
Session 2 – Focus Mediation

SAVING TIME & MONEY THROUGH MEDIATION



Dr. Michael Gross

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CEOs / CFOs

→ Legal Departments

wasting time and money

Some reasons

- often little ADR experience (big and small companies!)
 - therefore court litigation selected, lack of choice of dispute resolution mechanism
 - contract negotiations:
 - no escalation clauses in general (→ negotiations → mediation → arbitration or court)
 - clauses and recommendations:
 - International context: WIPO AMC Rules accepted & used
 - German context: Mediation Centre of the Chamber of Commerce and Industry for Munich and Upper Bavaria Rules accepted and used
- Both organizations:
- good service
 - WIPO AMC: PCT discount

Patent Litigation

Country	Characteristic of Legal System	Average Length	Average Cost
France	<ul style="list-style-type: none"> - Civil Law - Unified Litigation - No specialized courts 	First Instance: 18-24 months Appeal: 18-24 months	€80,000-150,000 (1 st Inst.)
Germany	<ul style="list-style-type: none"> - Civil Law - Bifurcated Litigation - Specialized court for invalidity 	First Instance: 12 months Appeal: 15-18 months	€50,000 (1 st Inst.) €70,000 (App.)
Italy	<ul style="list-style-type: none"> - Civil Law - Unified Litigation - Specialized courts 	First Instance: few months – 24 months Appeal: 18-24 months	€50,000-150,000 (1 st Inst.) €30,000-70,000 (App.)
Spain	<ul style="list-style-type: none"> - Civil Law - Unified Litigation - Commercial Courts 	First Instance: 12 months Appeal: 12-18 months	€100,000 (1 st Inst.) €50,000 (2 nd Inst.)
UK	<ul style="list-style-type: none"> - Common Law - Unified Litigation - Specialized courts - Mediation promoted 	First Instance: 12 months Court of Appeal: 12 months Supreme Court: 24 months	€750,000-1,500,000 (1 st Inst.) €150,000-1,500,000 (App.) €150,000-1,500,000 (Supreme Court)
China	<ul style="list-style-type: none"> - Civil Law - Bifurcated Litigation - Specialized courts 	First Instance: 6 months Appeal: 3 months	USD150,000 (1 st Inst.) USD50,000 (App.)
Japan	<ul style="list-style-type: none"> - Civil Law - Bifurcated Litigation - Specialized courts 	First Instance: 14 months Appeal: 9 months	USD300,000 (1 st Inst.) USD100,000 (App.)
USA	<ul style="list-style-type: none"> - Common Law - Unified Litigation - Specialized court of appeals (CAFC) - Jury trial available - Mediation promoted 	First Instance: up to 24 months Appeal: 12 + months	Up to USD4,000,000 (1 st Inst.) USD150,000-250,000 (App.)

Source: This chart is based on figures provided in Patent Litigation - Jurisdictional Comparisons, Thierry Calame, Massimo Sterpi (ed.), The European Lawyer Ltd, London 2006.

