Arbitration of Patent Disputes in Turkey

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There are different types of intellectual property, but this article focuses only on patents. The number of patents in a county has a very close connection to the level of economic performance of a country. Since knowledge transfer is easy and rapid in today's information age, developments in technology make patent infringement easier. In consequence disputes determined by patent arbitration arise.

There are different methods of dispute resolution including court litigation, mediation, conciliation and arbitration. This article concerns arbitrating and litigating patent disputes under Turkish law. The first part of the article analyses arbitrability generally under Turkish law. The second part looks at which kinds of patent disputes are arbitrable and which are non-arbitrable. The third part compares litigation and arbitration and explores which form of dispute is favourable for patent disputes. The final part then sets out the conclusion to the article.

Introduction

As intellectual product is mainly data, it is difficult to protect it under global economic conditions. As knowledge and transfer technology becomes ever easier, the need for protection of intellectual property becomes crucial. This is especially true of technological innovations in global markets for communication technology. Protection of intellectual property rights is important for industrialised countries and developing countries alike. Intellectual property rights constitute one of the most valuable assets in world market as the global economy becomes highly dependent on technology.[1]

Expansion in the intellectual property market and the short life span of technology products enhances the need for rapid resolution of disputes arising in this area. For this reason developments in dispute resolution are considerable.[2]

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[1] Jennifer Mills, "Alternative Dispute Resolution in International Intellectual Property Disputes" (1996) 11 Ohio St. J. on Disp. Resol. 227, 227.

[2] Ted E. Pons, "Arbitration Protects Intellectual Property" (1994) 49 Disp. Resol. J. 6, 6.

A general look at arbitrability in Turkey

Domestic and international arbitration was regulated by Code of Civil Procedure No.1086, until 2001. Turkey adopted the International Arbitration Law (IAL),[3] No.4686, in 2001. This Law is mainly based on the UNCITRAL Model Law on International Commercial Arbitration. However some of the articles are an adaptation of Swiss private international law, International Chamber of Commerce Rules and UNCITRAL Arbitration Rules.

Before IAL the general rule on arbitrability was regulated by the Code of Civil Procedure art.518. Under this article disputes that are not subject to settlement by the parties are not arbitrable. Because of this regulation, there can be no arbitration agreement about matters related to criminal judgment, administrative judgment and non-contentious judgment. Matters related to public policy such as parentage and insolvency are non-arbitrable as well.[4] However, under the Law on the Principles in Arbitration of Disputes Arising from Public Service Concession Proviso and Agreements, disputes arising from public service concessions can be resolved by arbitration.

Although there was no any explicit provision prior to IAL, the Appeal Court considered that disputes arising from real rights on immovables in Turkey related to public policy and were therefore non-arbitrable.[5] One of the decisions of the Appeal Court stated that disputes arising from real rights—since these disputes relate to transference of ownership in land registry—were non-arbitrable since ownership of an immovable can only be transferred by consent or by court decision at the land registry office.[6] These kinds of decisions have been criticised on the ground that the parties can settle and concede issues at their will.[7] The criticisms were based on the point that the public policy element in disputes concerning immovables is largely about the jurisdiction of the court which remains at the place of the immovable. However, this has no necessary connection with arbitration. In fact, the Appeal Court made certain rulings in the opposite direction. For instance, one of the decisions of the Appeal Court held that changes in the land register are procedures that can be freely performed by the parties. As these transactions depend on party autonomy, there should be no obstacle in going to arbitration.[8]

IAL has a similar provision in Civil Procedure Code, art.518, on arbitrability. According to art.1(IV) of the IAL, this law shall not be applied to the disputes concerning real rights over immovable properties in Turkey and to disputes which

[3] For more explanation about the Turkish International Arbitration Law see Ali Yesilirmak, "The Turkish International Arbitration Law of 2001" (2002) 19 J. of Int'l Arb. 171, 171–177.

[4] Saim Ustundag, *Medeni Yargilama Hukuku [Civil Procedure Law]* (2000), p.943; Ziya Akinci, *Milletlerarasi Tahkim [International Arbitration]* (2007), p.285.

[5] See Akinci, *Milletlerarasi Tahkim [International Arbitration]*, 2007, p.286 fn.585.

[6] See Erol Ertekin and Izzet Karatas, *Uygulamada Ihtiyari Tahkim ve Yabanci Hakem Kararlarinin Tenfizi ve Taninmasi [Voluntary Arbitration in Practice and Enforcement and Recognition of Foreign Arbitral Awards]* (1997), pp.80–81.

[7] Baki Kuru, *Hukuk Muhakemeleri Usulu [Civil Procedure Law]*, 6th edn (2001), p.5947; Sabri Sakir Ansay, *Hukuk Yargilama Usulleri [Procedures in Civil Law]*, 5th edn (1954), p.396; Saim Ustundag, *Medeni Yargilama Hukuku [Civil Procedure Law]*, 7th edn (2000), p.942; Hakan Pekcanitez, Oguz Atalay and Muhammed Özekes, *Medeni Usul Hukuku [Civil Procedure Law]*, 2nd edn (2001), p.586.

[8] See Kuru, *Hukuk Muhakemeleri Usulu [Civil Procedure Law]*, 2001, p.5948; Ilter Erdemir, *Hukuk Usulu Muhakemeleri Kanunu Serhi [Code of Civil Procedure Commentary]*, 2nd edn (1998), p.1939.

are not subject to the will of both parties.[9] This article has ended the haziness about the disputes arising from real rights on immovable properties and has become the rule on arbitrability in IAL.

IAL restricted only the disputes arising from real rights on immovables in Turkey. So, it is possible to say that matters about immovables other than real rights are arbitrable.[10] Since immovables in Turkey are specifically referred to in the IAL, disputes arising from real rights over immovables outside Turkey are arbitrable. The arbitral award would be enforced in the country of the immovable, so if the dispute is arbitrable under that country's law then it is not necessary to invalidate the arbitration agreement. This is because the real rights on immovables in Turkey are considered as matters of public policy and disputes arising from real rights should be resolved by Turkish courts.[11] According to the IAL, if the subject-matter of the dispute is not arbitrable under Turkish law or the arbitral award is in conflict with public policy then the award will set aside by the court (IAL art.15(2)(a)).

Public policy is not a constant notion. However, the content of public policy is not the same in Turkish national and international law. In national law, public policy seeks to protect the basic principles and benefits of Turkish society. Accordingly, breach of rules of fundamental rights and freedoms in the Constitution, and basic principles of law, customs and moral questions constitute matters of public policy.[12] In Turkish private international law the notion of public policy is considered more limited. Matters conducted by mandatory rules which are considered in public policy in domestic law would not be considered as public policy under private international law.[13] For this reason, some of the matters will not be taken into consideration under IAL which regulates the arbitration outside the Code of Civil Procedure.[14]

Under the rules of the Code of Private International Law and Procedure Law (PILPL), and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, contradiction of public policy is one of the reasons to refuse the enforcement and recognition of the award. The public policy issue that has been stated in art.62 of PILPL is Turkish public policy. Since Turkey is a member of the New York Convention, if the place of enforcement of the award is Turkey then Turkish public policy will be taken into consideration under art.V(2)(a) of the Convention.

Arbitrability of patent disputes

There is no provision about arbitrability of patent disputes in IAL or in the UNCITRAL Model Law, which is the reference law. For this reason, arbitrability of patent disputes shall be considered under the existing rules. As a general rule,

[9] For the full English version of the International Arbitration Law, see Kemal Dayinlarli, *Milletlerarasi Tahkim Kanunu [International Arbitration Law]* (2002).

[10] See Akinci, *Milletlerarasi Tahkim [International Arbitration]*, 2007, p.203.

[11] Kemal Dayinlarli, *Milli-Milletlerarasi Kamu Duzeni ve Tahkime Etkileri [National-International Public Policy and its Effect on Arbitration]* (1994), p.79; Akinci, *Milletlerarasi Tahkim [International Arbitration]*, 2007, p.201.

[12] Akinci, *Milletlerarasi Tahkim [International Arbitration]*, 2007, p.208; Dayinlarli, *Milli-Milletlerarasi Kamu Duzeni ve Tahkime Etkileri [National-International Public Policy and its Effect on Arbitration]*, (1994), p.11.

[13] Akinci, *Milletlerarasi Tahkim [International Arbitration]*, 2007, p.289.

[14] Dayinlarli, *Milli-Milletlerarasi Kamu Duzeni ve Tahkime Etkileri [National-International Public Policy and its Effect on Arbitration]* (1994), p.66.

disputes that are not subject to settlement by the parties are not arbitrable in Turkish arbitration law. In this context, disputes arising from patent licensing agreements are arbitrable as they are subject to settlement by the parties. Disputes arising out of patent infringement are also subject to settlement by the parties, so parties are allowed to resort to arbitration in these kinds of disputes.[15] However, there are obstacles to the arbitrability of disputes arising from patent invalidity.

