

Contribution to the PMAC Consultation on Draft FRAND Guidelines

Legal obligations and the design of consensual proceedings

Matthieu Dhenne, PhD

Avocat, UPC Representative, Adjunct Professor and arbitrator

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This contribution is offered in my personal capacity. It does not express the position of any institution, professional organisation or client.

EXECUTIVE SUMMARY

The PMAC Discussion Paper provides a persuasive basis for specialist FRAND dispute resolution. Its strongest choices are the separation of mediation, arbitration and expert determination, the attention paid to early scoping, and the refusal to prescribe a single valuation methodology. Since this first consultation concerns only an outline, the priority should be to improve its organising principles and the practical instruments through which they will operate.¹

My central recommendation is to make explicit the relationship between the underlying FRAND obligation and the chosen procedure. A party's entitlement to a licence, an agreement to arbitrate and the authority to bind a corporate group or a patent pool are distinct legal questions. A procedure can serve the undertaking effectively only if those questions are identified before they become obstacles to settlement or enforcement.

Three connected additions would materially strengthen the outline. The first is an optional schedule identifying the relevant undertaking, the applicable laws, the participating persons and the intended effects of the result. The second is an explanation of how information and decisions may pass between mediation, expert determination, arbitration and litigation without converting protected negotiations into evidence of unwillingness. The third concerns published outcomes, which should disclose enough of their legal and methodological premises to permit comparison while preserving the confidentiality protections and publication opt-outs of the Rules.

These additions would support flexible case management. Arbitral consent and the legal consequences of rejecting a licensing package are different questions, and *Acer v Nokia* shows that refusal can have serious consequences in a particular legal setting. Interim protection must distinguish payment from security. A worldwide mandate must satisfy both the institutional scope of the Centre and the applicable limits on adjudication. The clauses and annexes proposed below are offered as guidance and do not describe obligations already imposed by the Rules.

¹ PMAC, Draft FRAND Guidelines Discussion Paper, introduction and §§ 1.1 and 2.3. Consultation announcement, 25 September 2026. The first consultation concerns the outline and its deadline is 26 October 2026. The PMAC Rules cited below are the versions adopted on 24 April 2026. Sources were checked for this revision on 13 October 2026.

1. SCOPE AND METHOD

This contribution is normative and addresses an outline consultation. It does not purport to give an exhaustive account of global FRAND law or an empirical evaluation of ADR. It analyses the PMAC instruments, the relevant treaty and statutory provisions, the SSO instruments and selected judicial decisions as available on 13 October 2026. The comparisons serve to test particular procedural problems and do not rank national systems. Reported holdings are distinguished from analogies and proposals. No claim of lower costs, faster resolution or representative royalty levels is made without data.

2. GENERAL OBSERVATIONS

2.1 The undertaking as starting point

This contribution advances a contractual and procedural thesis: the normative framework of standardisation, the undertaking given within that framework and the licence through which performance is achieved must be kept distinct. A FRAND commitment cannot be reduced to a royalty figure, but its contractual character does not answer every question of valuation, jurisdiction or remedies. The practical test is whether a proposed procedure can produce performance of an identified obligation by persons legally bound to perform it.

Under the ETSI framework, the policy and the licensing declaration are governed by French law. The *stipulation pour autrui* gives the intended beneficiary a direct right against the promisor, although the content, the beneficiaries and the temporal scope of the particular promise still call for analysis. Implementation does not itself conclude a licence, and the ETSI model must not be projected onto every standard-setting organisation. *Tesla* confirms the importance of distinguishing the policy, the declaration and the resulting licensing obligation, while illustrating that licensing claims may concern a platform containing the rights of several proprietors.²

Competition law retains an independent role. *Huawei v ZTE* concerns exclusionary remedies sought by a dominant SEP holder under Article 102 TFEU. It does not decide the entire private-law content of FRAND, nor does it establish that every SEP confers dominance. Conversely, contractual analysis cannot displace mandatory competition rules. *Eco Swiss* shows, in relation to what is now Article 101 TFEU, that arbitral autonomy is constrained by public-policy review, and the judgment also recognises limits arising from procedural finality. The guidelines should identify the relevant constraints without promising a uniform worldwide injunction or enforcement regime.³

² ETSI Directives, version 52, 5 December 2025, Annex 6 (IPR Policy), cls 3.1–3.2, 6.1, 6.1bis and 12, and Appendix A (licensing declaration). French Civil Code, art 1205 and art 1206 (subject to temporal applicability). See also *Tesla v InterDigital* [2026] UKSC 27, 27 July 2026, [15]–[22]. The scope and binding effect of an actual declaration must be established in the particular case.

