摘要

隨著知識經濟的發展，專利成為企業的重要資產，專利訴訟更成為企業經營管理必修顯學。專利之高度技術內容及其商業化本質，使得專利訴訟成為技巧最複雜、成本最高昂、耗費時間也最冗長的救濟程序，終而引發各界對於專利訴訟制度之反思，開始強調應循公平、合理、迅速、經濟、專業之糾紛解決程序來排解專利糾紛。美國於 1982 年制訂專利法第 294 條開放專利有效性及專利侵權爭議得由當事人自願提付仲裁，聯合國國際貿易委員會於 1985 年制訂國際商務仲裁模範法（UNCITRAL Model Law on International Commercial Arbitration），作為各會員國仲裁法制之參考藍本，世界智慧財產權組織（World Intellectual Property Organization，WIPO）亦於 1994 年成立「仲裁與調解中心」為智慧財產案件提供專業性及跨國性之糾紛解決服務。上開仲裁立法及機構設置均顯示專利仲裁制度之發展與成長。

專利是一種權利保護期間短暫、權利範圍不明確、保護客體高度技術化，且集結科技、法律、管理三大專業於一身之權利，其糾紛解決對於迅速性、專業性、經濟性、秘密性、靈活性、和諧性、跨國性及風險控制性之需求，正係仲裁程序所能提供之優點。惟專利權與仲裁程序仍有本質上之互斥，包括：專利權之獨佔性及其背後蘊含之龐大商機，吸引專利權人寧願循訴訟途徑奮戰到底；專利糾紛當事人之實力差距，使得雙方難以達成仲裁協議；專利糾紛對於調查證據之強烈需求，與仲裁程序強調之迅速、經濟致生衝突；專利判決的不確定性，以致專利案件約有 50%的上訴成功率，此亦促使當事人欲循訴訟程序爭取由上訴審法官重新審視案件，而不願意循仲裁程序「一戰定江山」。

經本文就我國企業專利糾紛循仲裁程序解決進行分析，發現有下列幾點之限制：一、我國企業客觀實力不足，主觀心態復趨於保守，導致企業之糾紛程序選擇權受到一定的限制。二、仲裁程序以當事人合意為前提，雙方就現在之爭議欲達成仲裁協議，本即有一定之難度。三、我國仲裁法未開放專利有效性糾紛之仲

裁容許性，權利有效性問題仍待行政法院認定，致生程序切割及審理時程延宕之不利益。四、我國仲裁制度因仲裁人之公正、獨立性有待加強、證據法則規範不夠完整且未能落實，導致程序正義不彰，當事人對仲裁制度信賴感普遍不足。五、我國仲裁法未明文賦予仲裁人核准保全程序之權限，當事人仍須向法院聲請假扣押、假處分裁定，不但緩不濟急，法官對於應否進行保全程序及核准為何種保全措施，其掌握度亦不如仲裁人。六、我國非紐約公約簽約國，以致於我國仲裁判斷面臨難以於外國獲得承認及執行之困境。上述幾點，都是我國企業專利糾紛欲循仲裁程序解決所面臨之限制因素。

有鑑於專利仲裁於我國企業之主要活躍領域，即美國與中國，已逐步成熟發展，本文謹建議我國企業面臨專利糾紛程序選擇時，應考量糾紛之目的及類型，以決定是否適用仲裁程序。若適用之，則需作好仲裁策略規劃，對於仲裁協議、仲裁地、仲裁機構、仲裁人、仲裁程序均應為適當之安排，以爭取最有利之仲裁判斷。

本文最末則自短程及長程觀點，對我國專利仲裁之發展提出建議。短程而言，我國企業就單純的法律解釋爭議、訟爭性不高或彼此間存有持續性合作關係之專利契約，宜約定仲裁條款；就專利侵權糾紛則得透過互相退讓之方式，約定就專利有效性爭議不為爭執，或同意被告之損害賠償上限，以換取適用仲裁之空間。長程而言，於仲裁立法面，我國應於仲裁法或專利法明文開放專利糾紛之仲裁容許性、增訂仲裁程序之調查證據規範、明文立法賦予仲裁庭核准保全程序之權限；於仲裁制度面，應提升仲裁人之公正性、獨立性及自律性、加強仲裁人之專業及制訂專業之專利仲裁規則；於企業策略面，建議企業應依專利糾紛之目的及類型為適當之程序選擇，如適用仲裁程序，則應妥善配置仲裁要素，規劃出最有利之仲裁程序。

