflict situation. If there was more time, it would have been interesting to further dive into this particular difference between litigation and arbitration and to find reasons for or against it in form of empirical studies.

\textsuperscript{131} (American Arbitration Association, 2005).
2.5 Discussion and Critique

An important issue can be drawn from the discussions made in this thesis; there are always two sides of an issue. Whether arbitration or litigation is the right means to solve patent infringement disputes in the EU, strongly depends on two aspects: Firstly on the arrangement of the respective system and a thorough fulfilment of all necessary prerequisites and secondly on the particular case and the relationship of the parties involved in the dispute. It is not a simple task to compare two systems not yet in existence; as such a comparison must be based entirely on theoretical papers dealing with the idea of establishing a litigation system.

Furthermore, for the establishment of an arbitration system, no model patent arbitration system exists to be used as a sample. For this, the focus of this thesis in the part relating to an arbitration system was set on the procedural rules that might be used in EU patent arbitration. Provided a very limited and short amount of time and words for the thesis, it was not possible to fully set up a new system of procedural rules, so they were composed as amendments to existing institutional arbitration rules which have a strongly positive reputation. The short amount of time available also made it impossible to discuss in-depth every argument for or against a certain article in the arbitration rules, as the author deems would have been appropriate.

However, this lead to a comparison of an institutional establishment of a patent litigation system according to a precise draft on the one hand with mainly procedural rules possibly being used for EU patent arbitration on the other hand, a comparison, that does not precisely take place on the same level, also because the arbitration model was created by the author. It would have been interesting to also engage in some studies or gain further insights into practical experience with litigation and arbitration in terms of content of cases, proceedings, costs, duration etc. In total, the topic might be further extended in a doctoral thesis.
Arbitration might be the less complicated system and might seem as the favourable system in patent matters, which surely might bring some improvements to the EU patent dispute resolution system, but this might also be due to the author’s experiences.\(^{132}\)

### 3. Conclusion and Outlook

As in patent dispute resolutions, parties often do not have contractual duties to either proceed to litigation or to arbitration, they are completely free to decide which option best suits their needs. Arbitration might offer some large advantages in patent disputes due to lower costs, faster trial and less publicity as well as with the rendering of an award that is merely binding on the parties in this particular case.

Furthermore, arbitration offers the advantage of establishing a standby arbitration tribunal, in case, further disputes arise between the parties and might be the more suitable solution to disputes with a certain amount at stake.

Nevertheless, other reasons might lead parties to deliberately submit their claims to litigation, such as for instance, that many lawyers do not seem to be as experienced in arbitration as in litigation\(^{133}\), even today, and are thus not able to give the parties a clear understanding of the difference of both dispute resolution means. Which system will gain acceptance in the end is yet to be seen.

According to the lengthy discussions on the establishment of an EU patent litigation system, mostly relating to the challenges that occur while establishing a stable basis by fulfilling some necessary prerequisites to the system, such as a harmonized EU patent law, this will surely be implemented one day, although some hurdles might even then still have to be overcome.

Arbitration continues to grow as a legal field of practice, however, it still remains unfamiliar territory for many parties and lawyers. In this respect, one must consider

\(^{132}\) Which have been more distinct in the field of arbitration than in litigation.

\(^{133}\) (Robb, 1952).
that the introduction of an EU patent arbitration system might still be a long way off, in spite of it perhaps appearing to be the most practical solution to many dispute resolution issues surrounding patent infringement. Or let Born conclude this thesis: “arbitration is much like democracy; it is nowhere close to ideal, and often fails fully to realize it’s objectives, but it is generally a good deal better than the available alternatives.”\textsuperscript{134}
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