

THE ANDROID WARS:

A NEW LOOK AT THE

APPLE

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SAMSUNG

DISPUTE



CHEAT SHEET

- *Proceedings are held in private.* The privacy and increased confidentiality of international arbitration is often a vital consideration for opting for arbitration.
- *Choose your decision-makers.* An advantage of international arbitration over court proceedings is the ability of the parties to select the panel of arbitrators.
- *Disclosure is less burdensome.* Traditionally, parties in international arbitration disclose only those documents on which they intend to rely, rather than all relevant documents.
- *Awards are widely recognized and enforceable.* The 1958 U.N. Convention on the Recognition and Enforcement of Arbitral Awards allows for international recognition and enforcement of international arbitration awards made in a member state.

By Gary L. Benton, Lester Schiefelbein and Rachel Koch

In recent years, bulging patent portfolios and multi-million dollar patent litigations have characterized the technology sector, especially the smartphone and tablet industry. Accumulating lawsuits between the world's most prolific technology companies — Apple, Google, HTC, Microsoft, Motorola, Nokia and Samsung — span a multitude of courts and several continents.

The Apple-Samsung dispute encompassed over 50 lawsuits in nine countries, with each company now spending more on patent lawsuits and portfolios than research and development of new products. In what has been termed the “patent trial of the century,” Apple won a \$1 billion jury verdict against Samsung in one of the US lawsuits in 2012. In 2013, a portion of the case was retried, and the verdict was reduced to slightly over \$850 million. Both sides appealed and a second US case involving additional patents resulted in an additional \$119 million verdict for Apple in May 2014. There are also inconsistent decisions in cases in other regions between the parties on similar issues. Apple and Samsung agreed to dismiss all of the non-US lawsuits in August 2014. The time and expense of litigations around the world, often with inconsistent and uncertain results, raise the question of whether litigation is the best means of resolution for complex, multinational disputes.

This article considers the Apple-Samsung dispute and provides an alternative universe scenario: What would this litigation battle look like in international arbitration? Would international arbitration yield a substantively different outcome? Would arbitration of the dispute be more procedurally efficient? Would the costs differ? The following consideration of the distinctions between litigation and international arbitration in the context of the Apple-Samsung dispute can be instructive to counsel and clients.

National courts v. worldwide arbitration

A court's power extends no further than the reach of its jurisdiction, which is limited by domestic and national boundaries. Concerns regarding the geographic scope of power do not apply in international arbitration. The power of an arbitral tribunal to hear and adjudicate a case is provided by contract between the parties and applies globally. In a properly drafted international arbitration agreement, the parties will specify the place of the arbitration, the applicable arbitral rules and the governing substantive law. In selecting the place of the arbitration, the parties submit to the power of the courts in that jurisdiction to oversee the arbitration. There is, however, no geographical limitation on the reach of the award. There is no requirement for judicial review of the arbitration award by a court sitting at the place of the arbitration and no appellate review. Confirmation of the award by a local court is not required for enforcement of the award by courts in other jurisdictions around the world.

Apple and Samsung have a long and ongoing history of business relations. It is almost counterintuitive that these two large, sophisticated global business partners would not agree up front to a defined dispute resolution mechanism. Typically, failure to provide for international arbitration occurs when a

party with greater negotiating strength requires dispute resolution in a favored local court. Other times, it occurs due to lack of understanding regarding the benefits of international arbitration. Although Samsung has relied on arbitration clauses in cross-border agreements with other parties, Apple's preferred default appears to be its local courts. In any case, by failing to insert a broad arbitration provision in any one of the many supply or license agreements between them, Apple and Samsung committed themselves to dozens of litigations around the world, rather than a single worldwide dispute resolution process.

Forum

Unlike litigation, where the forum is determined by the parties' contacts with the forum and the forum court's control over the parties, in arbitration agreements, the parties mutually select the forum. This gives parties the ability to opt for a jurisdiction particularly conducive to arbitration and the power to select a panel suited for addressing the subject matter of the dispute.

