Master Thesis

International Business Law

Arbitration and the Unified Patent Court: the new perspectives

Ana Luiza Romano Madureira
ANR: 491579
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Supervisor: Erik P.M. Vermeulen

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1. INTRODUCTION

Globalization became a strong effect in the 21st century and since then the world started to not have the same boundaries as before. Technology is also evolving very quickly, informations are easier to be obtained and society needs are different and more demanding. Therefore, economical demands from businesses and individuals are also different and aligned with such changes. Thus, there is a pressure for the laws to comply with the constantly evolving demands of the currently technological innovative world.

Therefore, Intellectual Property (IP) is probably the field that needs to evolve the most together with the measures of how to mitigate the growing cross-border disputes involving the IP rights. Therefore, arbitration became an interesting Alternative Dispute Resolution (ADR) exactly due to the evolving field of international commercial arbitration.

Thus, the first chapter is an analysis of the reasons why arbitration became a strong alternative to Court litigation. It is possible to conclude by the first chapter that arbitration has a great success solving conflicts[1]. Therefore, governments and courts could no longer ignore arbitration as a possibility that had to be supported[2].

Arbitration became especially interesting for cross-border patent disputes because it is considered a faster, less expensive, flexible and confidential type of dispute resolution[3]. Also, it started to become the ideal choice for disputes that leads to complex technical issues in different jurisdictions.[4]

The analysis of arbitration is also important to understand the tendency for harmonization of laws and how it influences the patent disputes.

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[1] Legal Instruments and Practice of Arbitration in the EU (*European Parliament - Policy Department Citizen's rights and Constitutional affairs, 2014*) < http://www.europarl.europa.eu/RegData/etudes/STUD/2015/509988/IPOL_STU(2015)509988_EN.pdf> accessed: 28 May 2017

[2] ibid

[3] Joseph Lookofsky and Ketilbjorn Hertz, *Transnational Litigation and Commercial Arbitration: An analysis of American, European, and International Law* (2nd edn, Juris Publishing 2004)

[4] Guide to International Arbitration *(Latham & Watkins, 2014)* < https://www.lw.com/thoughtleadership/guide-to-international-arbitration-2014> accessed: 14 May

Arbitration has already established a tradition for the evolving tendency of harmonization since 1958 with the New York Convention (NYC), which is a way for the participating member states to recognize and enforce the foreign arbitral awards in different jurisdictions[5].

This tendency of harmonization is also possible to be seen in the attempt of the United Nations Commission on International Trade Law (UNCITRAL)[6]. It assumes the important role of developing frameworks through the UNCITRAL Model Law in order to reach a more progressive and harmonized modernization of the international commercial arbitration laws and its procedures in different jurisdictions[7].

The recognition of the importance of a modern and harmonized cross-border dispute resolution is happening by many different countries. Currently, there are 145 participating members of the New York Convention[8].

Also, it was possible to analyze in the second chapter that most countries are adopting the UNCITRAL Model Law. Even when the UNCITRAL Model Law is not adopted, it influenced somehow the laws about international commercial arbitration (which is the case of the UK and Switzerland, for example).

Also, countries, that have never had a strong tradition for arbitration, are not only recognizing its importance for cross-border disputes, but also adopting the UNCITRAL Model Law and becoming participating members of the New York Convention. This is the example of Brazil that is going to be further analyzed in the second chapter.

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[5] Convention on the Recognition and Enforcement of Foreign Arbitral Awards: New York, 1958 *(United Nations, 2015)* < http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/New-York-Convention-E.pdf> accessed: 17 May 2017

[6] A Guide to UNCITRAL: Basic facts about the United Nations Commission on International Trade Law (*United Nations, 2013*) <http://www.uncitral.org/pdf/english/texts/general/12-57491-Guide-to-UNCITRAL-e.pdf> *accessed: 17 May 2017*

[7] UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006 (*UNCITRAL website, 2017)* <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html> accessed: 17 May 2017

[8] Guide to International Arbitration *(Latham & Watkins, 2014)* < https://www.lw.com/thoughtleadership/guide-to-international-arbitration-2014> accessed: 14 May

Thus, in the second chapter there is the analysis of different jurisdictions in order to understand better how the different countries are complying with the international arbitration as a way to solve the cross-border IP disputes. Also, the second chapter has the aim to understand the reason why harmonization is particularly essential for patent dispute. Therefore, the second chapter is a tool to better comply with the affirmation of the EU Parliament: the interaction between both the international commercial arbitration and EU law can lead to some potential inconsistencies. Such potential inconsistencies are about the different ways that arbitration is treated by different jurisdictions (even with the effort of harmonization through the New York Convention and the UNCITRAL Model Law)[9].

The third chapter is an analysis of the future implementation of the Unified Patent Court (UPC) as a way to harmonize better the system for the patent disputes in Europe. The implementation of the Unified Patent Court will turn the EU package effective and the process for patents will be facilitated since the request of the patent until the litigation[10].

Also, the third chapter has the aim to understand what will be the relation and impacts of the implementation of the UPC for the practice of the international commercial arbitration. Both UPC and International commercial arbitration strive for an effective harmonized process. However, the UPC brings the harmonization of the litigation process among the member states of the EU while arbitration is an ADR with no such strong need for compliance as the UPC Agreement demands.[11] Basically, the UPC will be part of the national jurisdiction of the member states which represents a supranational tendency for harmonization in Europe[12].

There is also the analysis of the perspectives of the patents for the future. The extensive analysis of this work needs to comply with the perspectives that the patents have. The modernized harmonization attempt of

[9] ibid
[10] EPO, 'Unitary Patent and Unified Patent Court' <http://www.epo.org/law-practice/unitary.html> accessed 23 May 2017
[11] UPC, 'Unified Patent Court' < https://www.unified-patent-court.org/> accessed: 23 May 2017
[12] ibid

the EU package needs to be complied with a patent in accordance with the ongoing demands of innovation of this century.

2. THE ROLE OF ARBITRATION FOR PATENT CONFLICTS

Intellectual Property is a matter that is in constant evidence in the current globalized world. The advances of technology make businesses interested and worried about how to protect their intangible assets, which includes intellectual property[13]. In order to keep their competitiveness, businesses need to be always ahead of their competitors and find better and fast paced solutions.

Therefore, arbitration comes as a promise of an efficient Alternative Dispute Resolution (ADR) in comparison to litigation. This happens for many reasons and probably the most important one is the facility that it offers for different multinationals all over the world to agree into a more international and neutral solution (and then avoiding possible situations regarding local protectionisms).[14] Furthermore, there is a tendency for a better harmonization of the international arbitration rules and the States are starting to recognize the importance of it by adopting rules that facilitate such harmonization. Therefore, arbitration seems to be constantly evolving in order to be aligned with the new advances of the world (which includes the intellectual property).

Intellectual Property itself also has the currently world's tendency for harmonization of laws and decisions (especially for patents). This is possible to be seen through the European Patents and the discussion over the implementation of the Unitary Patent and the Uniform Patent Court (UPC). This is going to be further analyzed in the next chapter with the parallel of the perspectives of arbitration in such scenario.

Thus, arbitration for Patent disputes is on the rise for the many advantages that it can offer nowadays[15]. This chapter is going to analyze the importance of the role of arbitration for the intellectual property field, the

[13] Maurizio Crupi 'Patent arbitration: a European analysis' (*Universita Commerciale Luigi Bocconi, Tesi de Laurea Magistrale in Giurisprudenza, 2013-2014*) <http://www.studiotorta.it/premio/pdf/tesi2015/tesi/2015-Maurizio-Crupi-Patent-arbitration-a-European-comparative-analysis.pdf> accessed: 04 April 2017

[14] Guide to International Arbitration *(Latham & Watkins, 2014)* < https://www.lw.com/thoughtleadership/guide-to-international-arbitration-2014> accessed: 14 May

[15] Mihir Chattopadhyay 'Recent Event: the Case for Arbitration of Patent Disputes' (Kluwer Arbitration Blog, 25 February 2016) <http://kluwerarbitrationblog.com/2016/02/25/recent-event-the-case-for-arbitration-of-patent-disputes/> accessed: 14 May 2017

tendency of international harmonization of the international commercial arbitration rules and the advantages that arbitration can offer for patent disputes.

There is a vast literature about International Commercial Arbitration, but the idea of this chapter is to understand why arbitration is being considered the best choice over litigation for the patent disputes.

2.1. Overview of arbitration for Intellectual Property Disputes

Arbitration is a type of dispute resolution in which parties agree that a third party will solve their dispute. Instead of going to Court (litigation process), the parties establish, prior to the conflict, that the upcoming decision of the third party will be legally binding and not simply advisory[16].

Arbitration is often seen as a way of an Alternative Dispute Resolution (ADR). In fact it is an alternative to Court litigation, but arbitration provides great success resolving conflicts and due to that it has been receiving support both by governments and courts[17]. One of the benefits of arbitration is the freedom that it is given to parties to solve their conflicts in a different way that it is adopted in the national courts[18]. However, it is important to have the idea that arbitration is very dependent on national courts and also on national legal systems[19].

Arbitration clause is only binding to the parties in the agreement, and third parties are not bind[20]. This is also true even when the third parties out of the agreement are somehow involved in the dispute or even if their

[16] Legal Instruments and Practice of Arbitration in the EU (*European Parliament - Policy Department Citizen's rights and Constitutional affairs, 2014*) < http://www.europarl.europa.eu/RegData/etudes/STUD/2015/509988/IPOL_STU(2015)509988_EN.pdf> accessed: 04 April 2017
[17] ibid
[18] ibid
[19] ibid
[20] ibid

cooperation is essential for the better enforcement and applicability of the agreement[21].

Therefore, in an international commercial scenario, contracting merchants from different States make an agreement establishing that any kind of dispute that could arise from the contractual relationship would be settled, not in court by judges, but by arbitrators[22]. Thus, according to Joseph Lookofsky and Ketilbjorn Hertz:

> By agreeing to arbitrate, merchants "contract out" of their right to litigate disputes in those national courts which would otherwise have jurisdiction to adjudicate; and such an exercise of commercial contractual freedom is generally respected under the applicable rules of both national and international law.[23]

About the arbitration process, it is usually conducted or by one or three arbitrator(s) that are referred in each case as a Tribunal[24]. However, although quite equivalent of a judge or even a panel of judges, in arbitration the parties have the freedom to select the arbitrators and own the control of how and who is going to settle the dispute[25]. Also, the expertise of the arbitrators is a strong characteristic that puts arbitration even more in evidence: arbitrators are normally extremely experienced lawyers in the field of the dispute (especially when it involves international cases)[26]. The parties are also entitled to decide the terms of the tribunal's powers and duties in the arbitration agreement as well as the national law that shall be applied[27].