Patent Life Sciences Litigation in Selected Jurisdictions

Country	Characteristic of Legal System	Competent Courts	Average Length	Average Cost
Brazil	Civil Law Unified Litigation Specialized courts	First Instance Court of Appeal Superior Court of Justice Supreme Federal Court	2-4 years 1-3 years 1-3 years 1-3 years	USD 50,000-1 Mio USD 20,000-150,000 USD 10,000-300,000 USD 10,000-300,000
China	Civil Law Bifurcated Litigation Specialized courts	Specialized IP Courts* Higher People's Court Supreme Court Intermediate Court** Higher People's Court Supreme Court <i>*Beijing, Shanghai, Guangdong</i> <i>**Other provinces</i>	1-2 years* 6 months-1 year* 6 months-1 year 1-2 years* 6 months-1 year* 6 months-1 year	USD 150,000-250,000 USD 100,000-150,000 USD 100,000-300,000 USD 150,000-250,000 USD 100,000-150,000 USD 100,000-300,000
France	Civil Law Unified Litigation	Tribunal de Grande Instance, Paris Court of Appeal, Paris Supreme Court	18 months 2 years 18 months	EUR 200,000-500,000 EUR 150,000-375,000 EUR 50,000
Germany	Civil Law Bifurcated Litigation Specialized courts	<i>Infringement:</i> * Regional Court Higher District Court Federal Supreme Court <i>Invalidity:</i> * Federal Patent Court – Revocation Chamber Federal Supreme Court <i>*Value in dispute: 1Mio-15Mio</i>	6-12 months 12-18 months 18-24 months 18-24 months 20-24 months	EUR 80,000-650,000 EUR 90,000-765,000 EUR 115,000-1 Mio EUR 85,000-740,000 EUR 105,000-880,000
India	Common Law Unified Litigation	District Court High Court Supreme Court	3-5 years 3-5 years 3-5 years	EUR 25,000-150,000 EUR 20,000-500,000 EUR 20,000-100,000
Japan	Civil Law Unified Litigation Specialized courts	District Court IP High Court Supreme Court	15.7 months 6.7 months 12.5 months	USD 100,000-1 Mio USD 50,000-100,000 USD 50,000-100,000
Republic of Korea	Civil Law Bifurcated Litigation Specialized courts	<i>Infringement:</i> District Court High Court Supreme Court <i>Invalidity:</i> Patent Tribunal Patent Court Supreme Court	12-18 months 12-18 months 6-24 months 10-12 months 12-18 months 6-24 months	USD 50,000-200,000 USD 50,000-300,000 USD 50,000 – 500,000 USD 10,000- 50,000 USD 50,000-300,000 USD 50,000-500,000

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Russia	Civil Law Bifurcated Litigation Specialized courts	First instance court Appellate court (First Appeal) IP court (Second Appeal) Supreme Court	6-9 months 2-3 months 3-4 months 5-12 months	USD 60,000-80,000 USD15,000-25,000 USD15,000-25,000 USD5,000-17,000
Spain	Civil Law Unified Litigation	Court of First Instance Court of Appeal Supreme Court	12-18 months 12-18 months 2-3 years	EUR 75,000-200,000 EUR 50,000 EUR 50,000
Sweden	Civil Law Unified Litigation	Stockholm City Court Court of Appeal Supreme Court	12-18 months 1 year 1 year	EUR 150,000 EUR 100,000 EUR 75,000
Switzerland	Civil Law Unified Litigation Specialized courts	Swiss Federal Patent Court Swiss Federal Supreme Court	Nullity: 1.5 years; Infringement: 2 years; Preliminary injunction: 4 months-1 year 6-8 months	CHF 100,000-150,000 CHF 100,000-300,000 CHF 80,000-160,000 CHF 40,000-80,000
The Netherlands	Civil Law Unified Litigation Specialized courts?	District Court of The Hague The Hague Court of Appeal Supreme Court	10-12 months 14 months 18 months	USD 200,000 USD 175,000 USD 125,000
United Kingdom	Common Law Unified Litigation Specialized courts	Intellectual Property Enterprise Court (IPEC) Patents Court – Chancery Division of the High Court Court of Appeal of England and Wales Supreme Court	12-18 months 12-18 months 12 months 18-24 months	USD150,000-250,000 USD 800,000 USD 400,000 USD 400,000
United States of America	Common Law Unified Litigation Specialized court of appeal Jury trial	District Courts Court of Appeals for the Federal Circuit Supreme Court USPTO - PTAB Inter Partes Review Post Grant Review	24-40 months 1 year 1 year 18 months from filing 18 months from filing	USD 4-6 Mio USD 1 Mio USD 1 Mio USD 500,000-600,000 USD 500,000-600,000

Source: A Compilation of Practitioners' Views - Life Sciences Dispute Resolution, Judith Schallnau, WPO Arbitration and Mediation Center, Les Nouvelles, Journal of the Licensing Executives Society International, September 2016, p.129

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How to save



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Possible ways forward:

Feasible solutions should be evaluated in line with various types of Conflict Management, e.g.