These forum considerations have substantial import in the context of the Apple-Samsung dispute. The dispute is being litigated in the United States, Germany, France, Italy, Netherlands, Japan, Australia, England and South Korea. Arguably, a single arbitration

could be considerably more efficient. The parties could have one proceeding conducted in a mutually convenient location, with hearings by a selected panel of arbitrators in other locations as needed.

Judicial and arbitral administration

Administration of disputes varies significantly in litigation and international arbitration. In litigation, each court relies on its own local procedure and independently schedules cases. There is no administrative coordination among the courts and limited, if any, coordination on judicial findings. For instance, the administration of the Apple-Samsung case in the United States has little bearing on the court in South Korea, and the South Korean court is not bound to accept the decisions of US courts.

In contrast, an international arbitration is typically administered for the parties by a private arbitral institution. The selected institution oversees the entire process from filing to closing by providing arbitration rules, managing the appointment of arbitrators, scheduling conferences and ensuring the award is delivered to the parties in a timely fashion. For example, the International Centre for Dispute Resolution (ICDR), a division of the American Arbitration Association (AAA), the largest arbitration provider



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in the United States, administers international arbitrations worldwide under its International Dispute Resolution Procedures. Some institutions, such as the International Chamber of Commerce (ICC) International Court of Arbitration based in Paris, have detailed processes to scrutinize draft awards. Newer arbitral institutions have also been established, most notably in Hong Kong and Singapore. The quality of arbitral institutions and their rule provisions vary; however, in all arbitrations, the selected institution works at the behest of the parties, rather than leaving the parties dependent on government clerks for the administration of their case.

Arbitration provides the opportunity for global administration. If Apple and Samsung had opted to arbitrate, they would not be dependent on the oversight and decision-making of different national court systems. The dispute would be addressed in a single process administered for them by their selected arbitral institution and would result in a single award.

Decision-makers: Judges, juries and arbitrators

Many judges have no intellectual property or technical experience. One study of US cases concluded that “judges with very little patent experience manage the vast majority of cases.”¹ Judicial inexperience with patent law and technology issues is not limited to US courts; similarly, most other jurisdictions lack specialized patent trial courts. There is an obvious problem in having complex technical matters decided by judges with limited technical experience. The problem is accentuated when disputes are resolved by judges who may have local or cultural biases.

Another complication is the prevalence of juries in US patent trials. In the United States, a party to a patent infringement suit has a constitutional right to a jury trial, but there are no distinct prerequisites for jurors in a patent

trial. Although juries are perceived to leaven proceedings with community norms, there is a risk that jury decision-making on complex cases will not be decided based on principled application of the law. In patent cases, jurors may be overwhelmed by the complexity of the legal issues, the volume of evidence or the highly technical nature of disputes. In such cases, trial lawyers may seek to appeal to jury prejudices, rather than focus solely on technical analysis and argument.

In contrast, in the international arbitration setting, the parties select the decision-makers. There are a variety of mechanisms used to select the arbitration panel. In some instances, three neutral arbitrators are appointed, with each party selecting one arbitrator, and the parties or party-appointed arbitrators jointly selecting the third arbitrator. Alternatively, the arbitrator(s) could be designated in the arbitration clause or appointed from a list provided by the arbitral institution. In smaller cases, a single arbitrator is typically appointed either jointly by the parties or by the arbitral institution. The rules of the leading arbitral institutions and the laws of many jurisdictions impose strict requirements for arbitrator neutrality and conflict disclosure, typically more stringent than required of judges, where in many countries, there may be no requirement for conflict disclosure and limited checks and balances on the judiciary process. While there is no guarantee a panel of arbitrators will reach the correct result, an advantage of international arbitration over court proceedings is the ability of the parties to select the panel.