³ CJEU, *Huawei Technologies v ZTE*, C-170/13, 16 July 2015, ECLI:EU:C:2015:477, [42]–[44] and [53]–[69]. The referring court did not ask the CJEU to determine dominance. On competition law and arbitral review, see CJEU, *Eco Swiss v Benetton*, C-126/97, 1 June 1999, ECLI:EU:C:1999:269, [35]–[40] and [46]–[48], which concerns what is now Article 101 TFEU and is not a FRAND-specific ruling under Article 102.

2.2 Institutional functions before borrowed techniques

Tokyo, Munich and the PMAC address overlapping commercial disputes through different sources of authority. Tokyo's January 2026 arrangements distinguish the settlement-oriented management of SEP infringement litigation from a separate SEP judicial mediation procedure. The litigation guidance envisages early settlement discussions and, having regard to the parties' wishes, possible judicial suggestions concerning global royalties. The judicial mediation guidance generally contemplates three sessions, with an additional technical session where appropriate. Neither instrument establishes a general adjudicative power to impose a worldwide licence merely because settlement has failed.⁴

The judgment of the Munich I Regional Court of 5 February 2026 in case 7 O 7655/25 illustrates a different institutional function, the assessment of the FRAND defence in infringement proceedings. Its treatment of negotiation conduct, interim payment and comparable licences is a judicial application within a specific dispute. It is neither legislation nor the position of every German or UPC court. Predictability is valuable, but converting the expectations of one chamber into universal conditions of admission to consensual ADR would require a justification that the judgment alone cannot provide.⁵

The opportunity for the PMAC is to borrow the early identification of issues and an intelligible timetable while making the basis for each procedural choice visible. Its authority in arbitration depends on consent and applicable law, and its mediator cannot impose a settlement. It should therefore avoid importing judicial inferences about conduct, disclosure or valuation as universal conditions of access to consensual resolution. European coherence would be advanced by reasoned explanations that other institutions can examine, rather than by giving one litigation culture a new institutional label.⁶

3. SPECIFIC COMMENTS

3.1 The obligation and the mandate

Sections 1.2 to 1.5, 2.1 to 2.2 and Annexes 1 and 2

Consent is necessary but does not alone define the institutional scope of the Centre. Articles 1 and 2 of the Arbitration Rules cover specified European patent and supplementary-protection disputes, together with Related Disputes having the requisite factual, legal or commercial nexus. A worldwide portfolio does not dispense with that nexus, while pending UPC litigation is not invariably required. The schedule should therefore identify the connecting dispute as well as the agreement to arbitrate.⁷

⁴ Tokyo District Court, SEP infringement litigation guidance, January 2026, §§ 1–3. SEP judicial mediation guidance, January 2026, §§ 1–3. The descriptions are paraphrases of the Japanese originals and do not quote an official English translation.

⁵ Munich I Regional Court, 5 February 2026, 7 O 7655/25, GRUR-RS 2026, 2292, especially [117]–[120] and [127]–[139]. References are to the German judgment published by the Bavarian justice administration. The reasoning is attributed to that chamber and dispute, without assuming finality or uniform German practice.

⁶ PMAC Mediation Rules, art 16(3). Arbitration Rules, arts 1–2, 17 and 49. The institutional FRAND guidelines are expressly non-binding.

⁷ Arbitration Rules, art 1 (definition of "Related Disputes") and art 2(1). Related Disputes require a factual, legal or commercial nexus with an actual or contemplated dispute involving a European patent, a unitary patent or a supplementary protection certificate for which the UPC is wholly or partly competent.