Public policy issues

One of the obstacles to arbitrability of disputes arising from patent invalidity is public policy. The basis of this idea lies in the registration of the patent right and the role of the public authority in granting the patent. Moreover, invalidity of a patent is not considered as a subject of settlement by the parties, so these kinds of disputes are non-arbitrable because they are related to public policy. In addition, since patents are granted by a public authority (the Turkish Patent Institute in Turkey), which is not a party to arbitration agreement, arbitrators could not rule a patent invalid.[16]

In Turkish patent law, a patent owner can freely dispose on his/her patent. A patent owner can grant a licence; patent acquisition is possible; and the patent owner is able to strike out the patent. There is no a legal obstacle for parties seeking to settle a dispute over patent invalidity. So it can be argued that, as an economic dispute, patent invalidation could be settled by the parties and should be arbitrable. However, as patents are seen as closely related to the economic and technical development of the country, disputes related to patent invalidation are non-arbitrable.[17]

Public policy considerations should be more flexible in international arbitration than in domestic arbitration. For this reason if Turkey is chosen as the seat of arbitration, because of geographical practicability, then public policy intervention should be the minimum possible.[18] Therefore, if arbitration over a foreign patent infringement takes place in Turkey and the plea of invalidation is stated in that arbitration, then the arbitrators should be competent to decide upon the invalidation of that patent in that case.[19]

[15] Akinci, *Milletlerarasi Tahkim [International Arbitration]*, 2007, p.287.

[16] Ergun Özsunay, "Tahkime Elverişlilik Kavramina Ilişkin Yeni Gelişmelerin Işiginda Rekabet Hukuku Uyuşmazliklari Bakimindan Tahkim ve Türk Hukukunun Durumu", 4. Milletlerarasi Tahkim Semineri ["Arbitration in Competition Law Disputes under the New Developments in Arbitrability Concept and the Situation in Turkish Law", 4th International Arbitration Congress] (2005), p.3; Yusuf Caliskan, *Uluslararasi Fikri Mulkiyet Hukukunda Uyusmazlik Cozum Mekanizmalari: WIPO Tahkimi ve Dunya Ticaret Orgutu [Dispute Resolution Mechanisms in International Intellectual Property Law: WIPO Arbitration and World Trade Organization]* (2008), p.37.

[17] Cemal Sanli, *Milletlerarasi Ticari Tahkimde Esasa Uygulanacak Hukuk [Applicable Substantive Law in International Commercial Arbitration]* (1986), p.27.

[18] Akinci, *Milletlerarasi Tahkim [International Arbitration]*, 2007, p.209.

[19] William Grantham, "The Arbitrability of International Intellectual Property Disputes" (1996) 14 Berkeley J. Int'l Law 173, 186; Caliskan, *Uluslararasi Fikri Mulkiyet Hukukunda Uyusmazlik Cozum Mekanizmalari [Dispute Resolution Mechanisms in International Intellectual Property Law*, 2008, p.37.

The effect of an arbitral award to third parties

Under the Turkish patent system, if the invalidity of a patent has been claimed before the court, and the award has become final, then the Turkish Patent Institute will amend the register. The reasons for invalidity of a patent are stated in Decree Law 551 on the Protection of Patent Rights[20] (Decree Law 551) art.129. According to art.129:

> "... [A] patent shall be declared invalid by the court in the following situations: (a) where it is established that the subject matter of the invention does not meet the patentability requirements laid down in articles 5 to 10 of this Decree-Law; (b) where it is established that the subject matter of the invention has not been described in a sufficiently explicit and comprehensive manner for a person skilled in the technical field concerned to carry it out; (c) where it is established that the subject matter of the patent goes beyond the scope of the application or is based on a divisional application filed under article 5 or on an application to which article 12 applies and exceeds the scope thereof; (d) where it is established that the holder of the patent does not have the right to a patent under article 11."

If any of the first three technical reasons are present then the registrar will strike out the patent. In the case of the last paragraph the registrar will amend the register. When the court declares a patent invalid, the existing infringement trials will become moot; the patent right will end.[21] The final awards declaring the patent invalid will affect *erga omnes*. For this reason it can be argued that disputes related to patent validity should not be arbitrable. Issues may negatively affect the third-party rights and benefits even though they are not party to the arbitration agreement and should not be arbitrable. It has been accepted that the constitutive awards affect third parties (*erga omnes*). These awards affect the legal position of third parties who are not party to the dispute. This is akin to court awards declaring the annulment of a general meeting decision of a joint stock company that affects third parties who are not parties to the trial. It is accepted that these kinds of issues are not arbitrable.[22]

[20] For complete translation of this Decree Law in English see *http://www.wipo.int/clea/en/text_html.jsp?lang=EN&id=3859* [Accessed September 6, 2010].

[21] According to art.131 of Decree Law 551, "A court decision ruling that a patent is invalid shall have retroactive effect. Consequently, where invalidity is declared, the legal protection afforded to the patent application or patent under this Decree-Law shall be deemed never to have existed. Without prejudice to compensation claims for damage caused by acts of bad faith on the part of the owner of the patent, the retroactive effect of invalidity shall not extend to the following:(a)any decision on patent infringement that has become res judicata prior to the declaration of invalidity;(b)contracts executed and fulfilled *prior* to the declaration of invalidity; partial or full reimbursement of sums paid under the contract may, however, be claimed on grounds of equity to the extent justified by the circumstances. A declaration that has become res judicata shall be binding on all persons."

[22] Meral Sungurtekin, "Inşai Karar ve Özellikleri" ["Constitutive Award and Its Characteristics"] in Prof. Dr Baki Kuru Armagani, *Essays in Honor of Professor Dr. Baki Kuru* (2004), pp.553, 565; Bilgehan Yesilova, *Milletlerarasi Ticari Tahkimde Nihai Karardan Once Mahkemelerin Yardimi ve Denetimi [Court Assist and Intervention Before the Final Award in International Arbitration]* (2008), p.341; Hakan Pekcanitez, *Medeni Usul Hukukunda Fer'i Mudahale [Secondary Intervention in Civil Procedure Law]* (1992), p.95; Ali Cem Budak, *Medeni Usul Hukukunda Uçuncu Kişilerin Haklarinin Korunmasi [Protection of Third Parties' Rights in Civil Procedure Law]* (2000), p.23.

The arbitral award is binding between only the parties to the arbitration agreement. Since an award about invalidation of a patent is a constitutive award that will affect third parties, validity disputes are not arbitrable.[23] However, there is a school of thought that favours the arbitration of patent validity disputes inter partes.[24]

Arbitration is a private trial between the parties to the arbitration agreement. For this reason there may be some issues to be considered in terms of procedure. Namely, to protect the third parties in patent litigation who have rights on the patent—such as a right of detention—there is an article included in Decree Law 551. According to art.130(III)[25] in the case where patent invalidity has been claimed, the right holders in the patent registry shall receive notice to enable them to take part in the court action. The court shall give notice to the right holders ex officio. If Turkish law is to be applied to the arbitration proceedings—since there is no provision concerning secondary intervention in IAL—the Code of Civil Procedure will be relevant.[26] Under art.49 of Code of Civil Procedure, only the parties can give notice to third parties about the trial. If none of the parties demands it, the court cannot give notice to third parties ex officio. However, there is a special provision in Decree Law 551 which regulates that the court shall give notice to third parties ex officio. For this reason the court should give notice to third parties who are the right holders on the patent. Since the third parties' rights depend on the result of this trial, they would be interveners and help the patent owner in the patent invalidation suit.[27]

The parties of the arbitration agreement are free to designate the procedural law to be applied to the arbitration proceedings within the limits of public rules at the place of arbitration. If the parties have chosen the law that is going to be applied to the arbitration procedure, arbitrators shall apply that law. Parties can also decide on the procedure for secondary intervention in the arbitration. Secondary intervention shall take place in accordance with the parties' agreement. There are different views in Turkish doctrine on secondary intervention in arbitration. According to one school, if the parties have not decided upon secondary intervention it is impossible to actuate any intervention mechanism. Since the arbitration agreement is valid between the parties of the arbitration, the third parties who did not sign this agreement should not be examined under this agreement. However, the parties can allow a third party right of secondary intervention.[28] According to another school of thought, a third party who takes a place as an intervener—not as a party of arbitration agreement—in the arbitration proceedings and the arbitral award does not receive a final judgment. However, the arbitrators

[23] Yesilova, *Milletlerarasi Ticari Tahkimde Nihai Kararda Once Mahkemelerin Yardimi ve Denetimi [Court Assist and Intervention Before the Final Award in International Arbitration]*, 2008, p.341, fn.87.

[24] Grantham, "The Arbitrability of International Intellectual Property Disputes" (1996) 14 Berkeley J. Int'l Law 173, 186; Pierre Véron, "Arbitration of Intellectual Property Disputes in France" [1995] Int'l Bus. Law. 132, 134; Caliskan, *Uluslararasi Fikri Mulkiyet Hukukunda Uyusmazlik Cozum Mekanizmalari [Dispute Resolution Mechanisms in International Intellectual Property Law]* (2008), p.37.

[25] Decree Law 551 art.130(III) provides: "The court of action for invalidation of a patent shall be directed against the person who, at the time of the institution of proceedings, is entered in the Patent Register as the owner of the patent. Notification shall be served on the persons entered in the Register as holders of rights in the patent, to enable them to take part in the court action."

[26] Akinci, *Milletlerarasi Tahkim [International Arbitration]*, 2007, p.43.

[27] Kuru, *Hukuk Muhakemeleri Usulu* [Civil Procedure Law], 2001, p.3457.

[28] Pekcanitez, *Medeni Usul Hukukunda Fer'i Mudahale [Secondary Intervention in Civil Procedure Law]*, 1992, pp.203–204.

can allow the third parties to take their place as interveners in the arbitration without the parties' consent. But to allow this may seem inconsistent with the arbitration itself. In addition to this, the validity and enforceability of the arbitral award would be at risk. For this reason, it would be not be right to let the third parties intervene without the parties' consent.[29] Furthermore, in the view of the fact that disputes relating to patent invalidity are joined with the infringement pleas in practice, it is hard to see why the party claiming the invalidity of the patent would consent to secondary intervention.