關鍵詞：專利糾紛、專利訴訟、專利仲裁、專利有效性、仲裁容許性、程序選擇、ADR

Abstract

As the knowledge-based economy rapidly grows today, patent rights has become one of the most valuable assets of corporation. Patent litigation becomes the most important commercial method to generate massive revenue in nowadays. Patents usually involve complicated technology and commercial elements and patent litigation procedure is usually complicated, time consuming and mostly very expensive. Hence, new solutions, which are more fair, reasonable, rapid, economic and professional, are proposed to replace litigations. In the U.S., the Congress approved 35 U.S.C. 294 in 1982 to regulate rules allowing dispute parties may voluntary initiate binding arbitration procedure in regard with patent validity and infringement issues. The UNCITRAL Model Law on International Commercial Arbitration enacted in 1985 offered as prototype of arbitration legislation for UN members. In 1994, the WIPO Arbitration and Mediation Center was established to offer professional and cross-broader Alternative Dispute Resolution (ADR) options for the resolution of intellectual property disputes between private parties. All these reforms show the development and growth of patent arbitration.

Patent are characterized with limitations on period of protection, scope of claim and advanced technology. It involves with the knowledge of law, technology and commerce. Thus it will be required to deal with patent dispute with efficiency, profession, confidentiality, economic, flexibility, multi-nation and risk control when one decides which dispute resolution method to adopt, and arbitration is exactly the ADR method that satisfies all the requirements.

Nevertheless, the exclusivity and the great commercial interests inherent behind patent litigation attract patentees to enforce their patent rights through courts regime. The difference in financial strength and interest leads to a difficulty for different parties to achieve an agreement. Extensive discovery procedure is almost compulsory in patent infringement litigation so that information between parties can be fully disclosed

through the process. On the other hand, information disclosure is limited in arbitration proceedings. Also the parties may appeal a patent case in court, and it has an approximately 50% win rate in such attempt. All these factors decrease the parties' intention to settle their case by arbitration.

Through the case study and analysis of the Taiwan companies on patent litigation and arbitration history, it is not difficult to discover the deficiency of Taiwan's current arbitration regime. The shortage in resource and unwillingness to take arbitral procedure restricts Taiwan companies to exercise they right to select dispute resolution procedure. Mutual consensus is the key priority for arbitration, but this could be extremely difficult to achieve on given patent dispute. Patent validity cannot be determined through the arbitration under current Taiwan Arbitration Law and needs to be determined by court, which prolongs the arbitral proceedings. Moreover, the professional ability of Taiwan's arbitration remains in doubt, in terms of lack of fairness, independence and evidence rules, led the untrustworthiness of our arbitration regime. The arbitral tribunal has no authority to order interim measures, such as provisional seizure and preliminary injunction and Taiwan is not a signature party of New York Convention are also the factors that weaken the value of arbitration procedure in Taiwan.

In comparison with the system in Taiwan, China and the U.S. patent arbitration are more systematized and are still increasing in numbers in both China and the United States. This thesis shall point out the factors for parties to consider adopting arbitration as patent dispute resolution, and assist parties to plan arbitration strategies.

Lastly, this thesis will give suggestions on Taiwan's patent arbitration regime development in both short and long terms. In short term, the public should be more aware the benefits by adopting arbitration clause in contract, when argument and disagreement might exist merely on obvious legal definition or less argument presented or when collaboration still exist between parties. This will encourage parties to agree to

solve their dispute through arbitration in advance. In long term, legislators should regulate more detailed rules on arbitration procedure, evidence rules, and judicial support. Arbitration institutions should increase the training, improve the quality of arbitrators and develop more conscientious procedure rules. Corporation should have the concepts to learn and understand more about arbitration, and takes arbitration into consideration as commerce strategy in advance.

Key words: patent dispute, patent litigation, patent arbitration, patent validity, arbitrability, right to select dispute resolution procedure, ADR