Section 1.3 recognises the law governing the SSO declaration. Yet the law governing the undertaking, the prospective licence, the arbitration agreement and the procedure need not coincide, and patent status and mandatory remedies raise further issues. There is also a textual tension within Article 19 of the Arbitration Rules. Paragraph 1 refers, absent agreement, to the law deemed most appropriate after hearing the parties, whereas paragraph 3 refers to the law selected through the applicable conflict rules. The guidelines should illustrate how a tribunal might reconcile those formulations in a reasoned decision after submissions. They should neither silently replace either provision nor present an unsettled interpretation as the only possible one. The arbitral seat under Article 15 is distinct from the hearing venue. Article 14 of the Expert Determination Rules has its own formulation.⁸

I propose a short, optional schedule of applicable obligations and intended effects, completed at the initial case management conference and revised as necessary. It should record the relevant SSO policy and declaration, their dates and the legal basis asserted by each party, the persons owing and claiming performance, the portfolio, products, territory and period in dispute, the laws chosen or disputed, including the seat and the applicable procedural law, and the questions entrusted to each neutral. It should also identify the contemplated result, whether a settlement, a determination of specified terms, an obligation to execute a licence or an award granting particular relief. Disagreement should be recorded rather than treated as a failure to qualify for the procedure.

A beneficiary's substantive right is not itself consent to arbitration. A mandate to negotiate for a group or a pool does not necessarily authorise a representative to submit each principal to an award. The Rules separately regulate jurisdiction, representative authority, joinder and consolidation. *Tesla* must be read with procedural care. At the stage of assessing whether the declaratory claims could proceed, the Supreme Court accepted that they were arguable and addressed utility and fairness without requiring all licensors to be joined. *Avanci* was not itself a FRAND promisor. The decision neither establishes arbitral consent for absent licensors nor requires universal joinder whenever a platform is involved. The relevant distinction is between commercial repercussions for others and a binding disposition of their rights.⁹

Suggested addition to section 1.5:

At an early stage, the parties should be invited to identify the undertaking or other legal basis relied upon, the persons entitled or subject to it, and the scope and intended effects of the chosen procedure. The record should distinguish agreement from issues reserved for determination. Participation in one form of ADR does not, without the requisite consent, constitute submission to another or confer authority over persons who are not bound by it.

The same annex should ask whether a pool administrator acts in its own name or for identified principals, and what authority it holds to settle or arbitrate. For supply-chain disputes, the parties should identify overlapping licences, exhaustion arguments, indemnities and the risk of double

⁸ Arbitration Rules, arts 15, 19–21 and 48. Expert Determination Rules, art 14. Article 19(1) refers to the law deemed most appropriate after hearing the parties, whereas art 19(3) refers, absent designation, to the law determined through the conflict rules considered applicable.

⁹ Arbitration Rules, arts 21–22, 32(4) and 33(2). *Tesla*, [64]–[65] and [131]–[143], especially [132] and [142]. The Supreme Court addresses the viability of declaratory claims at an interlocutory stage. *Avanci* is not itself a FRAND promisor, and the judgment does not supply an arbitration agreement on behalf of its licensors.

recovery, without prejudging the level at which a licence must be taken. These questions often determine whether a proposed global solution can actually be performed.

3.2 Cooperation and a credible route to performance

Sections 1.4 to 1.5, 2.1, 2.5, 2.9 and 3.1 to 3.4

The guidelines should help participants assess an ADR proposal without conferring immunity from the consequences of their conduct. *Huawei* allows determination by an independent third party by common agreement. In *Acer v Nokia*, the Court of Appeal assessed a package combining an immediate, adjustable global interim licence with ICC arbitration of the final terms. It held that package to be RAND. Refusal meant that the claimants were not willing licensees for the claims at issue, which were stayed, and the interim declarations were discharged. Those conclusions are essential to the case. The court nevertheless reserved the sufficiency of a bare arbitration offer, the treatment of substantiated objections to procedural terms, and the converse situation of an implementer proposing arbitration. Consent remains necessary to confer arbitral jurisdiction, but it does not entail a substantive entitlement to reject a particular licensing package without consequences.¹⁰

An optional checklist should therefore examine whether the offer identifies a competent institution or a workable appointment mechanism, a defined scope, an achievable timetable, access to the necessary evidence, the binding character of the result and arrangements for ongoing use. It should invite a reasoned response and, where appropriate, a workable alternative. A proposal that excludes the decisive issue, or makes participation practically unaffordable, may offer little route to performance. Equally, repeated changes to the proposed process may become a means of postponing it. These are matters for contextual assessment under the applicable law, and the guidelines should not turn them into presumptions.