Existing competent courts in the intellectual property area

Article 146 of Decree Law 551 provides that "Special courts to be established by the Ministry of Justice shall have jurisdiction over all actions and claims provided for in this Decree Law". The aim of these courts is the resolution of intellectual property disputes, rapidly, by experienced judges without entering too deeply into the controversy. The important point of these disputes is they must fall within the context of Decree Law 551.[30]

The competent courts are those established by a particular law for resolving certain disputes. These courts are specially appointed courts. The relation between the competent courts and the other courts is jurisdictional relation.[31]

Competent courts should not be an obstacle to the arbitration of validity disputes.[32] For example, there are marine competent courts—established by Turkish Commercial Code art.4(III). However, arbitration is the preferred way of resolution of disputes related to maritime law. Moreover, it is not possible to say that competent courts have judicial monopoly in Turkish law as in German law.[33] Judicial monopoly needs more than a regulation. As Berger states:

> "... [I]t has to be ascertained with sufficient certainty that the legislature wanted to go beyond this formal aspect, in that it wanted to ensure in the interest of legal values that deserve particular legal protection that only the state judiciary shall be authorized to judge on these claims. This is the case, for example, with disputes relating to the status of natural persons (divorce, etc.).[34]

[29] Ziya Akinci, *Milletlerarasi Ozel Hukukta Insaat Sozlesmeleri [Construction Agreements in Private International Law]* (1996), pp.208–211; Leyla Keser Berber, *Uluslararasi Ekonomik Tahkimde Cok Tarafli Tahkim Sorunu [Multi-Party Arbitration Issue in International Economic Arbitration]* (1999), p.198.

[30] Ramazan Arslan and Suha Tanriver, *Yargi Orgutu Hukuku [Judicial Organization Law]*, 2nd edn (2001), pp.77–78.

[31] Sabih Arkan, *Marka Hukuku [Trademark Law]* (1998), p.259; Cahit Suluk, *Yedek Parça Tasarim Hakkinin Korunmasi [Protection of Industrial Design Rights in Spare Parts]* (2001), p.299; Feyzan Hayal Sehirali, *Patent Hakkinin Korunmasi [Protection of Patent Right]* (1998), p.199; Tahir Sarac, *Patentten Dogan Hakka Tecavuz ve Hakkin Korunmasi [Infringement of the Right Arising from Patent and Protection of this Right]* (2003), p.311.

[32] Yesilova, *Milletlerarasi Ticari Tahkimde Nihai Karardan Once Mahkemelerin Yardimi ve Denetimi [Court Assist and Intervention Before the Final Award in International Arbitration]*, 2008, p.35; Akinci, *Milletlerarasi Tahkim [International Arbitration]*, 2007, p.287; Arkan, *Marka Hukuku [Trademark Law]*, 1998, p.259; Nevhis Deren Yildirim, *Haksiz Rekabet Hukuku ile Fikri ve Sinai Mulkiyet Hukukunda Ihtiyati Tedbirler [Interim Measures in Unfair Competition and Intellectual and Industrial Property Law]*, 2nd edn (2002), p.33; Suluk, *Yedek Parça Tasarim Hakkinin Korunmasi [Protection of Industrial Design Rights in Spare Parts]*, 2001, p.299; Sarac, *Patentten Dogan Hakka Tecavuz ve Hakkin Korunmasi [Infringement of the Right Arising from Patent and Protection of this Right]*, 2003, p.313.

[33] According to German Law, Federal Patent Courts have judicial monopoly on disputes related to patent invalidity. Bundesgerichthof (BGH—Federal Court of Justice), March 3, 1996, 1 *Entscheidungen des Bundesgerichtshofes in Zivilsachen* (BGHZ—Supreme Court) at 278.

[34] Klaus Berger, "The New German Arbitration Law in International Perspective" (2000) 26 *Forum Internationale* 7.

Juridical monopoly of national courts

Jurisdiction of competent courts has been regulated by Decree Law 551 art.137. According to art.137(II) and (III):

> "... [T]he competent court for the institution of legal proceedings by the patent owner against third parties shall be the one at the domicile of the claimant or at the place where the offence was committed or at the place in which the infringing act had effect. Where the plaintiff is not domiciled in Turkey, the competent court shall be the court at the place of business of the representative of record or, in the absence of such representative, before the courts at the place where the Turkish Patent Institute has its office."

As can be understood from these provisions, the competent court in patent infringement cases is first the one at the place of claimant. Since patent infringement is a tortious act, the claimant can file the suit at the place where the offence was committed or at the place where the infringing act had effect. The law-maker sought convenience for the patent owner here by providing for more than one possibility of an authorised court.[35] Since there are different possible authorised courts in Decree Law 551, this rule on jurisdiction is not definitive. Jurisdiction of the court in infringement cases is not exclusive. The aim of the law-maker is protection of the patent owner and instituting a competent Turkish court for every situation. However, since the national courts do not have exclusive jurisdiction in infringement cases, the patent owner can institute legal proceedings abroad[36] or sign an arbitration agreement as well.[37]

Under art.137(IV) of Decree Law 551 the competent court for the institution of legal proceedings by third parties against the patent owner shall be at the domicile of the defendant. If the defendant is not domiciled in Turkey, the competent court shall be the court at the place of business of the representative of record or, in the absence of such representative, the court at the place where the Turkish Patent Institute has its office. There is a consensus in Turkish doctrine that courts have a juridical monopoly in disputes regarding patent validity. Turkish courts are the only competent fora in disputes concerning a Turkish patent's validity and in disputes about registration in terms of international procedural law. Patent granting depends on the right of sovereignty of the country; for this reason national courts should have juridical monopoly. Disputes related to patent validity and registries are closely related to the national courts' law. Accordingly, the national courts of the country will have juridical monopoly over whose law is going to be applied in disputes related to patent validity and registration.[38]

[35] Sarac, *Patentten Dogan Hakka Tecavuz ve Hakkin Korunmasi [Infringement of the Right Arising from Patent and Protection of this Right]*, 2003, p.310; Arkan, *Marka Hukuku [Trademark Law]*, 1998, p.259.

[36] B. Bahadir Erdem, *Fikri Hukukta Turk Mahkemelerinin Milletlerarasi Yetkisi [International Jurisdiction of Turkish Courts in Intellectual Law]* (2003), p.194.

[37] Sarac, *Patentten Dogan Hakka Tecavuz ve Hakkin Korunmasi [Infringement of the Right Arising from Patent and Protection of this Right]*, 2003, p.310.

[38] James J. Fawcett and Paul Torremans, *Intellectual Property and Private International Law* (1998), p.12; Erdem, *Fikri Hukukta Turk Mahkemelerinin Milletlerarasi Yetkisi [International Jurisdiction of Turkish Courts in Intellectual Law]*, 2003, pp.196–197; Cemal Sanli, *Uluslararasi Ticari Akitlerin Hazirlanmasi ve Uyusmazliklarin Cozum Yollari [Preparation of International Commercial Contracts and Resolving Ways of Disputes]* (2002), p.127; Nuray Eksi, *Turk Mahkemelerinin Milletlerarasi Yetkisi [International Jurisdiction of Turkish Courts]*, 2nd edn (2000), p.213; Caliskan, *Uluslararasi Fikri Mulkiyet Hukukunda Uyusmazlik Cozum Mekanizmalari [Dispute Resolution Mechanisms in International Intellectual Property Law]*, 2008, p.38.

Comparison of patent litigation and arbitration in Turkish law

Resolving the place of the dispute—a national court or a neutral platform

If the parties resort to litigation in a patent dispute, the matter is primarily one for the national courts. However there may be difficulties concerning jurisdiction in an international patent dispute.[39] Parties normally like to litigate in courts of their own country.[40]

Under Turkish law a case should have connection with Turkey in order to be handled in Turkish courts.[41] The international jurisdiction of the Turkish courts is determined by the territorial jurisdiction rules of domestic law (PILPL art.40). If a court has jurisdiction under domestic law then it will also have international jurisdiction.[42]

In asset-based actions, parties can choose the international jurisdiction of the Turkish courts even if Turkish courts do not have jurisdiction.[43] Parties can also choose a foreign court with a jurisdiction agreement (PILPL art.47). However, in cases in which Turkish courts have exclusive jurisdiction, parties could not opt for a foreign court through a jurisdiction agreement. If a jurisdiction rule has been introduced with the aim of entitling a Turkish court then Turkish court will exclusive jurisdiction and a jurisdiction agreement entitling a foreign a court will not be valid.[44]

Parties can designate a foreign court thereby conferring jurisdiction in international contracts on patent licence agreements or alienation of patent right[45] (PILPL art.47). In disputes arising from patent infringement, the patent right holder and the infringer can conclude a jurisdiction agreement conferring jurisdiction on a foreign court, after the alleged act of infringement has occurred.[46]

The jurisdiction of courts can be compared to the place of arbitration.[47] The parties who have different domiciles may have concerns about the neutrality of the court. In contrast arbitration provides a neutral resolution platform to the parties.[48] Parties to the dispute are free to decide on the place of arbitration. Parties can also leave determination of the seat of the arbitration to the arbitrators or to the arbitration institution, if it is an institutional arbitration (IAL art.9).