A related advantage of international arbitration is the ability of the parties to select expert decision-makers. The parties are free to specify arbitrator qualifications in their arbitration agreement or simply appoint a panel that satisfies their requirements. Undoubtedly, a panel of skilled arbitrators, whether engineers, industry

insiders or technology lawyers, are better qualified to address patent disputes than most jurors and many judges. The parties’ selection of arbitrators minimizes the risk of an erroneous ruling by an unqualified judge or runaway jury, allowing the parties more control in the dispute-resolution process.

The Apple-Samsung litigation in the United States was filed in a court with robust experience with patent disputes. The Northern District of California includes Silicon Valley, where many of the world’s most innovative technology companies, including Apple, maintain their corporate headquarters. Despite judicial expertise, only one juror in the Apple-Samsung case had any direct experience with patents. While it is unknown what role the jurors’ background and lack of experience played in their verdict, one may reasonably argue that few jurors are qualified to render a reasoned judgment in such a complex technical legal dispute.

In an arbitration context, Apple and Samsung could have selected a panel of patent and technology law experts and engaged in a much more efficient, focused proceeding. Arguably, a panel of three qualified arbitrators can collectively reach a reasoned decision on a patent matter as well as, if not better than, a single judge, and almost certainly better than a jury lacking any legal or technical background. At a minimum, the popularity of Apple as a cultural icon in the United States and the risk that a jury would decide against a foreign party should have made international arbitration particularly attractive to Samsung.

Privacy and confidentiality

Privacy and confidentiality can be important considerations in analyzing the benefits of the international arbitral process over litigation. Court proceedings in many countries are open to the public, except to the extent the court enters an order protecting the opposing party’s proprietary information.

In stark contrast, international arbitration proceedings are held in private. Additionally, the law in many jurisdictions requires confidentiality in international arbitral proceedings. The rules of the leading arbitral institutions fill any gap requiring that the tribunal and the parties keep matters relating to the arbitration and award confidential unless the parties consent otherwise. Thus, the proceedings and the documents submitted during arbitration remain inaccessible to third parties. The only time particulars of an arbitration may be acknowledged is when a party seeks court assistance (e.g., to request preliminary relief at the start of a proceeding or enforcement of an award after a proceeding) or when there is some governmental requirement.

The privacy and increased confidentiality of international arbitration is often a vital consideration for opting for arbitration. Conversely, choosing court litigation for greater public scrutiny could be a strategic choice as well. Undoubtedly, there are policy considerations to be taken into account in considering whether major commercial disputes are best resolved in public view or in private hearing rooms.

In the Apple-Samsung dispute, as with any major technology matter in litigation or international arbitration, the parties relied on protective orders to guard against the disclosure of proprietary information. As to non-proprietary information, Apple and Samsung have consistently relied on the media to tell their stories to the public.

Unless the parties agree otherwise, media access to the international arbitration process and information disclosed in the course of the proceeding would be strictly limited, although certain minimal disclosures would likely be required in the course of public securities filings. Whether Apple or Samsung would prefer confidentiality to media scrutiny depends on their success in litigating the cases and their

broader public relations strategies. What is certain is that the litigation process mandates exposure to media scrutiny, while international arbitration would provide the parties a choice in the matter.

Preliminary injunctive relief

Every nation sets its own standards for preliminary relief. In each case, courts must balance the competing claims of injury and consider the effect of granting or refusing the requested relief. In US patent cases, where a patentee can establish the requisite factors to a “near certainty,” a court may grant a preliminary injunction and thereby bar the defendant from making, distributing and selling the infringing products.

Under the leading international arbitral rules, international arbitrators have broad discretion in issuing directives for interim relief and making initial awards before rendering a final decision. Accordingly, regardless of whether the parties are in court or arbitration, the same substantive law considerations apply.

In the context of the Apple-Samsung dispute, multiple courts were asked to make preliminary injunction rulings under multiple bodies of law based on overlapping factual issues. That scenario almost ensures inconsistencies. Where the German and Dutch courts granted a preliminary injunction on the sale of Samsung’s Galaxy Tab 10.1, the English, South Korean and Japanese courts denied it. Even if the requirements for preliminary injunctions were the same in every jurisdiction, the factual case-by-case analysis remains dependent on the separate analyses by the judges in the various courts.