In most legal systems, the arbitrators will have to make their awards in accordance with the applicable law (with the exception when

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[21] ibid
[22] Joseph Lookofsky and Ketilbjorn Hertz, *Transnational Litigation and Commercial Arbitration: An analysis of American, European, and International Law* (2nd edn, Juris Publishing 2004)
[23] Ibid 754 (emphasis added)
[24] Guide to International Arbitration *(Latham & Watkins, 2014)* < https://www.lw.com/thoughtleadership/guide-to-international-arbitration-2014> accessed: 14 May 2017
[25] ibid
[26] ibid
[27] ibid

the parties have agreed otherwise)[28]. The Tribunal has to follow the due process and give the same opportunity for each party to present their arguments and defend themselves (apart from that, the process is very much flexible)[29].

Arbitration might be preferred over litigation 'because arbitration is perceived as faster, less expensive, more flexible, and more confidential means of dispute resolution'[30].

The disputes involving Intellectual Property (IP) normally arise among parties that have long juridical relationships[31]. For example, in cases of a license contract involving patents.[32] Therefore, arbitration can be extremely useful in the cases cited before.

Jacques de Werra confirms that by saying:

> In today's global consumer-oriented and technology-based economy, the value and competitiveness of companies are increasingly depending on their intangible assets (that already exist or must be generated in order to remain competitive). It is therefore not surprising that more and more international business transactions relate (at least partly) to intangible assets (which are protected by intellectual property law, such as patents, trademarks, and trade secrets). As a consequence, intellectual property issues regularly arise in international business disputes. Given that international disputes are frequently submitted to out-of-court dispute resolution systems (primarily arbitration but also other types of alternative dispute resolution mechanisms), it logically results that intellectual property disputes also tend to be decided outside of state courtrooms, particularly by arbitral tribunals (which already supports the view that such disputes shall be considered as arbitrable).[33]

The possibility of risks or complexities as an outcome of intellectual property litigation before state courts can be a problem in situations involving

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[28] ibid
[29] ibid
[30] Lookofsky and Hertz (n9) 756
[31] Maurizio Crupi 'Patent arbitration: a European analysis' (*Universita Commerciale Luigi Bocconi, Tesi de Laurea Magistrale in Giurisprudenza, 2013-2014*) <http://www.studiotorta.it/premio/pdf/tesi2015/tesi/2015-Maurizio-Crupi-Patent-arbitration-a-European-comparative-analysis.pdf> accessed: 04 April 2017
[32] ibid
[33] Jacques de Werra, *New Developments of IP Arbitration and Mediation in Europe: The Patent Mediation and Arbitration Center Instituted by the Agreement on a Unified Patent Court* (Revista Brasileira de Arbitragem, 2014, Arbitragem e mediacao em materia de propriedade intelectual) 17-35 (emphasis added)

cross-border intellectual property[34]. Also, arbitration (and ADRs in general) has advantages (it will be further explained later) that contribute to explain the reason why arbitration is considered an attractive method for intellectual property and, consequently, patent disputes[35].

2.2. Harmonization: The UNCITRAL Model Law on International Commercial Arbitration and the New York Convention

After the globalization effect, the facilities of the internet, the development of a European Union, the world realized the proper need of a harmonized system for communication and transactions. The United Nations stated that 'in an increasingly economically interdependent world, the importance of an improved legal framework for the facilitation of international trade and investment is widely acknowledged'[36]. For that, the United Nations Commission on International Trade Law (UNCITRAL) has an important role for the development of frameworks in order to reach 'a progressive harmonization and modernization of the law of international trade[37]'. The Guide to UNICITRAL says:

> These instruments are negotiated through an international process involving a variety of participants, including member States of UNCITRAL, nonmember States, and invited intergovernmental and non-governmental organizations. As a result of this inclusive process, these texts are widely accepted as offering solutions appropriate to different legal traditions and to countries at different stages of economic development. In the years since its establishment, UNCITRAL has been recognized as the core legal body of the United Nations system in the field of international trade law[38].

Thus, the UNCITRAL proposes solutions for a better cooperation, participation and harmonization of the laws that involves International Trade

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[34] ibid
[35] ibid
[36] A Guide to UNCITRAL: Basic facts about the United Nations Commission on International Trade Law (*United Nations, 2013*) <http://www.uncitral.org/pdf/english/texts/general/12-57491-Guide-to-UNCITRAL-e.pdf> *accessed: 17 May 2017 (emphasis added)*
[37] ibid
[38] Ibid (emphasis added)

Law in different countries of the world (and this also involves the International Commercial Arbitration).

The UNCITRAL Model Law on International Commercial Arbitration has the function to assist States for the reforming and modernization of the laws regarding the international commercial law and its procedure (covering all the stages of an arbitral process from the arbitration agreement until the recognition and enforcement of the arbitral award).[39] The States have the sovereignty to adopt the UNCITRAL Model Law or not. However, the UNCITRAL Model is extremely well accepted by different States of different regions and economic systems [40].

The 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards is also another attempt of an effective international commercial arbitration based on the harmonization of decisions. It provides the enforcement of arbitral awards in more than 145 contracting States that are limited only to the defenses set out in the Convention[41].

The New York Convention (NYC) is also another way to recognize the growing importance of the international arbitration by facilitating the recognition and enforcement of foreign arbitral awards[42]. Therefore, the NYC has the ambition to provide a 'common legislative standards for the recognition of arbitration agreements and court recognition and enforcement of foreign and non-domestic arbitral awards'[43]. Non-domestic arbitral awards will be all the awards conceded under the rules of any foreign State[44].

The Article III of the Convention states the basic obligation that the contracting States have to follow:

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[39] UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006 (*UNCITRAL website, 2017)* <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html> accessed: 17 May 2017

[40] ibid

[41] Guide to International Arbitration *(Latham & Watkins, 2014)* < https://www.lw.com/thoughtleadership/guide-to-international-arbitration-2014> accessed: 14 May

[42] Convention on the Recognition and Enforcement of Foreign Arbitral Awards: New York, 1958 *(United Nations, 2015)* < http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/New-York-Convention-E.pdf> accessed: 17 May 2017

[43] ibid

[44] ibid

> Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards[45].

The idea of the Convention is to provide the same enforcement of the domestic arbitral awards to the non-domestic ones with no possibility of discrimination[46]. Thus, it aims to give certain certainty to the parties that the arbitral awards can be recognized and be capable of enforcement in the chosen jurisdiction[47].

2.3. The Patents and the European Patents

The patent gives the exclusive right that is granted for an invention; invention can be a new product, new process of a way of doing something or a new technical solution for a problem[48]. To be granted with a patent, the technical information of the invention needs to be disclosed to the public through a patent application[49].

The aim of the patent is to protect the owner's exclusive right for the commercially exploitation of the patented invention[50]. Therefore, no one can try to exploit the patent somehow (distributing, using and etc) with no authorization from the owner[51]. The duration for the patent protection is for a limited period and it is usually 20 years from the filling date in the application[52].

Due to its territorial characteristic, patents can only be enforced with its exclusive rights in the country where the patent has been filed and granted in accordance with the law of such jurisdiction[53].

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[45] ibid
[46] Guide to International Arbitration *(Latham & Watkins, 2014)* < https://www.lw.com/thoughtleadership/guide-to-international-arbitration-2014> accessed: 14 May
[47] ibid
[48] WIPO, 'Patents' < http://www.wipo.int/patents/en/> accessed: 15 May 2017
[49] ibid
[50] ibid
[51] ibid
[52] ibid
[53] ibid

The idea of a European Patent as an agreement between the States of the European Union happened even before the creation of the European Union itself. It was in 1949, just right after the creation of the Council of Europe, that the French Senator Longchambon came with a proposal for a type of regional patent system[54]. The proposal was reject, but the idea of a patent office providing a better integration of the States in Europe gained many supporters[55]. However, it was only in 1977 that the European Patent Convention (EPC) became effective[56]. Therefore, the EPC came to establish a harmonized system of law that would be common to all the contracting states in order to grant the patents for inventions[57]. Also, it came to establish a European Patent Organization with both administrative and financial autonomy with a single procedure and office for the so called 'European patent'[58].

However, even though it was established a single procedure for the application of the patent, there is no unitary right[59]. In practice, there are the national patents that are subjected to the national laws of the contracting state where the patent was filled[60]. The validity of the European Patent is conditioned to the patent to be translated for the language of the contracting state that the effect is searched and needed[61]. Therefore, the idea of harmonization of the European Patent is valid, but it is a fragmented patent system (each contracting state governs their share of the European Patent)[62]. To exemplify, Ana Alba Betancourt states that 'the remedies are not addressed in the EPC, the post-patent granting issues, such as amendment, revocation and infringement and litigation will take place at national level'[63]. However, the EPC represents an important first step for an effective harmonization.

[54] Alba Betancourt 'Cross-Border Patent Disputes: Unified Patent Court or International Commercial Arbitration?'(*Utrecht Journal of International and European Law., 2016, pp.44–58*) < http://www.utrechtjournal.org/articles/10.5334/ujiel.262/> accessed: 17 May 2017
[55] ibid
[56] ibid
[57] ibid
[58] ibid
[59] ibid
[60] ibid
[61] ibid
[62] ibid
[63] ibid

2.4. The advantages of the Arbitration for the Patent Disputes

Arbitration might not be the best choice for every situation. However, when there is a negotiation with parties in different jurisdictions or if the dispute may lead to some complex technical issues, then arbitration is an important choice of alternative dispute resolution that can have better advantages compared to litigation[64]. Thus, intellectual property, which includes patents, can have both of the characteristics cited before which makes it to be better addressed by arbitration than by court litigation.