[39] Baki Kuru, Ramazan Arslan and Ejder Yilmaz, *Medeni Usul Hukuku [Civil Procedure Law]*, 18th edn (2007), p.148.

[40] Akinci, *Milletlerarasi Tahkim [International Arbitration]*, 2007, p.27.

[41] Erdem, *Fikri Hukukta Turk Mahkemelerinin Milletlerarasi Yetkisi [International Jurisdiction of Turkish Courts in Intellectual Law]*, 2003, p.108.

[42] Ergin Nomer, *Devletler Hususi Hukuku [Private International Law]*, 16th edn (2008), pp.430–445.

[43] Nomer, *Devletler Hususi Hukuku [Private International Law]*, 2008, p.448; Erdem, *Fikri Hukukta Turk Mahkemelerinin Milletlerarasi Yetkisi [International Jurisdiction of Turkish Courts in Intellectual Law]*, 2003, p.200; Kuru, Arslan and Yilmaz, *Medeni Usul Hukuku [Civil Procedure Law]*, 2007, p.176.

[44] Nomer, *Devletler Hususi Hukuku [Private International Law]*, 2008, p.450.

[45] Erdem, *Fikri Hukukta Turk Mahkemelerinin Milletlerarasi Yetkisi [International Jurisdiction of Turkish Courts in Intellectual Law]*, 2003, p.203; Ziya Akinci, *Milletlerarasi Usul Hukukunda Yetki Sozlesmesine Dayanan Yabanci Derdestlik [Foreign Pendency Depending on Jurisdiction Agreement]* (2002), p.88.

[46] Erdem, *Fikri Hukukta Turk Mahkemelerinin Milletlerarasi Yetkisi [International Jurisdiction of Turkish Courts in Intellectual Law]*, 2003, p.204.

[47] Mahmut Birsel, "Milletlerarasi Tahkimde Tahkim Yerinin Seçiminin Önemi", Milletlerarasi Tahkim Semineri ["The Importance of Choosing the Place of Arbitration in International Arbitration"] (International Arbitration Seminar, 2003) p.64.

[48] Akinci, *Milletlerarasi Tahkim [International Arbitration]*, 2007, p.27.

All national laws have their own rules on intellectual property and arbitration, and it makes sense to choose a country that has supportive law on arbitrating patent disputes as the seat of arbitration. Parties should consider the law in the place of arbitration alongside any geographical convenience. The arbitrability of patent disputes at the place of arbitration should be taken into consideration by the parties. If patent disputes are non-arbitrable at the place of arbitration, this may lead to the award being set aside. Moreover as interim measures are important in patent disputes, parties should also consider the law of the place of arbitration in case it becomes necessary to seek interim measures from the courts of that country.[49]

In contrast to national courts, arbitrators can have the hearings other than that the place of arbitration (IAL art.9). This may be beneficial in patent disputes since important evidence and key witnesses may be in different locations in international disputes.[50] For instance patent infringement may take place in different venues. Therefore having hearings in these places separately may expedite the arbitration process.[51]

The adjudicator: a judge or an arbitrator

If a patent dispute is going to be resolved by a national court, judges will take charge of the action. The "natural judge" principle is valid in court litigation. A natural judge is a judge of the court that instituted and has functions and powers determined beforehand by law.[52] It is impossible for the parties to choose or to designate the number of judges.

Since intellectual property disputes entail technical information, it is essential for judges sitting in this area to have professional experience. There have to be competent courts specialising in this area. The difference between competent courts and the others is the relevant judicial training in the appropriate working area.[53]

Under Decree Law 551, single judge competent courts will administer intellectual property cases. In places where there is no competent court, the ordinary civil courts will be competent to take care of action. Since trained judges serve in competent courts, they are supposed to reach decisions rapidly without expert examination. While these judges will analyse intellectual property disputes, a very technical subject such as patents may need technical expert examination to determine, for example, which patent claim has been infringed or whether reverse engineering infringes or not.[54] It would not be realistic to suppose that judges will know the necessary technical details and market conditions as well as technical experts working in the area.

[49] David W. Plant, *Resolving International Intellectual Property Disputes* (1999), pp.56–57.

[50] Robert H. Smit, "General Commentary on The WIPO Arbitration Rules, Recommended Clauses, General Provisions and The WIPO Expedited Arbitration Rules" in *WIPO Arbitration and Rules: Commentary and Analysis* (Juris Publishing, 2000), p.3, at p.14, see also p.57; Akinci, *Milletlerarasi Tahkim [International Arbitration]*, 2007, p.128.

[51] Plant, *Resolving International Intellectual Property Disputes*, 1999, p.57.

[52] Ejder Yilmaz, *Hukuk Sozlugu [Law Dictionary]* (1992), p.851.

[53] Serdar Arikan, "Fikri ve Sinai Haklar Hukuk Mahkemeleri", Amerika Birleşik Devletleri ve Türkiye'de Fikri ve Sinai Mülkiyet Haklarinin Etkin Korunmasi Semineri ["Intellectual and Industrial Rights Civil Courts"] (Effective Protection of Intellectual and Industrial Property Rights in United States of America and Turkey Seminar, 2004), p.6.

[54] Arikan, "Fikri ve Sinai Haklar Hukuk Mahkemeleri", Amerika Birleşik Devletleri ve Türkiye'de Fikri ve Sinai Mülkiyet Haklarinin Etkin Korunmasi Semineri ["Intellectual and Industrial Rights Civil Courts"], Effective Protection of Intellectual and Industrial Property Rights in United States of America and Turkey Seminar, 2004, p.6.

Unlike court litigation, parties are free to choose the person who will take care of the case in arbitration—the arbitrator[55] (IAL art.7). Parties can appoint any person that they view as qualified in the relevant legal or technical skills. Particularly in patent disputes, the technical specialisation of the arbitrator is important.[56] The parties' choice of expert arbitrators to resolve patent disputes may affect the correctness of awards, shorten the resolution process and lessen the expenses.[57] For instance, the experience and the knowledge of the arbitrator of the technical characteristics of the inventions might ease the resolution of disputes relating to products of advanced technology such as chemicals, medicines or computer components.[58]

It is a major advantage of arbitration—particularly in technical disputes like patent disputes—that the parties can choose arbitrators in whom they have confidence, and can decide on the number of the arbitrators and how those arbitrators are going to be appointed.[59]

Interim measures

Interim measures may protect the plaintiff and the defendant from non-compensatory or irreparable harm or disappearance of evidence pending a final award by the judge or arbitrator.[60] There are different forms of interim measures in Turkish law. These are precautionary measures, sequestration and the securing of evidence.[61]

Interim measures are highly significant in patent disputes. This is because patent law requires rapid and effective interim measures.[62] For instance if an invention has been exploited in excess of the licence agreement conditions this constitutes the infringement of a patent right. However, it may be difficult to determine the financial damage. Granting a rapid interim measure may offer protection to the right holder.[63]

Secure evidence and precautionary measures are the most often granted interim measures in patent disputes. Decree Law 551 art.150 provides that:

[55] Julian D.M. Lew, Loukas A. Mistells and Stefan M. Kröll, *Comparative International Commercial Arbitration* (2003), p.223.

[56] Toby Landau, "Composition and Establishment of the Tribunal" in *WIPO Arbitration and Rules: Commentary and Analysis*, 2000, p.45, at pp.45–47.

[57] Plant, *Resolving International Intellectual Property Disputes*, 1999, p.18; Camille A. Laturno, "International Arbitration of the Creative: A Look at the World Intellectual Property Organization's New Arbitration Rules" (1996) 9 Transnat'l L. 357, 369.

[58] Scott H. Blackmann and Rebecca M. McNeill, "Alternative Dispute Resolution in Commercial Intellectual Property Disputes" (1998) 47 Am. U. L. Rev. 1709, 1720–1721.

[59] Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration*, 2003, p.224.

[60] Ejder Yilmaz, *Gecici Hukuki Himaye Tedbirleri* (2001), p.32; 3 Baki Kuru, *Hukuk Muhakemeleri Usulü*, 6th edn (2001), p.3049; Hakan Pekcanitez, "Milletlerarasi Tahkimde Geçici Hukukî Koruma Önlemleri", Milletlerarasi Tahkim Semineri ["Interim Measures in International Arbitration"] (International Arbitration Seminar, 2003), p.115, at p.115.

[61] Pekcanitez, "Milletlerarasi Tahkimde Geçici Hukukî Koruma Önlemleri", Milletlerarasi Tahkim Semineri ["Interim Measures in International Arbitration"] (International Arbitration Seminar), 2003, p.115.

[62] Robert Briner, "The Arbitrability of Intellectual Property Disputes with Particular Emphasis on the Situation in Switzerland" in *Worldwide Forum on the Arbitration of Intellectual Property Disputes* (WIPO Publication, 1996), p.55 at p.69.

[63] Richard Allan Horning, "Interim Measures of Protection; Security for Claims and Costs; and Commentary on the WIPO Emergency Relief Rules" in *WIPO Arbitration and Rules: Commentary and Analysis*, 2000, p.155, at p.156.

> "Any person legally entitled to bring an action for infringement of patent rights may request the court to determine and secure evidence of acts that may be regarded as infringing such rights."

Decree Law 551 art.151 provides:

> "Persons who intend to institute or have instituted proceedings under this Decree Law may, in order to ensure the effectiveness of the main action, request the court to order precautionary measures, provided that they bring evidence of actual use of the patent in Turkey, or of genuine and effective preparations for such use, that will constitute infringement of the plaintiff's patent rights. The request for precautionary measures may be filed before or on the institution of proceedings or later. The request for precautionary measures shall be examined separately."