If the Apple-Samsung dispute had been submitted for international arbitration, there would have been more consistency and certainty in the preliminary injunction stage. A single arbitral panel could have assessed the necessity of a worldwide preliminary

injunction; there would not have been preliminary injunctions granted in some places and not others. A consistent substantive analysis would have been applied with little fear of non-compliance. Furthermore, reliance on an arbitral tribunal to issue a preliminary injunction would have avoided the flip-flopping trial and appellate court decisions in the US court case. Arbitration would have allowed the arbitral tribunal to make a uniform, decision on a preliminary injunction, without the need for relief (or opportunity for review) in the courts.

One downside of arbitration is that an arbitral institution may not be able to assemble a panel quickly enough to provide necessary preliminary relief; however, several of the leading arbitral institutions have addressed concern through rules providing for emergency appointments. Another concern is that, once preliminary relief is granted, enforcement requires a court order. If a party refused to comply with an arbitration panel’s preliminary injunction ruling, and proceeded in disregard of the wrath that might ensue from the panel, a court order would be required to compel enforcement.

Discovery v. disclosure

The approach to the exchange of information constitutes a crucial distinction between litigation and international arbitration. International arbitration favors a minimal “disclosure” of information, specifically disclosure of documents that the party intends to rely upon, supplemented through narrow document production requests, whereas litigation, depending on where it is conducted, involves a broader pre-trial production of all evidence.

Common law and civil law courts have divergent approaches to gathering relevant evidence and information. In civil law systems, there is no discovery. In contrast, the US discovery process can become particularly sprawling, costly and hugely time-consuming.

The average length of the discovery process for a US patent case, including discovery requests, depositions, interrogatories and clarifying motions, is three years. As a result, according to reported data, many large-scale patent disputes take a decade to resolve. For a patent dispute, document discovery could require extensive searches of archived hard copy and electronic data, and could easily involve production of hundreds of thousands of documents. The deposition process is equally time-consuming and intrusive, particularly for witnesses from countries where adversarial examination by lawyers is an unfamiliar concept. Penalties are significant; failing to provide the requesting party with required discovery can result in monetary sanctions or dismissal.

Disclosure in international arbitral proceedings is far less burdensome. Traditionally, parties in international arbitration disclose only those documents on which they intend to rely, rather than all relevant documents. Depositions and interrogatories are inconsistent with the standard international arbitration process. In some cases, limited document requests are allowed. This limited disclosure philosophy, which balances civil and common law sensibilities, puts the focus on the central documents supporting each party's case. The approach provides the opportunity to increase efficiency and reduce the overall cost and duration of the process by avoiding the production of vast quantities of useless documents and other information.

It is unlikely that limited disclosure would alter the substantive outcome of most patent disputes. The proceedings of the Apple-Samsung case in the United States support this proposition. The majority of evidence relied on at trial consisted of physical displays of the challenged products, records from the patent prosecution files and expert testimony relating to the software these products employed. In other words,

Apple prevailed largely by relying on its own documents and public records, rather than on discovery. Arguably, the same evidence would have been relied upon and the same result would have resulted if the Apple-Samsung case had been submitted to international arbitration. Even when Apple relied on discovery to support its willful infringement claim, it did not ultimately prevail. Millions of dollars in discovery practice could have been avoided.

Experts

Expert testimony is critical in both the litigation and international arbitration of patent disputes. In litigation, the parties spend considerable amounts of time and money in qualifying and educating experts, and having them prepare their testimony for written reports, depositions and trial. Expert presentations to juries are often colorful. While courts regard experts as important in providing damage calculations, they have warned against using experts as “hired guns” for presenting an “impenetrable facade of mathematics” to a jury.