- negotiation
- mediation
- arbitration
- litigation

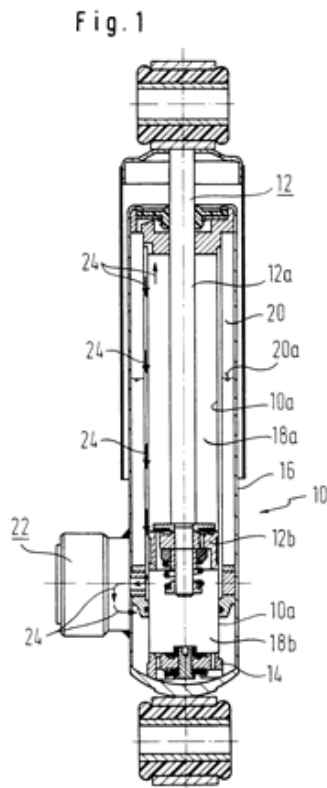
(www.RTMKM.de defined 17 types of Conflict Management!)

Cost and Time – Court Litigation Example

I. Damper case

(drawing > not case-related

> only example)



claims: co-inventorship & compensation

Cost and Time – Court Litigation Example

1.1 Time

Period to enforce the claims on grounds of cause and amount

(Landgericht Nürnberg → OLG Nürnberg → Bundesgerichtshof → Landgericht Nürnberg → Oberlandesgericht Nürnberg):

14 years!

1.2 Costs and outcome

→ **ca. 1,7 Mio. Euro ./.** 1,7 Mio. Euro

Cost and Time – Mediation Example (1)

2 German companies + 1 US company

General Terms and Conditions of the supply agreement:

→ „ADR first followed by Landgericht Düsseldorf“

→ German Company directly filed a suit with the LG Düsseldorf

→ Judge referred to the concrete ADR-clause and argued:
„dilatory lawsuit waiver“ which means: ADR first and – if ADR fails – then „Landgericht Düsseldorf“

→ Parties started a Mediation in Munich under the Mediation Regulations of the IHK-Mediation Center of the Chamber of Industry and Commerce for Munich and Upper Bavaria

1.1 Time

Landgericht Düsseldorf

Period to enforce the claims in Düsseldorf: more than 1 year.

Mediation in Munich

1 telco with parties, lawyers & mediator:

15 December 2014: ~ 2 hours

26 January 2015: 9:00 – 16:00 → 7 hours

1.2 Costs and outcome

Mediator: ~ 15 hours including preparation + expenses

Parties: lawyer's fees + expenses

./.. one-time payment

(→ case (publication of IHK München) → Annex)

Mediation in the Area of R&D

- Parties:

- European research institute focusing on applied research and company based in France

- Agreement:

- License agreement concluded 2010; technology with an application for patent on file in the European Patent Office

- Dispute resolution clause:

- WIPO Mediation followed by court litigation (German courts)
- Place of mediation: Munich; Language: English

Mediation in the Area of R&D

■ Dispute:

- Company alleged invalidity of the license agreement and requested refund of royalty payments in light of rejection of patent application before the EPO, product quality
- Research institute commenced WIPO mediation requesting payment of royalties

■ Mediation:

- Parties' request for WIPO Center list of mediator candidates (experience license agreements, patent law, English)
- Preparatory telephone conference (document submission, mediation meeting - timetable, party representation, venue)

Mediation in the Area of R&D

- One-day hearing at mediator's office in Munich; preceding dinner
- Result:
- **Settlement agreement**
 - **Less than three months after commencement of mediation; costs: less than EUR 5,000; enabled continued collaboration**
 - Option to negotiate a R&D agreement between parties
 - Amendment license and payment of royalties taking into account future EPO decision on patent application

Multi-Party Mediation Case Example - Cost and Time

- Two companies, one liquidator (Europe)
- Contract: implementation of a trademark assignment
- Dispute resolution: WIPO mediation followed by court litigation

- Trademark dispute
- Liquidator filed mediation; companies filed mediation
- “Consolidation” of several proceedings (same parties, same dispute)
- Party agreement

- WIPO List of mediator candidates (criteria: mediation experience, knowledge IP licensing, language skills)

Multi-Party Mediation Case Example - Cost and Time

- One-day meeting
- Clarification of disputed issues
- High level of satisfaction with mediator's support

- Parties continued detailed negotiations after meeting
- Mediator monitored discussions
- Settlement

- Mediation served to rebuild trust and to inform further collaboration

B. B2B-ADR Experience in General

1. Fraunhofer

a) Mediations

2013 – 2016: 6 mediations

- 4 settlements → succes rate (5 mediations): 80%

- 1 x no settlement →

- 1 x pending

1.1 time : 3 x 1 day (3 x 2 parties)