First advantage is the technical expertise and experience that the arbitration procedure can offer[65]. The parties can choose the arbitrators based on their expertise which is an important fact when leading to something as specific as patent disputes[66]. For litigation this is not possible and there is a reasonable chance that judges or juries may not have the necessary knowledge to give a decision that is not passive of modification[67]. About that, there is one report asserts that states that 52% of all the first instance decisions involving patent disputes are modified somehow on appeal in the United States[68]. Therefore, the possibility of choosing the arbitrators by expertise can be much more manageable for complex patent disputes[69].

Enforceability is a second advantage for the international commercial arbitration[70]. Countries are adopting International Conventions that facilitates the enforceability of the awards that were made in foreign States[71]. This is a great advantage against court judgments due to the facilitation that it can offer for international contracts. The most important Convention is the 1958 New

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[64] Guide to International Arbitration *(Latham & Watkins, 2014)* < https://www.lw.com/thoughtleadership/guide-to-international-arbitration-2014> accessed: 14 May 2017

[65] ibid

[66] ibid

[67] ibid

[68] Mihir Chattopadhyay 'Recent Event: the Case for Arbitration of Patent Disputes' (Kluwer Arbitration Blog, 25 February 2016) <http://kluwerarbitrationblog.com/2016/02/25/recent-event-the-case-for-arbitration-of-patent-disputes/> accessed: 14 May 2017

[69] ibid

[70] Guide to International Arbitration *(Latham & Watkins, 2014)* < https://www.lw.com/thoughtleadership/guide-to-international-arbitration-2014> accessed: 14 May 2017

[71] ibid

York Convention in which 145 countries are signatories and all of them agreed to facilitate the recognition and enforceability of foreign arbitral awards[72].

Neutrality is a third advantage that also comes from the international characteristic that arbitration can have[73]. The parties are entitled to choose the law for the arbitration process[74]. Therefore, both the arbitral procedure and the nationality of arbitrators 'can be neutral to law, language and institutional culture of parties'[75]. Thus, arbitration is a possibility to provide the opportunity for a neutral dispute resolution (for example, there is the possibility to use international rules applied by a multinational tribunal)[76].

Confidentiality is the fourth and a very important advantage that arbitration can offer.[77] Litigation is often public and although the degree of confidentiality will depend on the different arbitration laws of different jurisdictions (if there is no provision established already by the parties), arbitration is still a better choice on confidentiality than litigation[78]. The World Intellectual Property Organization (WIPO) also states that the proceedings and award are confidential in arbitration[79]. Therefore, it is extremely clear the reason why this very important especially for IP disputes. Confidentiality is fundamental for the protection of trade secrets and also the public image of the company that it is the party of the arbitration agreement[80]. Also, confidentiality is fundamental to ensure the competitive advantage of the parties[81].

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[72] Alba Betancourt 'Cross-Border Patent Disputes: Unified Patent Court or International Commercial Arbitration?'(*Utrecht Journal of International and European Law., 2016, pp.44–58*) < http://www.utrechtjournal.org/articles/10.5334/ujiel.262/> accessed: 17 May 2017

[73] Guide to International Arbitration *(Latham & Watkins, 2014)* < https://www.lw.com/thoughtleadership/guide-to-international-arbitration-2014> accessed: 14 May 2017

[74] ibid

[75] WIPO, 'Why Arbitration in Intellectual Property?'< http://www.wipo.int/amc/en/arbitration/why-is-arb.html> accessed: 17 May 2017 (emphasis added)

[76] Guide to International Arbitration *(Latham & Watkins, 2014)* < https://www.lw.com/thoughtleadership/guide-to-international-arbitration-2014> accessed: 14 May 2017

[77] ibid

[78] ibid

[79] WIPO (n62)

[80] Maurizio Crupi 'Patent arbitration: a European analysis' (*Universita Commerciale Luigi Bocconi, Tesi de Laurea Magistrale in Giurisprudenza, 2013-2014*) <http://www.studiotorta.it/premio/pdf/tesi2015/tesi/2015-Maurizio-Crupi-Patent-arbitration-a-European-comparative-analysis.pdf> accessed: 04 April 2017

[81] ibid

The length of the proceeding is the fifth advantage of arbitration in comparison to litigation[82]. According to WIPO there is a limited appeal option for arbitration (awards can only be reviewed in some strict circumstances) which makes it much simpler and faster than litigation[83]. Also, this happens due to the procedural simplicity and flexibility of arbitration. It is easily adaptable to the resolution of the dispute process in order to suit the relationship of the parties and the nature of the disputes[84]. About the length of the proceeding, WIPO also states the possibility of an urgent arbitration procedure in which arbitrators can shorten the procedure and the 'WIPO Arbitration may include provisional measures and does not preclude seeking court-ordered injunction'[85].

Patents are granted by national authorities and, due to this, it was argued that the disputes involving them were supposed to be settled by a public body within the national system[86]. Nevertheless, it is very well accepted that such disputes are arbitrable (as any other private rights). Nowadays it is broadly accepted that the rights that the parties can dispose are, generally, capable of being the subject of an arbitration agreement based on the parties wish[87]. Therefore, due its consensual nature, arbitration will only be binding to the parties in the agreement and third parties will not be affected. [88]

[82] Guide to International Arbitration *(Latham & Watkins, 2014)* < https://www.lw.com/thoughtleadership/guide-to-international-arbitration-2014> accessed: 14 May 2017
[83] WIPO (n62)
[84] Guide to International Arbitration *(Latham & Watkins, 2014)* < https://www.lw.com/thoughtleadership/guide-to-international-arbitration-2014> accessed: 14 May 2017
[85] WIPO (n62)
[86] ibid
[87] ibid
[88] ibid

3. ARBITRATION IN EUROPE (AND SWITZERLAND), UNITED STATES AND BRAZIL

The idea of this chapter is to analyze how the arbitration system works in different jurisdictions, with a special emphasis in situations involving Patent conflicts. Thus, the aim of this chapter is to analyze how arbitration is functioning in different jurisdictions.

Also, this chapter has the aim to analyze the advantages and the flaws of arbitration in different countries with a special emphasis to Europe (UK and Netherlands) and Switzerland. It is important to state that the analysis of Switzerland is necessary for international commercial arbitration due to its fundamental importance for the practice in the field of arbitration. Other international countries like United States and Brazil were included in this analysis for a better conclusion of the phenomenon of harmonization that is happening in the world.

Essentially, in order to better analyze the role of arbitration for patent disputes as well as the role of the future implementation of the Unified Patent Court (UPC), it is necessary to analyze and compare some classical systems for arbitration and their efficiency in a technologically, fast paced and competitive Era for companies and individuals.

3.1 Overview of Arbitration in Europe and Switzerland

For a better analysis, it is important to distinguish the differences between the domestic and international arbitration. When there is an 'international legal relationship' at stake, arbitration is usually chosen to avoid the national State Courts and situations that can become a burden (local protectionism as an example)[89]. Nevertheless, arbitration is also a possible dispute resolution chosen for nationals of a determined State for many reasons and advantages, such as: celerity, expertise, confidentiality or the adaptability

[89] Legal Instruments and Practice of Arbitration in the EU (*European Parliament - Policy Department Citizen's rights and Constitutional affairs, 2014*) < http://www.europarl.europa.eu/RegData/etudes/STUD/2015/509988/IPOL_STU(2015)509988_EN.pdf> accessed: 04 April 2017

of the rules of the procedure for the specific types of needs that the case might require.[90] About it, the European Parliament states:

> The meaning of the distinction between domestic and international arbitration largely depends on the adopted point of observation. It is undeniable that international arbitration is in many respects different from domestic arbitration: in light of the current evolution of this legal phenomenon, international arbitration is now described by some commentators as a transnational system of civil and commercial justice, an autonomous legal order largely independent from national systems. However, from the point of view of States, such a notion of international arbitration is not generally recognised in national legislation (with some notable exceptions, such as France): in this context, arbitration is usually seen as a private mechanism of dispute resolution, which is seated in one particular jurisdiction and regulated by its national laws. Therefore, it is important to analyse the scope of these national rules in light of the distinction between international and domestic arbitration.
> [91]

Arbitration law does not differentiate between the domestic and international arbitration in some jurisdictions across Europe. Therefore, whenever a State has an arbitration cause, it is going to be subject to the same national rules, even if the legal relationship is international in nature. The only criterion in this situation is whether the arbitration is domestic or foreign[92]. If the case is seated in the State then the arbitration law of the respective country will always be applied. If it is not seated in the State then the proceedings will not follow the scope of the national law[93]. The relevance of the foreign arbitration foe the State will only be, if much, as national provisions of public international law[94].

Therefore, different countries in Europe take different types of approaches as a way to distinct between the domestic and international arbitration[95]. The majority of countries does not make the difference between the types of proceedings (domestic and international): Austria, Belgium, Czech Republic, Denmark, England and Wales, Estonia, Finland, Germany, Hungary,

[90] ibid
[91] ibid 37 (emphasis added)
[92] ibid
[93] ibid
[94] ibid
[95] ibid

Ireland, Italy, Latvia, Lithuania, the Netherlands, Poland, Portugal, Scotland, Slovakia, Slovenia, Spain and Sweden[96]. On the other hand countries like Bulgaria, Cyprus, France, Greece, Malta, Romania and Switzerland have the distinction between international and domestic arbitration[97].

Thus, the arbitration practice in the European Union is not as transnational as it is portrayed[98]. The practices are usually very much national or regional even in the case when arbitration is considered somehow a transnational field for a group of practitioners[99].

Therefore, arbitration in reality has a regional emphasis. Usually arbitration practitioners are likely to recommend a State with geographic or cultural relations to their own State somehow (even in situations involving international arbitration)[100]. Normally only four States achieve Europe-wide recognition (England, France, Sweden, Switzerland)[101].