In international arbitration, the parties either appoint their own experts or the tribunal may appoint an independent expert. Where the parties appoint their own experts, the chief difference between litigation and arbitration is the audience to which the experts present their testimony. Where there is a single panel-appointed expert, a battle of the experts is replaced with a theoretically more objective presentation. In both situations, the expert presentation is made to an arbitral panel that presumably has more skill in the subject matter than a typical judge or jury.

In the arbitration scenario, Apple's and Samsung's experts would have presented to a skilled panel, as opposed to an inexperienced jury. Although it is unclear whether this distinction would have led to a different outcome in the case, it would

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reasonably be expected that the experts would have presented in a more direct and sophisticated manner, and their opinions would have been subjected to more qualified scrutiny.

Hearing procedure

The hearings in international arbitration and litigation differ in terms of formality and process. In litigation, procedural and evidentiary rules strictly govern the trial. In international arbitration, the principal of party autonomy permits the parties to jointly develop a hearing process that suits the case.

The procedural stages for both arbitration and litigation hearings are similar. Both employ opening statements, witness testimony and closing statements. One notable difference is that in international arbitration, direct testimony traditionally comes in the form of written affidavits. Doing so makes the introduction of direct testimony more efficient, and allows counsel and the tribunal to focus on areas in need of clarification.

It took years to conduct discovery and prepare for trial in the Apple-Samsung litigation. Less time would be required in an arbitration where there was limited discovery. Presumably, less time would be required for the hearing, principally through the elimination of jury selection and the expedited admission of evidence. Although the hearing process would differ from

a trial, those differences would be unlikely to lead to a substantively different outcome.

Substantive considerations

The same substantive law applies in litigation and international arbitration. As discussed below, the procedural differences between international arbitration and litigation would not alter the substantive analysis of the case. Consider how proving patent validity, infringement and damages would differ in international arbitral practice:

Patent validity

The most significant procedural difference between litigation and arbitration is the limited exchange of information in advance of the hearing. However, broad discovery is of little utility in addressing validity under the patent laws. The most challenged element of patentability — non-obviousness based on prior art — is easily established without discovery from the other party because prior art is publicly available. Likewise, as the United States has shifted to a first-to-file system, discovery of documents supporting the date of invention is of limited value.

In an international arbitration, the parties would presumably rely on their own disclosures to support the validity or invalidity of patents. Both sides would have access to all the documents that the opposing party intended to assert to support its claims. To the extent there are documents that are relevant and material to deciding whether the challenged patent is valid, modern international arbitration procedure allows the party to request such documentation. Accordingly, international arbitration would not have produced a different substantive outcome in determining patent validity in the case.

Infringement

Likewise, international arbitration would not have produced a different substantive outcome in determining infringement. The principal infringement issue in the Apple-Samsung case was whether Samsung's products infringed Apple's iPad and iPhone patents. The assessment of infringement of the iPad design patents focused on Samsung products themselves. The judge instructed the jury that the test for infringement of design patents is whether the overall appearances of the accused design and the claimed design are

substantially the same. She instructed the jury to compare Samsung's accused products with Apple's design patents.

Similarly, the assessment on infringement of the Apple utility patents focused on elements of Samsung products and a determination as to whether they were covered by the patent claims. The judge instructed on the meaning of Apple's utility and defined ways in which the jury could determine infringement (either directly, literally or under the doctrine of equivalents). Each of these approaches required comparing the patent claims with the challenged product. In the Apple-Samsung case, this evidence was readily available through examination of the Samsung products and accompanying documentation.

In the alternative universe of an international arbitration, the Apple-Samsung tribunal would base its decision on infringement on the same readily available evidence. Consequently, the findings on infringement should be the same in litigation and arbitration.

Damages

In the United States, the basis for compensatory damages in a patent case include, but are not limited to, a showing of lost profits, a reasonable royalty and/or a loss of market share. In the Apple-Samsung case, both parties sought continuous sales-related data during the discovery phase. The volume of sales and profit data could be made available in a summary fashion in arbitration. Relying on disclosure of only specific information could well be a more effective way to proceed.