Article 152 is about the nature of precautionary measures:

> "Precautionary measures shall be of such a nature as to permit the securing of the full effectiveness of the judgment and shall in particular provide for the following: (a) cessation of the acts infringing plaintiff's patent rights; (b) seizure within the borders of Turkey, wherever they are to be found, including at the customs or in free ports or free trade areas, and the holding in custody, of produced or imported goods that infringe the patent rights, or of means used in the implementation of the patented process; (c) provision of security for such damages as may have to be compensated."

In court litigation, judges can order all kinds of interim measures. However, in arbitration, arbitrators should consider if they are competent to order interim measures. The arbitral tribunal should take into consideration: the arbitration agreement; arbitration rules that have been designated by the parties; the law of the place of arbitration; and the law of the country where the patent has been granted.[64] Parties can limit the authority of the arbitral tribunal to order interim measures. If the law at the place of arbitration does not let the arbitral tribunal order interim measures and the place of arbitration is not the place that the patent was granted, parties may need to seek interim measures in country where the patent has granted.[65] Since it is not possible to seek interim measures from the arbitral tribunal until the arbitrators are appointed, parties may need to seek interim measures from a national court.[66] Seeking interim measures from a national court will not create an obstacle for resolving the patent dispute by arbitration.[67]

According to IAL art.6, unless otherwise agreed, the arbitrator or arbitral tribunal can order precautionary measures and sequestration. Yet it is impossible for the arbitral tribunal to order precautionary measures in practice. Since arbitration is

[64] Matthew A. Smith et al., "Arbitration of Patent Infringement and Validity Issues Worldwide" (2006) 19 Harv. J.L. & Tech. 299, 318 fn.97.

[65] Pekcanitez, "Milletlerarasi Tahkimde Geçici Hukukî Koruma Önlemleri", Milletlerarasi Tahkim Semineri ["Interim Measures in International Arbitration"] (International Arbitration Seminar), 2003, p.140; Julian D.M. Lew, "Final Report on Intellectual Property Disputes and Arbitration" (1998) 9 ICC Int'l Ct. Arb. Bul. 37, 47.

[66] Plant, *Resolving International Intellectual Property Disputes*, 1999, p.19; Lew, "Final Report on Intellectual Property Disputes and Arbitration" (1998) 9 ICC Int'l Ct. Arb. Bul. 37, 56.

[67] Ziya Akinci, "Hakemlerin Ihtiyati Tedbir ve Ihtiyati Haciz Karari Verme Yetkisi" ["Competence of Arbitrators about Ordering Precautionary Measures and Sequestration"] in *Prof. Dr Sükrü Postacioglu'na Armagan [Essays in Honor of Professor Dr Sükrü Postacioglu]* (1997), p.209, at p.215; Plant, *Resolving International Intellectual Property Disputes*, 1999, p.41.

binding for the parties to the arbitration agreement but not the third parties, the arbitral tribunal cannot order third parties to deliver their assets or order the sequestration of the defendant's assets or direct debtors of the defendant not to pay their debts to the defendant for sequestration of defendant's credits[68] Since the arbitral tribunal cannot order interim measures binding upon official organs,[69] it is not possible for the tribunal to order seizure within the borders of Turkey, wherever they are to be found, including at the customs or in free ports or free trade areas, and the holding in custody, of produced or imported goods that infringe the patent rights, or of means used in the implementation of the patented process; of produced or imported goods that infringe the patent rights. However a judge can order this kind of interim measure (Decree Law art.152(b)).

Because a party to the dispute may try to hide inconvenient evidence it is important for the success of the interim measures—especially in securing evidence—that they can be ordered without hearing the counter party (ex parte).[70] In the Turkish international arbitration system, there is no obstacle for the arbitral tribunal in granting interim measures ex parte. However, the arbitral tribunal should consider the right to be heard of the other party after the ex parte order.[71]

In the Turkish international arbitration system, interim measures ordered by the arbitral tribunal do not carry sanctions. Therefore, if the parties do not meet the order by consent, court assistance will be needed to enforce the arbitral tribunal's interim measure.[72]Article 6(3) of IAL provides:

> "If one of the parties does not fulfil the decision of conservatory measure and conservatory sequestration ordered by the arbitrator or the arbitral tribunal, the opposing party may seek the competent court's assistance for a decision on a conservatory measure or conservatory sequestration. If it is needed, the competent court may appoint another court for rogatory commission."

The court will decide the enforcement of the interim measures under Turkish law.[73] Arbitral tribunals can order more flexible interim measures. If the arbitral tribunal's order is not reached under Turkish law the judge may amend or annul the order of the arbitral tribunal in certain and necessary circumstances. The judges are not the agents for fulfilling the orders of the arbitral tribunal, but they should not be thought as a superior tribunal. Since the provision in IAL concerns court assistance, this does not mean that a new order should be given by the court but an executive power might be given to the order by the court.[74]

[68] Akinci, "Hakemlerin Ihtiyati Tedbir ve İhtiyati Haciz Karari Verme Yetkisi" ["Competence of Arbitrators about Ordering Precautionary Measures and Sequestration"] in *Prof. Dr Sükrü Postacioglu'na Armagan [Essays in Honor of Professor Dr Sükrü Postacioglu]* (1997), p.209, at pp.221–222.

[69] Akinci, *Milletlerarasi Tahkim [International Arbitration]*, 2007, p.102.

[70] James E. Castello, "Arbitral Ex Parte Interim Relief-The View in Favor" [2003] Disp. Resol. J. 60, 60.

[71] Pekcanitez, "Milletlerarasi Tahkimde Geçici Hukukî Koruma Önlemleri", Milletlerarasi Tahkim Semineri ["*Interim Measures in International Arbitration*"] (International Arbitration Seminar), 2003, p.129.

[72] Pekcanitez, "Milletlerarasi Tahkimde Geçici Hukukî Koruma Önlemleri", Milletlerarasi Tahkim Semineri ["Interim Measures in International Arbitration"] (International Arbitration Seminar), 2003, p.117.

[73] Pekcanitez, "Milletlerarasi Tahkimde Geçici Hukukî Koruma Önlemleri", Milletlerarasi Tahkim Semineri ["Interim Measures in International Arbitration"] (International Arbitration Seminar), 2003, pp.122, 135, 140.

[74] Pekcanitez, "Milletlerarasi Tahkimde Geçici Hukukî Koruma Önlemleri", Milletlerarasi Tahkim Semineri ["Interim Measures in International Arbitration"] (International Arbitration Seminar), 2003, p.138.

Procedural rules and proceedings

The procedural rules that apply in patent cases at national court level vary from country to country. In Turkey, the rules of written proceedings determined in the Civil Procedure Code shall be applied by competent courts. There are no other private rules for intellectual property disputes. Under the rules of written proceedings, after the exchange of bills and replication and duplication, expert examination and witness hearing is undertaken if necessary. The point that distinguishes competent courts from others is the presence of experienced and specialist judges on intellectual property. The experienced judge will take the evidences if needed, determine the dispute properly and decide if expert determination is needed.[75]

Unlike court litigation, party autonomy is very important in arbitration. Parties can decide the procedural rules that will apply to arbitration proceedings. Parties can choose institutional rules like International Chamber of Commerce Arbitration Rules or a national arbitration law such as IAL as well. If the parties have not designated the procedural law then the arbitral tribunal will determine this. Arbitration envisages the parties resolving the dispute and continuing their relationship after the arbitration process. However, one of the parties may intentionally lengthen the case in court litigation, thereby prejudicing business relationships.[76]

Owing to party autonomy, arbitration is more flexible than court litigation. For instance, parties can designate a time-limit for the arbitrators to make an award (IAL art.10(b)). Parties can also agree on examining the patented invention in greater detail. Parties have the right to choose the language used in arbitration proceedings (IAL art.10(c)). Determining the language of the proceedings is especially important in patent disputes; choosing a language which is the same one used in patent documents, affidavits and arbitrators' language is very advantageous.[77] Patent disputes are technical disputes and translation of all the technical documents and affidavits to the language of the arbitrators can be costly and time-consuming for the parties. In contrast court litigation will not designate a time-limit for the judges to award or the language that is going to be used in litigation.

Parties can be represented by attorneys in arbitration. They can also be represented by technical experts such as engineers, chemists or economists during oral statements and examination of witnesses. Usually parties are represented by an attorney and a technical expert.[78] For instance, a party can be represented by an attorney and the person who has invented the patented invention. This will help

[75] Arikan, "Fikri ve Sinai Haklar Hukuk Mahkemeleri", Amerika Birleşik Devletleri ve Türkiye'de Fikri ve Sinai Mülkiyet Haklarinin Etkin Korunmasi Semineri ["Intellectual and Industrial Rights Civil Courts"] (Effective Protection of Intellectual and Industrial Property Rights in United States of America and Turkey Seminar), 2004, pp.5–6.

[76] Konstantinos Petrakis, "The Role of Arbitration in the Field of Patent Law" (1997) 52 (Fall) Disp. Resol. J. 24, 28–30.

[77] Smit, "General Commentary on The WIPO Arbitration Rules" in *WIPO Arbitration and Rules: Commentary and Analysis*, 2000, p.16; Petrakis, "The Role of Arbitration in The Field of Patent Law" (1997) 52 (Fall) Disp. Resol. J. 24, 28.