In situations involving IP rights there is a legal protection of the holder of the title when there is the registration done by a sovereign power (the registration gives the right to use and exploit).[102] Situations involving IP rights have been limited for the use of arbitration due to the consequences for third parties[103]. However, other situations involving royalties or research agreements are easily to be solved through arbitration. [104] About arbitrable situations involving IP rights, Maurizio Crupi says:

> Fewer problems arise when the validity of the IP title is not at stake, therefore if the dispute concerns the payment of royalties or research agreements, these issues are generally considered to be arbitrable. In particular two systems, that will be exhaustively examined in the following paragraphs, have a wide conception of arbitrability of intellectual property disputes: that is to say Switzerland and the U.S. On the contrary most other countries draw a distinction between registered

[96] ibid
[97] ibid
[98] ibid
[99] ibid
[100] ibid
[101] ibid
[102] Maurizio Crupi 'Patent arbitration: a European analysis' (*Universita Commerciale Luigi Bocconi, Tesi de Laurea Magistrale in Giurisprudenza, 2013-2014*) <http://www.studiotorta.it/premio/pdf/tesi2015/tesi/2015-Maurizio-Crupi-Patent-arbitration-a-European-comparative-analysis.pdf> accessed: 04 April 2017
[103] ibid
[104] ibid

> rights (i.e. patents and trademarks) and those which do not require such a formality (e.g. copyright). While in the latter category arbitrability appears to be internationally accepted, the former, which is object of this analysis, is more interesting and lets most countries permit arbitrability on validity issues only with *inter partes* effect; on the other hand issues regarding ownership, infringement and violation are normally arbitrated.[105]

David Perkins and Richard Price cited Mr. Justice Laddie from a judgment of 1999 (*Sepracor v Hoechst Marion Roussell* 1999 1AllER (D) 80), in which stated that the European system of patent litigation was such a less satisfactory system that it could not have been dreamt up by Kafka. [106]

Due to the European Patent Convention (EPC), the European Patents (EPs) turn into national patents in the Contracting State once they are granted[107]. Currently, there are some possible Contracting States under the EPC and each of them has its own jurisdiction related to the validity and infringements of the EPs that are registered in their jurisdictions[108]. Therefore, over the years there have been many conflicting situations and decisions in different European countries over the same EP and the same infringement[109]. About the conflicting situations involving EPs, David Perkins and Richard Price explains:

> Coupled with the potential for conflicting outcomes, despite the Commission's efforts to harmonise procedures among the 28 EU Member States (the Enforcement Directive 2004/48/EC), there remain significant differences in procedures among European jurisdictions. For example, the Common Law procedure of the English Patents Court and the Irish courts and the Civil Law procedures of the German and most other Continental European Courts. Germany, in particular, operates a bifurcated system. The District Courts try infringement, but challenges to validity are dealt with in separate proceedings by the Federal Patent

[105] Maurizio Crupi 'Patent arbitration: a European analysis' (*Universita Commerciale Luigi Bocconi, Tesi de Laurea Magistrale in Giurisprudenza, 2013-2014*) <http://www.studiotorta.it/premio/pdf/tesi2015/tesi/2015-Maurizio-Crupi-Patent-arbitration-a-European-comparative-analysis.pdf> accessed: 04 April 2017, 45 (emphasis added)

[106] David Perkins and Richard Price "A European Perspective on the Arbitration of Patent Disputes" (*Kluwer Arbitration Blog, March, 29, 2016*) citing *Justice Laddie Sepracor v Hoechst Marion Roussell* [1999] 1AllER (D) 80< http://kluwerarbitrationblog.com/2016/03/29/a-european-perspective-on-the-arbitration-of-patent-disputes/> accessed:04 May 2017 (emphasis added)

[107] David Perkins and Richard Price "A European Perspective on the Arbitration of Patent Disputes" (*Kluwer Arbitration Blog, March, 29, 2016*) < http://kluwerarbitrationblog.com/2016/03/29/a-european-perspective-on-the-arbitration-of-patent-disputes/> accessed: 04 May 2017

[108] ibid

[109] ibid

> Court in Munich. The former is a relatively quick and pro patentee procedure, whereas the latter is known for its slowness and the high proportion of decisions reversed on appeal to the Federal Supreme Court (BGH) in Karlsruhe.[110]

Also, there is also the problem involving time and cost difficulties of the current system[111]. It is extremely costly to litigate in various European jurisdictions. Therefore, this current system is inefficient as a solution for a constant evolving globalized world.

The European Parliament already affirmed that the interaction between both the international commercial arbitration and EU law can lead to some potential inconsistencies[112]. Arbitration is about giving the parties the power to avoid litigation before the Member states courts and at the same time 'devolving adjudicatory functions to subjects operating outside of the aforementioned European area of justice'[113]. Therefore, there is the issue for the EU to be able of harmonizing all the Member States with the efficient application of the specific substantive law[114]. Thus, there is the questioning of how to apply an effective dispute resolution like arbitration and conciliate with the EU's community.

3.1.1 Arbitration in the United Kingdom

The legal system of the United Kingdom is complex and has different jurisdictions, which are: England, Wales, Northern Ireland and Scotland. England, Wales and Northern Ireland (for convenience "England" or "English) is considered one of the most important leading arbitral jurisdictions[115]. However, the arbitral expertise is located in London where the greater numbers of world's leading specialists are especially located (more than in any other city in the

[110] Ibid (emphasis added)
[111] ibid
[112] Legal Instruments and Practice of Arbitration in the EU (*European Parliament - Policy Department Citizen's rights and Constitutional affairs, 2014*) < http://www.europarl.europa.eu/RegData/etudes/STUD/2015/509988/IPOL_STU(2015)509988_EN.pdf> accessed: 04 April 2017 (emphasis added)
[113] Ibid 186
[114] ibid
[115] ibid

world)[116]. Also, even not being very uniformly assented, the English law and case laws about arbitration are very influential in a worldwide perspective.[117]

The majority of the commercial disputes can be arbitrated under the scope of the English Arbitration Act of 1996 if the parties agreed for such form of dispute resolution[118]. Thus, the English Arbitration Act can be applied in the jurisdictions of England, Wales or Northern Ireland[119]. However, Scotland follows its own separate legal system and also arbitration law[120].

Therefore, while English arbitration has been regulated since 1996 through the English Arbitration Act, Scotland had no specific regulation before 2010[121]. Nevertheless, in 2010 it happened of the Scottish Arbitration Act that is mainly based on the English Arbitration Act of 1996[122].

Thus, arbitration in Scotland could not develop before 2010 and, in consequence, it remains an undeveloped field of practice if compared to other countries under the English Arbitration Act[123]. However, there are good perspectives for the growing and development of arbitration in Scotland due to positive reception of the Arbitration Act in 2010[124]. Therefore, the analysis will be focused on the jurisdictions under the English Arbitration Act due the importance that arbitration as an ADR has in such countries.

The foundation for the English Arbitration Act is based in accordance of three guiding principles which are fairness, party autonomy and non-intervention by the courts.[125] Thus, the principle of fairness is based on obtaining a fair resolution of the dispute by an impartial tribunal with the

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[116] ibid
[117] ibid
[118] Guy Pendell and David Bridges, 'Arbitration in England and Wales' (CMS Guide to Arbitration e-guides vol 1, 12 April 2012) <https://eguides.cmslegal.com/pdf/arbitration_volume_I/CMS%20GtA_Vol%20I_ENGLAND%20WALES.pdf> accessed: 04 May 2017
[119] ibid
[120] ibid
[121] Legal Instruments and Practice of Arbitration in the EU (*European Parliament - Policy Department Citizen's rights and Constitutional affairs, 2014*) < http://www.europarl.europa.eu/RegData/etudes/STUD/2015/509988/IPOL_STU(2015)509988_EN.pdf> accessed: 04 April 2017
[122] ibid
[123] ibid
[124] ibid
[125] Pendell and Bridges (n41)

avoidance of additional delays or expenses[126]. The party autonomy means that the parties are free to agree how they want to solve the dispute, only limited to safeguard the public interest if it is involved[127]. At the end, the non-intervention by the courts is a principle that means that court intervention will be avoided and only permitted by the circumstances stated in the English Arbitration Act[128].

About the English Arbitration Act, Maurizio Crupi explains:

> Even the Arbitration Act of 1996 does not provide a clear definition on the above-mentioned distinction, devolving to common law the task of determining those "matters which are not capable of settlement by arbitration". Even if the principle of parties' autonomy is limited by the "necessary safeguards in the public interest", it is true that this limit refers only to the way in which these disputes must be resolved and not about the arbitrability of the subject matter. In this regard it is necessary to consider case law.[129]

Also, about the English Arbitration Act, it is not based in the UNCITRAL Model Law[130]. However, some of the drafting of the English Arbitration Act was inspired by it[131]. It is also important to state that the UK has been part of the New York Convention since 1975[132].

Therefore, it is important to state that both England and Wales is a common law jurisdiction. Therefore, the legal process 'has traditionally emphasized the importance of procedural issues and a number of English procedural concepts'[133]. Thus, these concepts are not applied in the European civil law tradition, but they are very well known in other common jurisdictions

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[126] ibid
[127] ibid
[128] ibid
[129] Maurizio Crupi 'Patent arbitration: a European analysis' (*Universita Commerciale Luigi Bocconi, Tesi de Laurea Magistrale in Giurisprudenza, 2013-2014*) <http://www.studiotorta.it/premio/pdf/tesi2015/tesi/2015-Maurizio-Crupi-Patent-arbitration-a-European-comparative-analysis.pdf> accessed: 04 April 2017, 45 (emphasis added)
[130] Justin Williams, Hamish Lal and Richard Hornshaw. 'Arbitration procedures and practice in the UK (England and Wales): overview' (Thomson Reuters Practical Law, September 2016) <https://uk.practicallaw.thomsonreuters.com/4-502-1378?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1> accessed: 04 April 2017
[131] ibid
[132] ibid
[133] Guy Pendell and David Bridges, 'Arbitration in England and Wales' (CMS Guide to Arbitration e-guides vol 1, 12 April 2012) <https://eguides.cmslegal.com/pdf/arbitration_volume_I/CMS%20GtA_Vol%20I_ENGLAND%20WALES.pdf> accessed: 04 May 2017

like the United States, Canada, Australia and the majority of the Commonwealth member states[134]. The procedural elements as cited by Pendell and Bridges are constituted by the 'disclosure and inspection of documents, the exchange of witness statements, cross-examination of witnesses and use of party-appointed expert witnesses'[135].