Suggested language:

The Guidelines do not themselves create a presumption of FRAND compliance or unwillingness from an offer, acceptance or refusal of ADR. The legal significance of that conduct remains governed by applicable law and a competent court's assessment, including assessment of a concrete licensing package. A party responding to an ADR proposal should identify any material objection and, where practicable, a workable alternative. These Guidelines neither supply missing arbitral consent nor insulate a refusal from legal consequences.

Payments under an interim licence, security for potential liabilities and an undertaking not to seek an injunction perform different functions. In *FRAND-Einwand III*, the BGH required timely security after rejection of the counter-offer, without waiting for a judicial finding that the holder's offer was FRAND. It distinguished that security from direct payment while the conclusion and terms of the licence remained open, and it left unresolved whether security had to match the holder's last offer in the

¹⁰ *Huawei*, [68]. *Acer v Nokia* [2026] EWCA Civ 564, 12 May 2026, [74]–[85] and [87]–[93]. The court held the package to be RAND, rejected the asserted prospect of obtaining the relevant declarations, stayed the claims and discharged the interim declarations. The reservations concerning a bare arbitration offer ([74]), substantiated objections to terms ([80]) and the converse implementer offer ([87]) must be read with that outcome.

circumstances discussed. The judgment supports neither a universal duty to pay the latest demand nor the postponement of all security until final adjudication.¹¹

The contrary pressure should be made explicit. The Munich judgment of 5 February 2026 distinguishes the BGH discussion and considers payment of an undisputed minimum appropriate where the licence parameters are sufficiently settled. Whether that distinction is persuasive is a substantive question for the relevant forum. A PMAC checklist should record the asserted basis for payment or security and the dispute about it, rather than present either judicial formulation as a universal rule.¹²

The annex could instead offer options for interim payment with adjustment, escrow or a guarantee, coupled with accounting, a defined duration and review triggers. The parties should address refunds, interest, credit against a final award and the treatment of non-monetary obligations. An interim licence requires an adequate legal basis and, where contractual, agreement. Arbitral interim measures remain subject to Article 24, including the applicable conditions, proportionality and the opportunity to be heard. A unilateral request for mediation does not itself suspend an injunction or any court timetable.¹³

3.3 Information across procedural transitions

Sections 1.6, 2.3, 3.3 to 3.6 and 4.6

The outline presents a useful menu of procedures but needs a more explicit account of their transitions. A failed mediation may leave useful technical work, protected concessions and a proposed settlement in the same file. Treating that file as a single evidential object creates both unfairness and avoidable duplication.

Tokyo makes the transition problem visible. Its SEP judicial mediation guidance contemplates the later use of technical materials and, in specified circumstances following failure, a record of the proposal, the committee opinion and the party response in proceedings concerning abuse of rights. The PMAC adopts a different design. Article 25 of the Mediation Rules protects mediation-specific documents, admissions, proposals and willingness to accept settlement, subject to its stated exceptions. Under paragraph 1, an agreed exception to confidentiality requires the written agreement of the parties and the mediator, whereas paragraph 2 uses a different formulation for evidentiary use. Consent to disclose and admissibility in a later forum are not interchangeable. The Tokyo approach should not be transplanted by implication.¹⁴

I recommend an optional transition protocol agreed before sensitive exchanges begin. It should identify a common evidential record that may lawfully be reused, distinguish material protected by the

¹¹ BGH, 27 January 2026, KZR 10/25, *FRAND-Einwand III*, ECLI:DE:BGH:2026:270126UKZR10.25.0, [85]–[92], especially [89] and [91]–[92]. *Huawei*, [67]. The official German judgment is hosted by the CJEU.