[78] Alan Redfern, Martin Hunter, Nigel Blackaby and Constantine Partasides, *Law and Practice of International Commercial Arbitration*, 3rd edn (2004), p.317.

the party to defend itself more competently. However, in court litigation, parties may only be represented by attorneys who are Turkish citizens in accordance with the Turkish Attorneyship Law art.3.

When the dispute is very technical the arbitral tribunal can appoint experts (tribunal appointed experts). The parties can appoint experts (party appointed experts) as well.[79] Parties can have expert witnesses. It is rare in Anglo-Saxon law to have tribunal appointed experts. However, in continental law—more applicable in Turkey—experts are frequently appointed by arbitral tribunals.[80] In court litigation, experts can be appointed by judges or called by the parties. If the names of the experts have been designated by the parties, the judge would consider these names on his appointment. In court litigation there may be problems finding qualified experts or getting reports in on time from experts.[81]

Since arbitration is a private form of dispute resolution, it is not open to the public. Only the parties, their attorneys and the persons authorised by the parties can attend the arbitration hearings.[82] Confidentiality in arbitration is particularly important in patent disputes, because the technical details of patented invention need to be protected from third parties.[83] On the other hand, confidentiality may not be preferable in disputes concerning infringement. Here the patent owner would prefer publicity because of chilling effect on third parties.[84] In court litigation the publicity rule is effective so that the hearings are open to third parties. The court has discretion to decide to have hearings in confidence under the conditions stated in law. In accordance with this, if public morality and public security dictates the court may decide having some parts or all of the hearings in confidence (Civil Procedure Law art.149; Turkish Constitution art.141(1)).

It is not possible to say with certainty that arbitration is a more economic way of dispute resolution than court litigation. However, considering the progress in techniques and commercial understandings, in complex disputes arbitration may be preferred as an economic way of problem solving.[85] In the meantime, a shortage of experienced arbitrators in the patent area and the high amount of fees paid to these experienced arbitrators and to the arbitration institutions in institutional arbitration should be noted.[86]

The fee for the facility of court litigation is modest when compared to arbitration. However, given ambiguities in the length of the litigation, parties' costs may exceed their expectations.

[79] *Comparative International Commercial Arbitration*, 2003, p.575; Ergun Özsunay, "Uluslararasi Ticarî Tahkimde Delillerin Sunumu ve Değerlendirilmesi", Milletlerarasi Tahkim Semineri ["Presentation and Evaluation of Evidences in International Commercial Arbitration"] (International Arbitration Seminar, 2006), p.62, at p.90.

[80] Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration*, 2003, p.575.

[81] Arikan, "Fikri ve Sinai Haklar Hukuk Mahkemeleri", Amerika Birleşik Devletleri ve Türkiye'de Fikri ve Sinai Mülkiyet Haklarinin Etkin Korunmasi Semineri ["Intellectual and Industrial Rights Civil Courts"] (Effective Protection of Intellectual and Industrial Property Rights in United States of America and Turkey Seminar), 2004, p.7.

[82] Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration*, 2003, p.8.

[83] Smit, "General Commentary on The WIPO Arbitration Rules" in *WIPO Arbitration and Rules: Commentary and Analysis*, 2000, p.5.

[84] Dube Bharat, "The Experience of the Cartier-Group", Objective Arbitrability Antitrust Disputes: Intellectual Property Disputes Conference [1994] Swiss Arb. Ass'n Special Series 175, 176–177.

[85] Petrakis, "The Role of Arbitration in the Field of Patent Law" (1997) 52 (Fall) Disp. Resol. J. 24, 27.

[86] Smit, "General Commentary on The WIPO Arbitration Rules" in *WIPO Arbitration and Rules: Commentary and Analysis*, 2000, p.7.

Applicable substantive law

When a patent dispute comes before a Turkish court, the judge will determine the law that applicable to the substance of the dispute. The court shall decide if the patent is valid or invalid and if there is an infringement or not under this law.[87]

Intellectual property rights have their own characteristics. For this reason there are separate provisions in PILPL on intellectual property rights and contracts. The applicable law on intellectual property rights is regulated by art.23 and the law to be applied to contracts related to intellectual property rights is regulated by art.28 of PILPL. As a result of the territoriality principle, intellectual property rights are governed by the law of the country in which the protection of the intellectual property is sought (PILPL art.23(1), Swiss PIL art.110).[88] *Lex loci protectionis* is applied to all issues arising from intellectual property rights including patent rights. The validity and expiry of the patent right shall be determined by *lex loci protectionis*.[89] In case of claims arising out of infringement of intellectual property rights, after the act causing damage has occurred the parties can agree on the law of the forum (*lex fori*) applicable to the dispute (PILPL art.23(2), Swiss PIL art.110(2)). In contracts related to intellectual property rights concerning issues such as the responsibility of the parties arising from their commitments or the determination of the scope of the transfer of using intellectual property right (as the territoriality principle mandates) *lex loci protectionis* shall be applied. Disputes arising as to whether the intellectual property right can be transferred or not, can be transferred partially or not, as whether there is the capability to assume the intellectual property right and disposing transactions are all governed by *lex loci protectionis*. Nevertheless, only the issues related to contracts creating obligations, namely issues related to the form, validity, content, interpretation, breach or failure to fulfil the contract fall within contract status.[90]

Under PILPL art.28(1), contracts related to intellectual property rights shall be governed by the law which the parties have chosen. Implicit choice of law shall be accepted as well (PILPL art.24(1)). Therefore the law that applicable to contracts on patent licensing or the transfer of patent right is the law that the parties have chosen. If the parties have not chosen the applicable substantive law, the contractual relationship will be governed by the law of place of business at the time of the foundation of the contract; in default of this the place of the habitual residence of the party who has transferred the patent right or its use may apply. However, if there is a law to which the contract has a closer connection then the contract shall be governed by this law[91] (PILPL art.28(2)).

[87] B. Bahadir Erdem, *Patent Hakkinin Korunmasina ve Patent Hakkina Iliskin Sözlesmelere Uygulanacak Hukuk [Applicable Law to the Protection of Patent Right and Contracts Related to Patent Rights]*, 2nd edn (2002), p.83; Fawcett and Paul Torremans, *Intellectual Property and Private International Law*, 1998, p.455.

[88] Kamen Troller, "Specific Aspects of Intellectual Property Disputes in Arbitration — The Swiss Perspective", Objective Arbitrability Antitrust Disputes: Intellectual Property Disputes Conference [1994] Swiss Arb. Ass'n Special Series 155, 162; Erdem, *Fikri Hukukta Turk Mahkemelerinin Milletlerarasi Yetkisi [International Jurisdiction of Turkish Courts in Intellectual Law]*, 2003, p.91.

[89] Erdem, *Fikri Hukukta Turk Mahkemelerinin Milletlerarasi Yetkisi [International Jurisdiction of Turkish Courts in Intellectual Law]*, 2003, p.105; Nomer, Devletler Hususi Hukuku [Private International Law], 2008, p.300.

[90] Nomer, *Devletler Hususi Hukuku [Private International Law]*, 2008, p.334–335.

[91] Erdem, *Fikri Hukukta Turk Mahkemelerinin Milletlerarasi Yetkisi [International Jurisdiction of Turkish Courts in Intellectual Law]*, 2003, p.127; Fügen Sargin, *Milletlerarasi Unsurlu Patent ve Ticari Marka Lisansi Sözlesmelerine Uygulanacak Hukuk [Applicable Law to the Patent and Trademark Licence Contracts with International Element]* (2002), p.21; Nomer, *Devletler Hususi Hukuku [Private International Law]*, 2008, p.335.

There is no question that the judge in national court should determine the applicable substantive law under *lex fori*. However, there is no certainty of this in the arbitral tribunal.[92] The arbitral tribunal will first consider the contract between the parties. Contracts relating to international commercial transactions in particular are prepared in detail. For instance, a construction agreement or a patent licence agreement may run to hundreds of pages. The rights and obligations of the parties can be understood from the contract.[93] Under the principle of party autonomy in arbitration, parties can choose the law applicable to the substance of the dispute (IAL art.12). Parties can designate the choice of law in an arbitration clause or in a separate provision other than the arbitration clause. Usually choice of law takes the form of a separate clause.[94] Though it is not seen often[95] parties can choose the applicable substantive law later at the point at which the dispute occurs.[96] If the parties designate of the law of a state in an arbitration clause and it is unclear whether it is substantive law or procedural law, then it shall be accepted as substantive law[97] (IAL art.12(c)).

If the parties have not chosen the applicable substantive law, there is a school of writers that argues that the arbitral tribunal should apply the law of the state that has been referred to in the conflict rules concerning place of arbitration. On the other hand the modern trend in international contract law and arbitration law is to promote freedom of action in favour of arbitrators.[98]

The IAL art.12(c)(II) provides that if the parties have not chosen the law to be applied to the substance of the dispute, the arbitral tribunal shall apply the substantive rules of the State that has the closest connection with the dispute. Arbitrators or the arbitral tribunal can decide according to *ex aequo et bono* or as *amiable compositeur* only if the parties have authorised this (IAL art.12(c)(III)).

Remedies—appeal or set aside

A civil remedy is a legal right awarded to the parties to court litigation. In this way, the awards of the first instance courts can be re-examined and changed.[99] Parties can apply for civil remedies reviewing the court awards, and correcting the deficiencies and faults.[100]

Remedies against the intellectual property competent court awards are governed by the Civil Procedure Law. According to this law civil remedies are by appeal to the Supreme Court, for correction of the award and/or rehearing. The Civil

[92] Ziya Akinci, "Hakemlerin Esasa Uyguladiklari Hukukun Devlet Yargisinda Denetlenmesi" ["Court Intervention on Substantive Law Applied by the Arbitrators"] (1994) 17 Banka ve Ticaret Hukuku Dergisi [Bank and Commercial L. Rev.] 119.