Actually, the proper English legal proceedings have in essence a much more adversarial than inquisitorial approach, which means it is 'party-driven with the judge adopting the position of arbiter between the opposing parties'[136]. The inquisitorial one gives more importance to the figure of the judge whom will be responsible for progressing the case[137]. However, the English arbitral proceedings do not depend on the procedure of the English Court due to the English Arbitration Act. About the English Arbitration Act, Guy Pendell and David Bridges states:

> English arbitral proceedings under the English Arbitration Act are not tied to English court procedure. The English Arbitration Act enables arbitrators to use wide-ranging powers (which are much more akin to the case management techniques employed under the continental European procedural system) to ensure that the arbitration progresses efficiently, proportionately and in the interests of the parties. [138]

Thus, arbitral proceedings are extremely common and well accepted in England. In situations where Intellectual Property is involved it is no different. The English Courts usually admits a broader possibility of arbitrability involving IP disputes[139]. About it, Maurizio Crupi gives the example of the *Roussel-Uclaf v. GD Searle & Co. Ltd* as a case involving the dispute of a patent license and the English Court determined that such dispute was supposed to be settled through arbitration (even without any arbitration convention among the parties; for that the Court gave a broader interpretation of the companies doctrine)[140].

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[134] ibid
[135] ibid 309
[136] ibid 309
[137] ibid
[138] ibid 310
[139] Maurizio Crupi 'Patent arbitration: a European analysis' (*Universita Commerciale Luigi Bocconi, Tesi de Laurea Magistrale in Giurisprudenza, 2013-2014*) <http://www.studiotorta.it/premio/pdf/tesi2015/tesi/2015-Maurizio-Crupi-Patent-arbitration-a-European-comparative-analysis.pdf> accessed: 04 April 2017
[140] ibid

However, situations might differ and each case will have its own particularities even in a jurisdiction considered as advanced for Arbitration as England. What is important to analyze is how it works and how it is accepted.

3.1.2 Arbitration in Switzerland

Switzerland is a country that is one of the most important jurisdictions for the international arbitrational law. According to the European Parliament, 85.62% of the respondents for the Survey of Arbitration Practitioners answered that they would recommend Switzerland more than any other country that was included in the study.[141]

Therefore, Switzerland has not only a highly professionalized group of arbitration practitioners, but it has its own arbitration law and it is not based on the UNCITRAL Model Law, but instead it is based on Switzerland's own expertise about arbitration (although there are some resemblances with the UNCITRAL Model)[142]. As expected, due to its leading position in the practice of international commercial arbitration, Switzerland is a participating member of the New York Convention[143]. About the positive impact of the Swiss arbitration law, the European Parliament confirms:

> Rather, the Swiss arbitral and legal communities felt that they had enough experience of and expertise in arbitration to enable them to draft their own arbitration law. In arguable confirmation of this judgement, Swiss respondents are overwhelmingly positive about the Swiss law applicable to arbitration, on average describing it as considerably more supportive of arbitration than did on average respondents Survey-wide with respect to their own national laws. In addition, Swiss respondents also described Swiss legislators as having both a higher understanding of arbitration and a more positive attitude towards arbitration than did respondents Survey-wide with respect to legislators in their own States[144].

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[141] Legal Instruments and Practice of Arbitration in the EU (*European Parliament - Policy Department Citizen's rights and Constitutional affairs, 2014*) < http://www.europarl.europa.eu/RegData/etudes/STUD/2015/509988/IPOL_STU(2015)509988_EN.pdf> accessed: 04 April 2017

[142] ibid

[143] Philipp Dicknmann, 'Arbitration in Switzerland' (CMS Guide to Arbitration e-guides vol 1, 12 April 2012) <https://eguides.cmslegal.com/pdf/arbitration_volume_I/CMS%20GtA_Vol%20I_SWITZERLAND.pdf > accessed: 04 May 2017

[144] ibid 183 (emphasis added)

Therefore, the swiss law about international arbitration represents a huge advancement of judicial and legislative developments in the last decades[145]. Thus, the general principles that it is based are: wide scope of application; emphasis on party autonomy by allowing the parties to determine the applicable procedural and substantive law; broad concept of arbitrability and favourable approach towards the validity of arbitration agreements by limiting formal requirements; the equal treatment of the parties and the right to be heard; recognition of the finality of the award; the option to exclude actions for setting aside the award; and significant restrictions on intervention by state courts and grounds to challenge an award in the state courts[146].

Swiss Courts are known for being more liberal about both the validity and the scope of the arbitration agreements in comparison to other countries.[147] The Swiss Judges are also more used to deal with international arbitration and due to that they have a higher understanding of arbitration and also a more positive attitude towards it.[148]

Furthermore, what makes the Swiss system efficient is the judicial review of the arbitral award. If an arbitral award is challenged then it will follow a special procedure in which the Swiss Federal Tribunal will have exclusive competence 'on setting aside proceedings'[149]. This is applied for both international (article 191 SPIL) and for domestic arbitration (article 389 Code of Civil Procedure). Therefore, the action itself is not under the "commonly applicable rules of civil procedure". [150]

As a result, the judicial review of arbitral award in Switzerland is such an efficient mechanism that its duration is just approximately five months and no possibility of other appeals[151]. It is also important to state that it is not possible for the losing party to search for another State court as a way to delay the

[145] ibid
[146] ibid
[147] ibid
[148] ibid
[149] Legal Instruments and Practice of Arbitration in the EU (*European Parliament - Policy Department Citizen's rights and Constitutional affairs, 2014*) < http://www.europarl.europa.eu/RegData/etudes/STUD/2015/509988/IPOL_STU(2015)509988_EN.pdf> accessed: 04 April 2017 183
[150] Ibid 183
[151] ibid

finality of the award.[152] Thus, the European Parliament affirmed that the "one stop system" mechanism of Switzerland is an effective way to avoid dilatory tactics.[153]

However, Switzerland is not as developed in its domestic arbitration as it is for international arbitration. There are some reasons for this. According to the European Parliament, one of these reasons remains in the fact that the Swiss courts are highly regarded which means that parties do not feel the strong need for arbitration[154]. Also, there is a priority regarding international arbitration in Switzerland: there are more experts in the area due to the success of the Swiss Chambers' Arbitration Institution at the International level[155]. Therefore, the domestic market for arbitration exists, but not as strong as the international market.[156]

Consequently, it is possible to conclude that Switzerland is a very "arbitration friendly" country. This also includes matters involving IP. This started in 1945 through the recognition made by the Swiss Federal Supreme Court on the non-exclusivity of the state jurisdiction in situation involving IP rights and continued until 1975, when the Federal Office of Intellectual Property stated that arbitral tribunals would have a complete jurisdiction on patent issues (even in situations involving the validity).[157]

Switzerland has a very strong and evolving tradition on arbitration and it probably has the most liberal approach regarding arbitration practice in general and, of course, arbitration cases involving Intellectual Property. It is possible to just state that by looking at the general principles of arbitration in Switzerland (for example, the broad concept of arbitrability and favorable approach towards the validity of arbitration agreements by limiting formalities). Therefore, Switzerland is likely to keep evolving according to the changes that might appear on both IP and arbitration in order to keep its leading status.

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[152] ibid
[153] Ibid (emphasis added)
[154] Ibid (emphasis added)
[155] ibid
[156] ibid
[157] Maurizio Crupi 'Patent arbitration: a European analysis' (*Universita Commerciale Luigi Bocconi, Tesi de Laurea Magistrale in Giurisprudenza, 2013-2014*) <http://www.studiotorta.it/premio/pdf/tesi2015/tesi/2015-Maurizio-Crupi-Patent-arbitration-a-European-comparative-analysis.pdf> accessed: 04 April 2017

3.1.3 Arbitration in the Netherlands

It was actually in October of 1838 that the legal basis for arbitration was in fact implemented in Netherlands in the Book III of the Code of Civil Procedure (*Wetboek van Bugerlijke Rechtsvordering*)[158]. In December of 1986, Netherlands implemented its Arbitration Act that was settled out in Book IV of the Code of Civil Procedure[159]. However, a new Arbitration Act was recently adopted and entered into force (the "Revised Act").[160]

The Arbitration Act that is now implemented in Netherlands is very much inspired by the UNCITRAL Model Law on International Commercial Arbitration of 1985 with the amendments that were adopted in 2006[161]. According to the European Parliament, 'the primary goals of the revised Act are to further align Dutch arbitration law with the UNCITRAL Model Law, to reduce delays arising from state court proceedings, and to increase party autonomy in arbitration proceedings'. [162]

About the international recognition of the Dutch arbitration system, the European Parliament also states:

> Driven to an extent by the international recognition earned by individual Dutch arbitration specialists as either pioneers in the field or current leading figures in the field, the Netherlands has secured a solid place within contemporary international arbitration. Indeed, when respondents to the Survey of Arbitration Practitioners undertaken as part of this Study were asked to recommend five States as seats for an international arbitration, the Netherlands was recommended by 36.27% of respondents Survey-wide, making it the sixth most preferred State among the thirty States included in this Study.[163]

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[158] Mark Ziekman and Marlous de Groot, 'Arbitration in Netherlands' (CMS Guide to Arbitration e-guides vol 1, 12 April 2012) <https://eguides.cmslegal.com/pdf/arbitration_volume_I/CMS%20GtA_Vol%20I_NETHERLANDS.pdf> accessed: 04 May 2017

[159] ibid

[160] Legal Instruments and Practice of Arbitration in the EU (*European Parliament - Policy Department Citizen's rights and Constitutional affairs, 2014*) < http://www.europarl.europa.eu/RegData/etudes/STUD/2015/509988/IPOL_STU(2015)509988_EN.pdf> accessed: 04 April 2017

[161] ibid

[162] ibid

[163] ibid 140 (emphasis added)

However, it is not possible to settle some disputes through arbitration in Netherlands. The parties may not have the free disposal to choose arbitration in order to have the legal enforcement needed for the dispute[164]. Netherlands exclude some disputes that include certain intellectual property disputes (Article 1020(3) DCCP).[165]

Therefore, the Netherlands is not as liberal as Switzerland and even England. For example, validity issues about patents are very unlikely to be arbitrable under the Dutch system[166]. Nevertheless, the validity of a patent is an issue that can be solved under the English or Swiss systems with different scopes (the Swiss system is much more liberal than the English one).