1 x 1,5 days (2 parties)

1 x 3 days in one week (3 parties)

1.2 costs and outcome

Mediator: ca. 30 hours à 300 EUR + expenses
(1 - 1,5 days)

Parties: lawyer's fees + expenses

./. case-related payments

b) Arbitrations

2013 – 2016: 4 arbitrations

- 1 settlement
- 1 x no settlement

because of bankruptcy of the adverse party before the start of the arbitration

- 2 enforcements in 2016

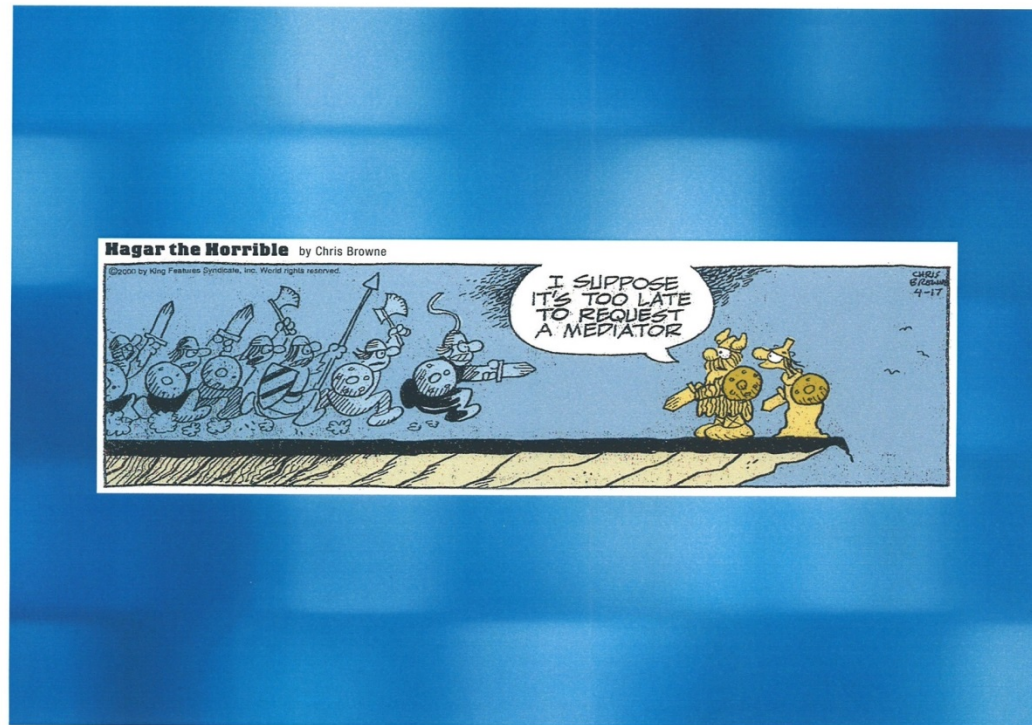
1.1 time: some weeks – 2 years

1.2 costs & outcome:

./ case-related payments

3. Counsel & Mediator/ Arbitrator

- Distinguish between ADR types to find the „appropriate“ conflict management tool



■ Negotiations:

→ mediation training for the negotiators

→ faster & cheaper negotiations without external lawyers



**“He said his first words:
‘I will only answer through
my counsel’”**

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- Negotiation training:
→ how do you negotiate?



- Mediation → advantages in (IP) life sciences disputes
 - flexibility to design and influence the process and define the conflict
 - less time & costs: minimal
 - in most of the cases: no external counsel
 - less internal transaction costs (researchers, legal counsel & trained internal mediator)
 - less time (1-3 days)
 - Enforceability
 - mediation cases to date: no need to enforce!
 - arbitration cases to date: 1/3 of all cases
- argumentation e contrario:
mediation FIRST!

■ Mediation → fields of use, e.g.:

■ German Inventor law:

DAX company – employee (2015)

- claims of a German employee inventor → German court
- dispute judge transferred the case to a quality judge
- quality judge proposed mediation
- settlement within one day
- very good result for both parties and employee kept the job (high interest of company to keep the employee)

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- R&D- & License Agreements
 - Nullity & infringement cases

- Careful selection of consultants & intermediaries

- proven experiences!

- beauty contests

- Movie: please select the „appropriate ADR-Tool“!