[93] Redfern et al., *Law and Practice of International Commercial Arbitration*, 2004, p.93; Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration*, 2003, p.441.

[94] Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration*, 2003, p.93; Akinci, *Milletlerarasi Tahkim [International Arbitration]*, 2007, p.159.

[95] Sanli, *Milletlerarasi Ticari Tahkimde Esasa Uygulanacak Hukuk [Applicable Substantive Law in International Commercial Arbitration]*, 1986, p.228; Akinci, *Milletlerarasi Tahkim [International Arbitration]*, 2007, p.168.

[96] Redfern et al., *Law and Practice of International Commercial Arbitration*, 2004, p.96; Christopher S. Gibson, "Awards and Other Decisions" in *WIPO Arbitration and Rules: Commentary and Analysis*, 2000), p.181, at p.183.

[97] Akinci, *Milletlerarasi Tahkim [International Arbitration]*, 2007, p.169; see Dayinlarli, *Milletlerarasi Tahkim Kanunu [International Arbitration Law]*, 2002, p.41 for art.12(c) of IAL: "Any designation of the law of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules or rules of procedure."

[98] Redfern et al., *Law and Practice of International Commercial Arbitration*, 2004, p.124.

[99] Kuru, Arslan and Yilmaz, *Medeni Usul Hukuku [Civil Procedure Law]*, 2007, p.631.

[100] Pekcanitez, Atalay and Özekes, *Medeni Usul Hukuku [Civil Procedure Law]*, 2001, p.486.

Procedure Law was amended by Law 5236 in 2004 and the remedy of correction of an award was abolished. The second instance courts were founded by Law 5235 in 2004. The awards that had been appealed to the Supreme Court before the inauguration date of the second instance courts under the old version of the Civil Procedure Law continue to apply.[101] According to the new version of the Civil Procedure Law parties should exhaust second instance court jurisdiction first and thereafter appeal to the Supreme Court.

After the amendment of 2004, parties must apply to the second instance courts in patent cases against competent court awards. The establishment of a private branch for patent cases within the body of second instance courts has been suggested so that the procedure would be accelerated. It has been also suggested to allow appeals to the Supreme Court from the second instance court award only for the disputes relating to patent invalidity.[102] According to the Civil Procedure Law, parties are not allowed to renounce their right to apply for remedies before the final award has given.[103]

In the Turkish domestic arbitration system, parties opt for appeal to the first instance courts against the arbitral award (Civil Procedure Law art.533). An agreement among the parties on renunciation is invalid under Civil Procedure Law art.535. With the amendment to the Civil Procedure Law, second instance court review of first instance court awards arising out of the appeal of the arbitral award is not allowed (Civil Procedure Law new art.427). In other words parties can appeal against domestic arbitral award to the first instance court. If they are not happy with the first instance court they can apply to the Supreme Court—but not the second instance court.

Unlike the domestic arbitration system, in accordance with the modern idea of minimising the remedies against arbitral awards, appeal of international arbitral awards is not allowed. Only an action to set aside against an arbitral award can be brought (IAL art.15). In this manner, control of international arbitral awards substantively will not happen.[104] Parties can apply to the second instance court against the first instance court decision regarding the setting aside of awards. At this stage it is not the arbitral award appealing, it is the first instance court award on setting aside.[105]

The setting aside reasons are limited and set out in IAL art.15(II)[106] as follows:

> "1. The party who applies proves that: a) a party to the arbitration agreement is under incapacity or the arbitration agreement is not valid under the law to which the parties have subjected it or, failing such a choice of law, under the Turkish Law; b) the appointment of the arbitrator or the arbitral tribunal has not been in accordance with the procedure provided in this Law or specified in the agreement of the parties; c) the award is not rendered within the term of arbitration; d) the arbitrator or the arbitral tribunal has decided on its competence

[101] Kuru, Arslan and Yilmaz, *Medeni Usul Hukuku [Civil Procedure Law]*, 2007, p.631.

[102] Ayşe Saadet Arikan, "Türkiye'de Fikri Sinai Haklar Ihtisas Mahkemeleri" ["Intellectual Industrial Rights Competent Courts in Turkey"] at *http://www.abgm.adalet.gov.tr/asarikan.pdf* [Accessed March 18, 2009].

[103] Kuru, Arslan and Yilmaz, *Medeni Usul Hukuku [Civil Procedure Law]*, 2007, p.575.

[104] Turgut Kalpsüz, "Yeni Milletlerarasi Tahkim Kanununun Değerlendirilmesi", Milletlerarasi Tahkim Semineri" ["Evaluation of New International Arbitration Law"] (International Arbitration Seminar, 2001), p.110, at p.125.

[105] Ejder Yilmaz, *Istinaf [Appeal]*, 2nd edn (2005), p.84.

[106] Dayinlarli, *Milletlerarasi Tahkim Kanunu [International Arbitration Law]*, 2002, p.56.

or incompetence in contradiction with the law; e) the arbitrator or the arbitral tribunal has decided on a matter beyond the scope of the arbitration agreement or has not decided on all of the matters claimed or exceeded its competence; f) the arbitral proceedings has not been carried out in accordance with the agreement of the parties as to procedure or failing such agreement in this respect, in accordance with the provisions of this Law and this situation has effected the substance of award; g) the principle of the equality of parties has not been respected; or

2. by the Court, it has been determined that: a) the dispute that is subject of the award of the arbitrator or the arbitral tribunal is not arbitrable in accordance with Turkish Law; b) the award is in contradiction with the public policy."

These reasons are very similar to the conditions of enforcement of arbitral awards stated in 1958 New York Convention. However, two of them are very important for patent disputes. The judge shall per se consider the arbitrability of the dispute under Turkish law and whether the arbitral award is in conflict with the public policy. As mentioned above there is no doubt about arbitrability of patent infringement disputes.[107] But disputes related to patent invalidity are not arbitrable because of public policy considerations under Turkish law.[108] It has to be specified here that public policy should not be understood as it is in domestic issues; the perspective should be in accordance with the international arbitration practice.[109] For instance, if a foreign patent is said to be invalid in an infringement case, and Turkey is the place of arbitration because of geographical convenience, then the public policy intervention should be at the minimum level possible.[110]

In contrast to court litigation and domestic arbitration, renunciation of the right to file an action partially or completely for setting aside has been regulated by IAL (IAL art.15(V). In this way the arbitral award is not going to be examined by the court in the place of arbitration.[111] The parties able to renounce the rights to file an action for setting aside are those with their domiciles or the habitual residences outside of Turkey. The parties can renounce together; one-sided renunciation is not allowed.[112]

Enforcement of the awards

A court decision on a patent case may need to be enforced in a foreign country. The enforcement of foreign decisions which are final under the law of that country can be enforced in Turkey under PILPL provisions (PILPL art.50(1)).

[107] Arkan, *Marka Hukuku [Trademark Law]*, 1998, p.259; Akinci, *Milletlerarasi Tahkim [International Arbitration]*, 2007, p.207.

[108] Caliskan, *Uluslararasi Fikri Mulkiyet Hukukunda Uyusmazlik Cozum Mekanizmalari [Dispute Resolution Mechanisms in International Intellectual Property Law]*, 2008, p.37.

[109] Akinci, *Milletlerarasi Tahkim [International Arbitration]*, 2007, p.211.

[110] Caliskan, *Uluslararasi Fikri Mulkiyet Hukukunda Uyusmazlik Cozum Mekanizmalari [Dispute Resolution Mechanisms in International Intellectual Property Law]*, 2008, p.37; Akinci, *Milletlerarasi Tahkim [International Arbitration]*, 2007, p.211.

[111] Turgut Kalpsüz, "Isviçre Hukukunda Milletlerarasi Tahkim", Milletlerarasi Tahkim Konusunda Yasal Bir Düzenleme Gerekir mi Sempozyumu ["International Arbitration in Swiss Law", Is There a Need for a Legal Regulation in International Arbitration Symposium] (Banka ve Ticaret Hukuku Araştirma Enstitüsü Yayinlari [Bank and Commercial Law Research Institute Publication], 1999), p.46.

[112] Akinci, *Milletlerarasi Tahkim [International Arbitration]*, 2007, p.199.