Netherlands is also not completely liberal about the awards from another 'contracting state'. Netherlands is the signatory of the New York Convention (NYC) since 1964, but with a reservation that the award made in another 'contracting state' needs recognition in Netherlands to be able to be enforced.[167]

Also, according to European Parliament, despite its good international reputation for arbitration, there are the indications that Dutch arbitration practice 'remains relatively regional'[168]. To illustrate, the European Parliament exemplified:

> For example, Dutch respondents who practice as arbitrators not only reported that serving as an arbitrator constituted a smaller proportion of their work than was reported by respondents Survey-wide who practise as arbitrators, but also reported sitting as arbitrator in a slightly smaller proportion of arbitrations seated abroad than did respondents Survey-

[164] Dirk Knottenbelt, Marielle Koppenol-Laforce and Isabelle van den Nieuwendijk 'Commercial Arbitration in the Netherlands' (*GAR Reference, 2010*) <http://www.houthoff.com/uploads/tx_hhpublications/Commercial_Arbitration_in_The_Netherlands.pdf> accessed: 10 May 2017

[165] ibid

[166] Maurizio Crupi 'Patent arbitration: a European analysis' (*Universita Commerciale Luigi Bocconi, Tesi de Laurea Magistrale in Giurisprudenza, 2013-2014*) <http://www.studiotorta.it/premio/pdf/tesi2015/tesi/2015-Maurizio-Crupi-Patent-arbitration-a-European-comparative-analysis.pdf> accessed: 04 April 2017

[167] Knottenbelt, Marielle Koppenol-Laforce and Nieuwendijk (n76)

[168] Legal Instruments and Practice of Arbitration in the EU (*European Parliament - Policy Department Citizen's rights and Constitutional affairs, 2014*) < http://www.europarl.europa.eu/RegData/etudes/STUD/2015/509988/IPOL_STU(2015)509988_EN.pdf> accessed: 04 April 2017

> wide who practice as arbitrators. In addition, arbitral appointments were strongly concentrated in the Netherlands, and only a single Dutch respondent reported having sat as an arbitrator in an arbitration seated outside the European Union/Switzerland in the past five years.[169]

Nevertheless, Netherlands has developed among the years its strong reputation about international arbitration and it is also a safe country to choose as the seat of arbitration[170].

3.2. Overview of Arbitration in the United States and Brazil

The United States were not a very liberal country about the arbitrability of the validity and enforceability of patents before 1983[171]. However, nowadays it is one of the most liberal countries of all on the relation regarding patent law and arbitration.[172] Currently, the US statute gives the freedom that it is possible for any type of patent issue to be arbitrated:

> A contract involving a patent or any right under a patent may contain a provision requiring arbitration of any dispute relating to patent validity or infringement arising under the contract. In the absence of such a provision, the parties to an existing patent validity or infringement dispute may agree in writing to settle such dispute by arbitration. Any such provision or agreement shall be valid, irrevocable, and enforceable, except for any grounds that exist at law or in equity for revocation of a contract[173]

The United States are under the rules of the New York Convention (NYC) codified in the Federal Arbitration Act (FAA) at 9 USC sections 201-208. Also, they are a contracting state of the Inter-American Convention on International Commercial Arbitration (Panama Convention) and the Convention

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[169] ibid
[170] ibid
[171] Therese Jansson, 'Arbitrability regarding patent law' (*Jurisdik Publikation, January 2011*) <http://juridiskpublikation.se/wp-content/uploads/2014/10/12011_Therese-Jansson.pdf> accessed: 14 May 2017
[172] ibid
[173] 35 United States Code § 294 (a)

on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention).[174]

In the United States the primary domestic sources are both in the federal and state law, statutes and also judge-made case law. It is the Federal Arbitration Act (FAA) that establishes the validity and also the enforceability of arbitration agreements[175]. The majority of the states also have enacted arbitration statutes that are based on the Uniform Arbitration Act (UAA) or then the Revised Uniform Arbitration Act (RUAA)[176]. However, the States statutes can only complement or even expand on federal arbitration law if such change does not conflict with the FAA. If a conflict end up happening then the FAA will prevail. [177]

Therefore, the FAA has a major importance for arbitration in the United States. However, it is not based on the UNCITRAL Model Law on International Commercial Arbitration (although there are some resemblances)[178]. Also, the majority of state arbitration statutes are actually based on the UAA and the RUAA, but there are some state statutes that are based on the UNCITRAL Model Law[179].

For the US courts arbitration is considered a 'creature of contract'[180]. Therefore, the arbitrators are bound to what the parties decided in the agreement. Arbitrability is extremely broad in the US and also about the awards (only situations against the law can be a true limitation for it).

Brazil has not a tradition on arbitration like the previous countries that were listed. However, it is starting to become a recognized arbitration-friendly country with the last changes over the last two decades. In 1996, there was the enactment of the Brazilian Arbitration Act (Law 9307 of 23 of September of 1996) which is based on the UNCITRAL Model Law and also some provisions

[174] Birgit Kurtz, Arlen Pyenson and Amal Bohabib, 'Arbitration in 49 jurisdictions worldwide: United States' (*Getting the deal through, January 2014*) < https://www.crowell.com/files/Arbitration-in-the-United-States.pdf> accessed: 14 May 2017
[175] ibid
[176] ibid
[177] ibid
[178] ibid
[179] ibid
[180] ibid

from the Brazilian Code of Civil Procedure (especially the ones that are related to enforceability and challenge of awards)[181]. In 2001, the Federal Supreme Court recognized the constitutionality of the new arbitration law and in 2002 there was the ratification of the New York Convention (NYC)[182].

Brazil started to experience a rapid growth in its economy which was reflected through the interest of a rapid and efficient alternative dispute resolution like arbitration by multinationals[183]. Also, other important fact that ratified the importance of arbitration is the crisis in the Brazilian judiciary (it may take, on average, something about ten years for a case to be decided by the Brazilian courts)[184]. Therefore, Brazil has become one of the key centres for arbitration in Latin America due to the consequently rapid expansion of it due to the advantages that arbitration has to offer[185].

The arbitrability is only limited to the capability of the parties to negotiate and the 'available patrimonial rights' that are able to be negotiated and agreed by the parties[186]. Therefore, in practice most situations in the commercial disputes can be arbitrable which includes the disputes related to patents[187].

The United States and Brazil are both federal republics, but they have different legal systems: Brazil is a recognized civil law country while the United States is a common law country. However, they both have very big geographic dimensions and, consequently, there is the struggle for a uniform decision that please the interest of all the member states of Brazil and the United States.

Historically speaking, Brazil is more limited regarding the freedom of the member states. This is confirmed in the 1988 Constitution of Brazil. The 1988 Constitution in Brazil is extremely analytical and complete and gives a

[181] Marcelo Javier Cipittelli, 'Arbitration in Brazil' (*CMS Guide to Arbitration e-guides vol 1, 12 April 2012*) <https://eguides.cmslegal.com/pdf/arbitration_volume_I/CMS%20GtA_Vol%20I_BRAZIL.pdf> accessed: 04 May 2017
[182] ibid
[183] ibid
[184] ibid
[185] ibid
[186] Brazilian Arbitration Act (Law 9307/1996) Article 1
[187] Ibid (103)

small freedom of legislation to the member states of Brazil. Therefore, the federal source is usually the major source in Brazil and the Brazilian Arbitration Act, as a recognized constitutional law, is enforced in all member states of Brazil.

The Unites States is the opposite of Brazil regarding the freedom of their member states. The member states of the United States always have had a broader freedom for both legislation and decisions and this is also strengthened by the common law system.

However, in order to avoid conflicts it is important to have a fair and uniform solution and the United States did that by giving the prevalence of the Federal Arbitration Act (FAA) in case of conflict between the member states. Also, since 1955 the Uniform Arbitration Act (UAA) was established among the member states in order to have one uniform way to go on arbitration in the US[188].

[188]Uniform Law Commission: the national conference of Commissioners on United State Laws < http://www.uniformlaws.org/Act.aspx?title=Arbitration%20Act%20(2000)> accessed: 15 May 2017

4. THE UNIFIED PATENT COURT AND THE NEW PERSPECTIVES

The attempt for a true harmonized system for patents disputes can be finally materialized through the implementation of the Unified Patent Court (UPC) that will make the EU package finally effective and, consequently, also the Unitary Patent[189].

The Unified Patent Court represents a huge change for the decision making of judges with a nationalistic mind. This represents the tendency of the European Union to have supranational laws that harmonizes all the different national laws and systems (civil and common law) into one standard way. This goes aligned with globalization and, consequently, also tries to comply with businesses interests. The idea of the UPC and the Unitary Patent is to be cost effective and faster than the traditional national litigation.

The current patent system is considered extremely expensive in Europe due to the necessary translations of the patents to the language of the country where the patent is requested to be granted[190]. Therefore, the EU Package has the aim to facilitate the process in a harmonized way since the moment that the patent is requested until the moment that litigation takes place.

4.1 The Unitary Patent and the Unified Patent Court

The Unified Patent Court (UPC) will be a common court in all the Contracting States and, consequently, also part of their judicial system[191]. It is expected to start functioning soon and this will be a new and important advancement in Europe and in its common market[192].

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[189] EPO, 'Unitary Patent and Unified Patent Court' <http://www.epo.org/law-practice/unitary.html> accessed 23 May 2017

[190] Alba Betancourt 'Cross-Border Patent Disputes: Unified Patent Court or International Commercial Arbitration?' (*Utrecht Journal of International and European Law., 2016, pp.44–58*) < http://www.utrechtjournal.org/articles/10.5334/ujiel.262/> accessed: 21 May 2017

[191] UPC, 'Unified Patent Court' < https://www.unified-patent-court.org/> accessed: 23 May 2017

[192] Kluwer UPC News blogger. ' Judges will have to help build the Unified Patent Court – and the IT system must work!' (*Kluwer Patent Blog, 27 February 2017)* < http://kluwerpatentblog.com/2017/02/27/judges-will-have-to-help-build-the-unified-patent-court-and-the-it-must-work/> accessed: 23 May 2017

Thus, the UPC will have the exclusive competence in all the matters that involves the European Patents and the European Patents with unitary effects[193]. The Unitary Patent, also known as 'European patent with unitary effect', is granted by the European Patent Office (EPO) with a unitary effect in all over the 25 member states that agreed to be part of the Unitary Patent Scheme (UPS)[194]. The Unitary Patent is part of the EU patent package that consists on the creation of the Unified Patent Court and also the establishment of the Unitary Patent with its unitary effect in all the signatory members[195].