In US patent litigation, the court may award a plaintiff trebled damages with a showing of willful infringement. To establish willful infringement, a patentee must show by clear and convincing evidence that the infringer acted despite an objectively high likelihood that its actions constituted infringement of a valid patent. If this objective

threshold is satisfied, the patentee must then demonstrate that the risk was either known by the accused infringer or was so obvious that it should have been known. The actual state of mind of the defendant is irrelevant.

Having broad discovery does not ensure a finding of willful infringement. In the Apple-Samsung case, the judge overturned the jury's finding of willful infringement, reasoning that although Apple presented evidence of copying, this did not prove knowing infringement. With limited disclosure in the international arbitration context, the result would not likely be altered.

Appellate review and award confirmation

Nearly all countries provide rights of appeal against judgments in patent litigations, in some cases, to specialized courts, and in others, to appellate courts with general jurisdiction. Appellate review can be extraordinarily valuable where it corrects a wrong, but in all instances, it adds time, cost and uncertainty to the litigation process. Patent cases in the United States are routinely reversed. The high reversal rate suggests that errors routinely occur at the trial-court level.

In contrast, there is generally no appeal from the award of an arbitration tribunal. Arguably, an arbitral tribunal is best situated to reach a correct decision in the first place because the tribunal is composed of experts and has the advantage of collaborative deliberations. These features provide a "built in" error-checking mechanism.

Despite these safeguards, critics of arbitration contend appellate review is necessary to ensure the correct result is reached and arbitration's preference for efficiency over appellate review is a defect in the arbitration process. Although efficiency and finality of awards is still largely viewed as an advantage of arbitration, where parties require additional safeguards, they can agree to review by an appellate arbitral

tribunal. The AAA, for example, offers review by a panel of retired judges under its new Optional Appellate Arbitration Rules.

The Apple-Samsung case is yet to be concluded due to appeals. Appeals may result in new trials and many more years of litigation. Had Apple and Samsung elected international arbitration before an experienced patent panel, and even elected review by an appellate arbitration panel, the matter would likely be resolved by now.

Award recognition

International arbitration awards are widely recognized and enforceable around the world. The 1958 U.N. Convention on the Recognition and Enforcement of Arbitral Awards (the New York Convention) allows for international recognition and enforcement of international arbitration awards made in member states, the total of which reached 148 in 2013. When enforcement is required, the process requires judicial proceedings in those jurisdictions where enforcement is sought; however, the proceedings are abbreviated, and the Convention provides only narrow exceptions to enforcement.

In contrast, there is yet to be a widely adopted multinational treaty for the enforcement of foreign court judgments. In most countries, these judgments are not recognized or enforceable unless there is a reciprocal enforcement treaty in place. At best, foreign judgments have *res judicata* effect or serve as persuasive authority.

In the context of Apple-Samsung, international arbitration would provide important treaty enforcement benefits. The United States and South Korea are signatories to the New York Convention and have not signed a bilateral treaty to enforce court judgments. Thus, while a US international arbitration award would be enforceable against Samsung in South Korea, a US court judgment would not be.

Perhaps more important, multinational enforcement of an arbitration award would allow the parties to seek the same treaty enforcement in courts in other jurisdictions where they transact business or have assets. A US court judgment would not provide any of these benefits.

Conclusion

Although it is not a perfect solution, international arbitration of complex patent disputes offers parties numerous benefits over litigation. If Apple and Samsung had agreed to international arbitration, the chief advantage is that they could have selected a panel of patent and technology law experts and engaged in a much more efficient and focused proceeding. Other benefits include party autonomy, cost and time efficiencies, multinational coordination and foreign recognition of awards. There are risks that a court would not honor an arbitral award, but those risks are limited and are outweighed by the benefits.

For Apple, Samsung and the parties in future patent disputes, litigation may be a traditional legal and business strategy. A better strategy is international arbitration, where the resulting time and cost savings could be invested in innovation. This would not only benefit disputing technology corporations, but also investors, consumers and the industry as a whole. **ACC**

NOTES

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