Special provisions on recognition and enforcement of court awards on intellectual property cases do not exist. For this reason the provisions on recognition and enforcement of foreign court awards are valid for patent cases as well (PILPL arts 54, 58). Under art.54 of PILPL the first condition of enforcement of foreign court awards is reciprocity (by agreement, law provision or de facto) between Turkey and the foreign country. Turkey has made bilateral treaties with several countries on enforcement of court awards.[113]

Court decisions ordering a defendant to pay an amount of money to the plaintiff are the most easily enforceable. Decisions ordering compensation for using a patented invention without permission provide examples of these decisions. The foreign court decision may be related to an order permitting or restraining an act. For instance, the court may decide that the defendant should stop selling counterfeits of patented products without permission. Enforcement of such decisions may be more complicated than monetary decisions. The enforcement court could accept the foreign decision that the defendant should not to do an act and therefore restrain the acts in a manner permissible under its own law. Alternatively it may deny the enforcement request and take the risk of retaliation from that foreign court in the future.[114]

The second condition of enforcement of foreign court awards concerns the Turkish courts' exclusive jurisdiction and excess of authority (PILPL art.54(1)(b)). Even if the parties designate a foreign court, it is not allowed to enforce foreign decisions on a subject that falls within the Turkish courts' exclusive jurisdiction. For instance, since invalidity of Turkish patents is within the exclusive jurisdiction of Turkish courts, the judge will deny the enforcement request. The jurisdiction of the foreign court shall be determined under that country's law. However, these jurisdiction rules should not permit excess of authority. Otherwise, the request of enforcement of the foreign court shall be denied.[115] Since the parties can designate a court, in subject-matter with a foreign element not falling within the context of exclusive jurisdiction of Turkish courts such as infringement of patent rights or obligations arising from contracts (PILPL art.47), the foreign court decision can be enforced in Turkey.[116]

Thirdly foreign court decisions should not be contrary to public policy, that is, the protection of basic and indefensible social values, where the contradiction is explicit. At this point, the absolute independence of the judges; protection of rights of defence of the parties are taken into consideration.[117]

The fourth enforcement condition concerns defence rights (PILPL art.54(1)(ç)). The right of defence of the defendant is going to be accepted as violated, if the defendant in the enforcement case has not been given notice of the case or is not represented at the foreign court or where there is judgment by default.[118] These

[113] For the list of countries that Turkey has bilateral agreements on enforcement of foreign court decisions see Nomer, *Devletler Hususi Hukuku [Private International Law]*, 2008, p.473, fn.257.

[114] Yoav Oestreicher, "Recognition and Enforcement of Foreign Intellectual Property Judgments: Analysis and Guidelines for a New International Convention" (unpublished PhD dissertation, Duke University, 2004), p.83 (on file with author).

[115] Nomer, *Devletler Hususi Hukuku [Private International Law]*, 2008, p.477.

[116] Erdem, *Fikri Hukukta Turk Mahkemelerinin Milletlerarasi Yetkisi [International Jurisdiction of Turkish Courts in Intellectual Law]*, 2003, p.203.

[117] Aysel Celikel, *Milletlerarasi Özel Hukuk [Private International Law]*, 5th edn (1997), p.360; Nomer, *Devletler Hususi Hukuku [Private International Law]*, 2008, p.479.

[118] Nomer, *Devletler Hususi Hukuku [Private International Law]*, 2008, p.486.

conditions shall be examined in enforcement of foreign court decisions. Only the condition about reciprocity shall not be reviewed in recognition of foreign court decisions (PILPL art.54(1)(a)).

If it is compared to the court awards, the enforcement of foreign arbitration awards is easier. This is because of widespread participation in the New York Convention. Yet, there is not an international contract like New York Convention on enforcement of foreign court decisions.[119]

As Turkey has been a member of New York Convention since 1991, if an arbitration award is in the context of this Convention then the judge at the enforcement court should enforce the arbitral award under the rules of the Convention. The awards under this Convention shall be enforced under the PILPL rules. The New York Convention does not separate conditions of recognition and enforcement of foreign arbitral awards. The PILPL has the same conditions for recognition and enforcement of arbitral awards as well (PILPL art.63). However, almost all of the countries with which Turkish citizens have business relations are members of New York Convention, so that PILPL would rarely be applied.

The conditions for enforcement of foreign arbitral awards under PILPL are mainly taken from the New York Convention. However, there are slightly different provisions. The reciprocity condition is fulfilled when the country that has granted the arbitral award is the member of the Convention. PILPL does not contain a provision about reciprocity for foreign arbitral awards (PILPL m.60, 61) unlike the enforcement of foreign court decisions (PILPL art.54(1)(a)).

According to New York Convention if an enforcement barrier exists, the enforcement court can deny the enforcement request. However, the court has the competence to admit the case although there is disqualification of the award. This happens especially where the arbitral awards have been set asided in the place of arbitration. If the enforcement court is of the opinion of that the foreign arbitral award is valid then the court can admit the request of enforcement under New York Convention. The related provision in New York is as follows: "recognition and enforcement of the award *may* be refused". While the court has power of discretion under New York Convention, it does not have it under PILPL. Because the provision in PILPL art.62(1) is strict, as follows: "the court *shall* refuse the enforcement request".[120]

Under New York Convention, the arbitral award should be arbitrable under the law of the place of the enforcement court (New York Convention art.V(2)(a)). The arbitral award should not be contrary to the public policy at the place of the enforcement court (New York Convention art.V(2)(b)). If the enforcement court is in Turkey then the arbitral award should be arbitrable under Turkish law and should not be contrary to public policy in Turkey.

Conclusion

The increase in patent disputes requires effective resolution methods. Parties can choose litigation, arbitration or alternative dispute resolution methods. In this article litigation and arbitration processes have been compared under Turkish law.

[119] Oestreicher, "Recognition and Enforcement of Foreign Intellectual Property Judgments: Analysis and Guidelines for a New International Convention", 2004, p.231 (on file with author).
[120] See Akinci, *Milletlerarasi Tahkim [International Arbitration]*, 2007, p.302 for details.

When it comes to arbitration, the arbitrability of patent disputes is problematic. Generally disputes arising from contract and infringement issues are accepted arbitrable. However, there is no consensus on arbitrability of patent disputes in national laws. Even in countries which do not have an explicit provision that prevents arbitrability, it may take time to accept arbitration as an alternative to the national courts. Furthermore, there are issues about the invalidity of patents on account of public policy considerations and questions concerning third-party interests in arbitration. There is a consensus in the Turkish doctrine that disputes related to patent invalidity are non-arbitrable. Disputes related to patent invalidity lie within the exclusive jurisdiction of courts. However, disputes other than validity issues are arbitrable. There is no explicit provision concerning the arbitrability of patent disputes in Turkish arbitration law. It is recommended that a provision on the arbitrability of patent disputes should be included in the new Patent and Utility Model Law which is currently at draft stage.

The resolution of patent disputes by litigation and arbitration can be compared from different perspectives. When the parties apply to courts in an international patent dispute there may be uncertainties about which national court have jurisdiction. Parties who have domiciles in different places may be hesitant about the neutrality of the national courts. In this regard arbitration presents a neutral platform because parties can choose the place of arbitration.

Although it is not possible for the parties to choose the judge in litigation, parties can choose an arbitrator whom they trust on account of his/her technical knowledge. In this way the process would be accelerated, the need for technical experts would be minimised and the expenses would decrease accordingly. If the dispute is related to a medicine patent this may be a chemist; if it is related to a machine then a mechanical engineer may be chosen as an arbitrator. Since these arbitrators understand the technical language of the dispute, the parties would save the translation expenses of the countless pages of explanations about the patented invention and avoid wasted time. Parties can appoint jurists together with the technical arbitrators. On the other hand, parties may not need to apply to arbitration in countries that have experienced judges in competent courts. However, if these specialised courts are not widely available in that country they may not fill the demand.

Litigation and arbitration can be compared in view of interim measures. The national laws have different provisions on interim measures. Under Turkish domestic arbitration rules arbitrators cannot order interim measures. However, under international arbitration rules arbitrators have the authority to order precautionary measures and sequestration unless otherwise agreed (IAL art.6). Arbitrators can order more flexible interim measures suited to the features of the present case. But, in the event that the arbitrator's interim measure orders are not met, the need of court intervention occurs. In this situation the court would amend or annul the arbitrator's order and adjust it to the *lex fori*. Apart from this, when an immediate interim measure is required and the members of the arbitral tribunal have not been appointed yet, it may be preferable to seek interim measures from the national court.

The law of procedure that is going to be applied in patent cases changes from country to country. In Turkey patent cases are executed under the rules of the Code of Civil Procedure. Parties do not have the opportunity to choose the procedural rules, the language of the litigation or the time-limit. Litigation may take long time because of the workload. For this reason, complex, costly and time-consuming cases like patent cases may be resolved over a long period. In contrast with this, parties can choose the procedural rules, time limit and the language in arbitration.

The publicity principle in court litigation does not exist in arbitration. It may be an advantage for protection of commercial secrets. But it is not possible to say the same for infringement cases because of a lack of any chilling effect on third parties.

Arbitration may be more economical than court litigation. However, this is not obvious for all disputes, because, it is well known that the institutional arbitration costs a significant sum and arbitrator fees are high.

The applicable substantive law would be *lex loci protectionis* on the issues related to the existence of the patent right in court litigation (PILPL art.23(1)). However, there is not certainty in arbitration like this. Parties can choose the applicable substantive law. If the parties have not chosen the applicable substantive law then the arbitral tribunal would apply the law under their discretion.

A comparison can be made on another point namely remedies against the award. Parties can apply to second instance courts against the first instance courts' (competent court) awards. Parties can apply to the Appeal Court against second instance court awards. However, it is not possible to appeal the arbitral awards. Arbitral awards can only be set aside. Parties can apply against the first instance court's set aside award to the second instance court. And it is possible to appeal the second instance court award.

Since there is an international convention like the New York Convention, enforcement mechanism of arbitral awards is easier than court awards. On the other hand national laws have different provisions on the arbitrability of patent disputes. There is a possibility for the arbitral awards in patent cases not to be enforced especially on the ground of non-arbitrability and public policy.

As a result, expeditious technological developments cause many patent disputes. In parallel to this patent owners and business environment need effective dispute resolution methods. At this point arbitration comes up as a practical dispute resolution method. Unfortunately, however, it is not completely unproblematic.