The Unitary Patent is supposed to exist with also the national patents and the 'classical European Patents'[196]. The aim is to open the possibilities to the parties to choose among the diverse combinations of 'classical European patents' and also unitary patents[197].

According to the EPO, the Regulation on the Unitary Patent states that the participating member states will have to comply with some tasks which are: 1) Receive and examine the requests for unitary effect; 2) Register the unitary patents; 3) Publish the translations during the transition period; 4) Set up and maintain a new 'Register for unitary patent protection' (with entries on assignment, transfer, lapse, licensing, limitation or the revocation of unitary patents); 5) Collect the annual fees regarding unitary patents; 6) Distribution of part of the annual fees to the other member states; 7) Administration of a compensation scheme.[198]

The tasks cited before are the new tasks of the beginning of the implementation of the Unitary Patent and they basically refer to the registration tasks[199]. In case of necessary review of a decision regarding the unitary patent by the EPO, the appeal will have to happen to the Unified Patent Court[200].

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[193] Jacques de Werra, *New Developments of IP Arbitration and Mediation in Europe: The Patent Mediation and Arbitration Center Instituted by the Agreement on a Unified Patent Court* (Revista Brasileira de Arbitragem, 2014, Arbitragem e mediacao em materia de propriedade intelectual) 17-35
[194] EPO, 'Unitary Patent and Unified Patent Court' <http://www.epo.org/law-practice/unitary.html> accessed 23 May 2017
[195] Betancourt (n2)
[196] EPO, 'Unitary Patent and Unified Patent Court' <http://www.epo.org/law-practice/unitary.html> accessed 23 May 2017
[197] ibid
[198] ibid
[199] ibid
[200] ibid

The transitional period will have some exceptions that must be complied for up to 12 years of implementation of the Unitary Patent[201]. For example, the translation requirement will continue at the beginning of the implementation, but after the transitional period it will not happen anymore.

Also, about the translation of the patents, the EPO's machine translation programme and Google developed together a tool for patent translation that is already working[202]. Nowadays, it provides the translation from and also into English, French and German for 29 different languages[203].

The idea of the Patent Translate is to make the process even faster and simpler. However, the human translation might be required in cases of dispute at the request of a court or an infringer. Therefore, the proprietor will have to provide the full human translation into the language required[204].

There are other transitional measures for also up to 12 years that the EPO clarifies:

> where the language of proceedings at the European Patent Office is French or German, the patent proprietor will have to provide a translation of the European patent into English; where the language of proceedings at the EPO is English, the patent proprietor will have to provide a translation of the European patent into any official language of the European Union[205].

Therefore, with the effective implementation of the Unified Patent Court that it is going to happen soon, the EU package will be also implemented. The Unified Patent Court together with the Unitary Patent represents the true attempt of harmonization of the patent disputes in the European Union.

The idea of the UPC to bring cooperation among the member states of the European Union in the patents field in order to efficiently contribute to the integration process in Europe, facilitating the implementation of the principle of

[201] ibid
[202] ibid
[203] EPO, 'Patent Translate' < http://www.epo.org/searching-for-patents/helpful-resources/patent-translate.html#tab1> accessed: 24 May 2017
[204] EPO, 'Unitary Patent and Unified Patent Court'<http://www.epo.org/law-practice/unitary.html> accessed 23 May 2017
[205] Ibid (emphasis adde)

the free movement of goods and services and also creating system that ensure a fair competition in the internal market of Europe[206].

The Agreement on a Unified Patent Court recognizes the flaws of the current system by calling the market as fragmented for patents due to the significant variations between the different demands of different jurisdictions. It also states that such variations are detrimental for innovation (especially for the small and medium sized enterprises).[207]

The UPC will only be open to member states of the European Union and it will only have competence in the jurisdictions that have had ratified the UPC Agreement at the given time[208]. However, it is important to state that the UPC shall not have any competence regarding the national patents[209]. Nowadays, the only countries that have not signed the Agreement are Spain and Poland[210].

Due to the recent news in 2016 of the Brexit vote in June 2016 and, consequently, the need for the United Kingdom to prepare for leaving the European Union, the UPC preparations were stopped for the uncertainty of the situation[211]. As it is stated in the UPC Agreement, only member states of the European Union would be able to be part of this new Unitary Patent system complied in the EU package. However, the UPC Committee decided that it would still include the UK and the United Kingdom also confirmed that it would ratify the UPC Agreement in the end of 2016[212].

At the beginning of 2017, the Industry organization Eurochambres and the British Chambers of Commerce (BCC) have written a joint letter to the UK Business Secretary, Greg Clark, urging the UK to help giving effectiveness

[206] Agreement on a Unified Patent Court (2012) < https://www.unified-patent-court.org/sites/default/files/upc-agreement.pdf> accessed: 25 May 2017
[207] ibid
[208] UPC, 'Unified Patent Court' < https://www.unified-patent-court.org/> accessed: 23 May 2017

[209] ibid
[210] ibid
[211] UPC, 'Unified Patent Court: Update on UPC ratifications – UK signals green light' < https://www.unified-patent-court.org/news/update-upc-ratifications-uk-signals-green-light> accessed: 28 May 2017
[212] ibid

to the Unitary Patent Court[213]. However, the uncertainties if the ratification is going to happen or not still remain[214].

However, there is another problem apart from the ratification of the UK. There is the issue about the Protocol on Provisional Application that has not yet been ratified by the number of member states required[215]. There is the need of '13 UPC member states, including France, UK and Germany, that have 1) ratified or received the parliamentary approval to ratify the UPCA and 2) approved or declared bound by the PPA'[216]. Now there is the discussion that the real problem for the effective implementation of the UPC rely on the German Federal Constitutional Court that is now prepared to hear appeals about the possible unconstitutionality of the European Patent Convention[217].

4.2 The Unitary Patent Court and the International Commercial Arbitration

The Agreement on the Unified Patent Court is not only limited to the implementation of a Unified Patent Court. The Agreement in the article 35 establishes the creation of a Patent Mediation and Arbitration Centre:

> ARTICLE 35
>
> Patent mediation and arbitration centre
>
> (1) A patent mediation and arbitration centre ("the Centre") is hereby established. It shall have its seats in Ljubljana and Lisbon.
> (2) The Centre shall provide facilities for mediation and arbitration of patent disputes falling within the scope of this Agreement. Article 82 shall apply mutatis mutandis to any settlement reached through the use of the facilities of the Centre, including through mediation. However, a patent may not be revoked or limited in mediation or arbitration proceedings.
> (3) The Centre shall establish Mediation and Arbitration Rules.

[213] Kluwer UPC News blogger. 'UK government urged to make the Unitary Patent System come true' (*Kluwer Patent Blog, 26 May 2017)* < http://kluwerpatentblog.com/2017/05/26/eurochambres-urges-uk-government-make-unitary-patent-system-reality/> accessed: 28 May 2017
[214] ibid
[215] ibid
[216] ibid
[217] ibid

> (4) The Centre shall draw up a list of mediators and arbitrators to assist the parties in the settlement of their dispute. [218]

The provision of the Agreement about arbitration is very significant due to the fact that it is 'the first official reference in a legal document adopted at the level of the European Union which confirms the availability of arbitration for solving certain types of intellectual property disputes'[219].

However, there might be some confusion about the article 35 of the Agreement. For example, the paragraph second states that 'a patent may not be revoked or limited in mediation or arbitration proceedings'[220]. The confusion is if the decision regarding the validity and scope are not possible to be decided by the arbitral tribunal or if the effect is supposed to be only *inter partes.*[221] According to Jacques de Werra, it is reasonable to consider that the arbitral tribunal is supposed to decide such issues with *inter partes* effect due to the characteristics of both the arbitration and the unitary patent.[222]

Thus, the article 35 of the Agreement is important for analysis due to the fact that it confirms the global trend of promoting the use of ADRs, and in particular arbitration, to solve intellectual property disputes[223]. However, Jacques de Werra points out the importance to be attentive to the interpretation of the article and how it is essential that such interpretation accommodate the interest of the parties (their autonomy) and in accordance with the best practice of the international commercial arbitration[224].

About the advantages, both Arbitration and the UPC are able to solve cross-border conflicts involving patents in one single procedure[225]. The only difference about them is the restriction that UPC has about the participating

[218] Agreement on a Unified Patent Court (2012) < https://www.unified-patent-court.org/sites/default/files/upc-agreement.pdf> accessed: 25 May 2017
[219] Jacques de Werra, *New Developments of IP Arbitration and Mediation in Europe: The Patent Mediation and Arbitration Center Instituted by the Agreement on a Unified Patent Court* (Revista Brasileira de Arbitragem, 2014, Arbitragem e mediacao em materia de propriedade intelectual) 17-35 (emphasis added)
[220] Agreement on a Unified Patent Court (2012) < https://www.unified-patent-court.org/sites/default/files/upc-agreement.pdf> accessed: 25 May 2017
[221] Werra (n22)
[222] ibid
[223] ibid
[224] ibid
[225] Alba Betancourt 'Cross-Border Patent Disputes: Unified Patent Court or International Commercial Arbitration?' (*Utrecht Journal of International and European Law., 2016, pp.44–58*) < http://www.utrechtjournal.org/articles/10.5334/ujiel.262/> accessed: 21 May 2017

members: only the participating members are able to submit the arbitration under the UPC rules. [226]

Some might even consider the transition period as a disadvantage compared to Arbitration[227]. During the transition period four parallel patent systems will co-exist in the EU and some of them will probably overlap: 1) National patents based on national applications; 2) National patents based on an EPO application within the UPC Agreement system; 3) National patents based on an EPO application outside the UPC Agreement system; and 4) European patents with unitary effect[228].

About the expertise and neutrality, it seems that the Pool of Judges system in the UPC will ensure neutral decisions by experienced experts[229]. Therefore, both might have the same advantages about the final decision. The only difference is if the parties want to decide the arbitrators themselves which will make arbitration a better choice[230].

Even though the UPC and the international commercial arbitration have their similarities, their aim is different. The UPC system has the aim to potentially solve the issue of the need to litigate in many national courts in the European Union about the same single patent that is registered in different jurisdictions and against one singular opponent[231]. Also, it intends to abolish the confusing and not practical patent system in the EU by facilitating its process through the unitary patent: one single process for all the participating member states in the UPC Agreement[232].

However, arbitration has a different aim. Arbitration, as seen in the previous chapters, has the aim to provide an alternative to ligation for the parties[233]. Arbitration is a contractual and confidential system that gives freedom to the parties to decide the best arbitration procedure in order to solve

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[226] ibid
[227] ibid
[228] ibid
[229] ibid
[230] ibid
[231] ibid
[232] Agreement on a Unified Patent Court (2012) < https://www.unified-patent-court.org/sites/default/files/upc-agreement.pdf> accessed: 25 May 2017
[233] Guide to International Arbitration *(Latham & Watkins, 2014)* < https://www.lw.com/thoughtleadership/guide-to-international-arbitration-2014> accessed: 14 May

their conflict[234]. Also, the UPC Agreement recognized that Arbitration is a good possibility for solving conflicts involving Intellectual Property in its article 35 which represents how the UPC Agreement has the aim to facilitate the patent disputes not only through litigation.

4.3 The future perspectives for Patents

Intellectual property is always evolving and so it was supposed to be intellectual property rights. However, the inventions that are supposed to mean the advancement of technology and, consequently, the advancement of society strive with the idea of 'patent-seeking marketers'[235]. Nowadays, the patent system and the intellectual property law strive to face the challenges of the twenty-first century technologies and the new way of thinking[236].

Intellectual property law played a very important role for the development of economy and the advancement of technology in the nineteenth century especially in the United States[237]. Inventors wanted their patents in profitable areas of commerce and they tended to lack formal education with an idea of a 'trial and error experimentation'.[238] This changed in the twentieth century with the increasing complexity of technology and commerce[239]. The new 'prolific inventors' tend now to have a formal training in both science or engineering[240].

Specialists are being able to analyze that patent controversies are basically 'old wine in new bottles'[241]. Many new ideas that are being patented are not exactly new[242]. Therefore, there is a 'concern that the increase of patenting along with the spread of patent subject matter will lead to patent

[234] ibid
[235] Stephen M. McJohn. 'Patents: Hiding from history' *(Santa Clara High Technology Law Journal, 2008)* < http://digitalcommons.law.scu.edu/chtlj/vol24/iss4/7> accessed: 28 May 2017
[236] ibid
[237] ibid
[238] ibid
[239] ibid
[240] ibid
[241] ibid
[242] Time to fix patents *(The Economist, 8 August 2015)* < http://www.economist.com/news/leaders/21660522-ideas-fuel-economy-todays-patent-systems-are-rotten-way-rewarding-them-time-fix> accessed: 28 May 2017

thickets, areas of technology such as software where innovation is hemmed by patents'[243]. About it, The Economist stated:

> Innovation fuels the abundance of modern life. From Google's algorithms to a new treatment for cystic fibrosis, it underpins the knowledge in the "knowledge economy". The cost of the innovation that never takes place because of the flawed patent system is incalculable. Patent protection is spreading, through deals such as the planned Trans-Pacific Partnership, which promises to cover one-third of world trade. The aim should be to fix the system, not make it more pervasive[244].

Currently patent challenges made the States realize that new proposals for the currently patent system are needed. The patent system is now being criticizing for blocking innovation and for being extremely expensive[245]. The critics emphasize that patents were supposed to 'burst innovation; instead they are used to lock in incumbents' advantages[246].

Due to the critics of the patents system, it is increasing the number of movements against the idea of intellectual property rights[247]. For example, there is the free software movement that is also known as 'open source software' in which the developers do not own their rights in the code that they have developed in the software (patent, copyright, trade market and trade secret)[248].

The number of patent abolitionist is increasing and the idea is gaining force[249]. However, intellectual property rights is not likable to end due to the interests involved about it. Also, it is not possible to conceive the idea of forcing the end of intellectual property rights. However, property rights are not absolute.

Therefore, the idea that governments should play a bigger role for an effective change is especially strong[250]. Thus, what is possible to conclude is that the patent system as it is does not contribute to the currently evolving technological world and the innovations that are happening.

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[243] ibid
[244] Ibid (emphasis added)
[245] ibid
[246] ibid
[247] McJohn (n34)
[248] ibid
[249] Time to fix patents *(The Economist, 8 August 2015)* < http://www.economist.com/news/leaders/21660522-ideas-fuel-economy-todays-patent-systems-are-rotten-way-rewarding-them-time-fix> accessed: 28 May 2017
[250] ibid

The patent as it is conceived needs to be reinvented to be aligned with the 21st century and the demands of companies, SMEs and individuals. There is no point in harmonizing the system of patents if the patent itself not complying with the currently innovations.

5. CONCLUSION

It was possible to conclude that the world, and not only the European Union, strives for a solution on the IP disputes (especially involving the patent disputes). In accordance with what was seen in chapter one, the United Nations well stated that 'in an increasingly economically interdependent world, the importance of an improved legal framework for the facilitation of international trade and investment is widely acknowledged'[251].

This is possible to be seen through the successful acceptance of both UNICITRAL Model Law and the 1958 New York Convention by different jurisdictions. They both have different proposals, but the aim is the same: the harmonization of laws in order to find effective solutions for cross-border disputes.

The analysis in chapter two makes it possible to state that the recognition of the harmonization's importance is a fact worldwide. Different countries, with different systems, now understand that disputes involving private rights needs to be facilitated in order to bring more investments and perspectives for their own countries.

Thus, it is important to ratify the situation of Brazil. Brazil is a great example of how a country with no tradition to be arbitration-friendly became recently one of the key centers for arbitration in Latin America[252]. In comparison with the other countries analyzed in chapter two, Brazil has recently adopted an Arbitration Act (based on the UNCITRAL Model Law) and it only ratified the New York Convention in 2002.

Also, this happened especially after the rapid growth of the Brazilian economy. Also, it is interesting to analyze how the Brazilian judiciary crisis influenced the need for Brazil to become more arbitration-friendly. Therefore, it is obvious to conclude that the expansion of businesses and innovations demand a faster dispute resolution. Consequently, a faster dispute resolution is

[251] A Guide to UNCITRAL: Basic facts about the United Nations Commission on International Trade Law (*United Nations, 2013*) <http://www.uncitral.org/pdf/english/texts/general/12-57491-Guide-to-UNCITRAL-e.pdf> *accessed: 17 May 2017 (emphasis added)*

[252] Marcelo Javier Cipittelli, 'Arbitration in Brazil' (*CMS Guide to Arbitration e-guides vol 1, 12 April 2012*) <https://eguides.cmslegal.com/pdf/arbitration_volume_I/CMS%20GtA_Vol%20I_BRAZIL.pdf> accessed: 04 May 2017

only possible to be reached through a standardized method which means harmonization of rules.

The EU patent package is the European Union attempt for a real harmonization from the very beginning, through the grant of patents, until the patents disputes. The European Union is already an economic bloc ahead of the others due to the free movement of goods and people; it is not only economic, but also political. Therefore, it is not surprisingly that the EU would try to advance even more in its supranational regulations.

The implementation of the Unified Patent Court (UPC) will make the EU package effective in practice[253]. This means that the Unitary Patent will also start to be effective[254]. Despite the critics of the transitional period, the UPC represents an important evolution for the facilitation of the cross-border disputes.

One important advantage that the EU package will bring is the end of the requirement for translation after the transitional period of the Unitary Patent[255]. Just this fact represents a great advancement in order to mitigate conflicts involving patents. The requirement of translation of patents in the EU is already a big source of complain from businesses and individuals[256].

Also, the European Patent Office (EPO) is trying to improve the issue about the translation of patents in Europe through a tool for patent translation developed in partnership will Google[257]. Therefore, even during the transitional period, there is still a possibility of a tool to mitigate a recognized problem that the EPO already assumed the existence.

There is no big advantage of the UPC compared to the international commercial arbitration for the effectiveness of patent disputes However, what makes the UPC so important is the effective implementation of the whole EU

[253] EPO, 'Unitary Patent and Unified Patent Court' <http://www.epo.org/law-practice/unitary.html> accessed 23 May 2017
[254] ibid
[255] ibid
[256] ibid
[257] EPO, 'Patent Translate' < http://www.epo.org/searching-for-patents/helpful-resources/patent-translate.html#tab1> accessed: 24 May 2017

package that includes also the Unitary Patent. Also, the UPC is still an important advancement for the evolution of harmonization in patent disputes and possibly it might be a first step for other cross-border disputes involving patrimonial rights.

However, the process of harmonization is complicated. The UPC is facing many issues for the implementation to be possible. There is still the difficulty involving the sovereignty of the member states that makes the implementation of the UPC a challenge. This is possible to be seen through the recent news cited in chapter four about the strives that the UPC is facing for its implementation (the Brexit and the German Federal Constitutional Court, for example).

Therefore, for the harmonization of the patent disputes to be possible it is important to be aligned with the interests and national laws of the member states. Sovereignty is a fact that cannot be denied or ignored and it will always be a challenge for the harmonization of laws. However, it is possible to surpass this challenge through dialogue.

Nevertheless, harmonization for the patent disputes still has another issue to surpass which is the patent itself. The patent as it is conceived nowadays is not aligned with the needs of the technological ongoing innovations.

The patent as it is conceived needs to be reinvented to be aligned with the 21st century and the demands of companies, SMEs and individuals. There is no point in harmonizing the system of patents if the patent itself is not complying with the currently innovations.

The currently model of patent still remains the same idea of the patent in the nineteenth century[258]. The difference is that the patent of today is less about innovation and more about the exploitation of profit that the patent can offer. Therefore, such retrograde idea is not possible to survive in a world where the open source is already a reality.

[258] Stephen M. McJohn. 'Patents: Hiding from history' *(Santa Clara High Technology Law Journal, 2008)* < http://digitalcommons.law.scu.edu/chtlj/vol24/iss4/7> accessed: 28 May 2017

However, there are many business interests around IP rights and, consequently, around patents. Therefore, the IP rights will probably continue to exist, but in a new format. The evolving concept of harmonization of patent disputes needs to comply with a reinvented idea about patents to be able to work in practice. Otherwise, it is not likely for the harmonization to be effectively implemented.

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