¹² Munich I Regional Court, 5 February 2026, 7 O 7655/25, [117]–[120]. The chamber treats BGH [89] as obiter and distinguishes a case in which it considers the licence parameters sufficiently settled. This is a position taken in a particular judgment and does not resolve every interim-payment question.

¹³ Arbitration Rules, arts 24 and 50. Mediation Rules, arts 23–24. Article 24(3) specifies the requirements for arbitral interim measures, and art 24(4)–(6) regulates exceptional applications without notice and the subsequent opportunity to be heard. The proposed options do not establish a power to order each arrangement in every case.

¹⁴ Tokyo SEP judicial mediation guidance, § 3(1) and (3)–(4). Mediation Rules, art 25(1)–(5). Article 25(1) and art 25(2) contain different exceptions and consent requirements. The existence of a document before mediation does not in itself settle every question of onward use.

Mediation Rules and specify the status of any jointly commissioned technical or economic work. A pre-existing document should not be treated as newly privileged simply because it was used in mediation. Equally, its prior existence does not dispense with contractual confidentiality, privilege or a court order restricting onward use. The source of each transfer, and the authority for it, matter.

Suggested language:

Before combining or sequencing procedures, the parties should identify the information and any determinations that may be used in the later procedure, the lawful basis for that use, and any restrictions affecting third-party material. No transition should be understood as waiving protections under the applicable Rules. A record confirming procedural progress or termination should not disclose protected offers, admissions or a party's position on settlement without the authorisation required by those Rules and applicable law.

The protocol should not invite a mediator to certify which party was "reasonable". A jointly approved factual record may state what procedure was agreed, which issues remain and whether the procedure has terminated, provided disclosure is permitted. It should not become a route around Article 25(2). In particular, its creation cannot retrospectively transform a confidential refusal of a settlement proposal into admissible evidence of unwillingness.

Article 19 of the Mediation Rules also requires accurate explanation. In one permitted model, the future arbitrator attends joint meetings as co-mediator but receives no caucus information. In the other, a separate arbitrator has no involvement in the mediation. The first model may expose the future decision-maker to joint settlement discussions. The parties should understand that exposure and specify the later evidential record and the opportunity to respond, since a procedural label cannot cure every due-process objection. Article 19(6) permits the parties to reserve in writing a right to withdraw consent. It does not give every participant an unconditional default right to withdraw.¹⁵

3.4 The legal and evidential premises of valuation

Sections 2.2 to 2.3, 4.4 and Annex 2

The methodological neutrality of the outline should be preserved. Comparable licences, top-down analysis and technical sampling answer different questions and depend on different assumptions. The relevant legal obligation must explain what is being valued and why a particular comparator or adjustment is probative. A monetary result alone cannot demonstrate compliance with the undertaking.

The reasoning should connect the method to the licensing perimeter. For comparables, it should explain selection, material exclusions and adjustments for territory, period, portfolio, products, cross-licences, releases and settlement context. A comparable is evidence and does not automatically confer a legal entitlement to identical terms. In *Unwired Planet*, the Supreme Court rejected the hard-edged non-discrimination obligation advanced under the ETSI framework, so that a lower rate granted

¹⁵ Mediation Rules, arts 18(3)–(4), 19(3)–(6), 21(2) and 25. Under art 19(6), the parties may reserve in writing a right to withdraw consent, and the provision does not create an unconditional default right of withdrawal. Recording a settlement as a consent award under art 21(2) is a separate situation.

elsewhere was not automatically decisive. The applicable undertaking and law must determine the comparison.¹⁶

For top-down analysis, the account should explain the aggregate burden, the denominator, the unit of counting, the treatment of patent families and the essentiality assumptions. Declaration of a patent to an SSO is not proof of essentiality, validity or use. A sample requires an identified population, a selection method and an explanation of the inference it can support. A negotiated illustrative sample should not silently become a statistical estimate of the entire portfolio, and any extrapolation should explain uncertainty and possible selection bias. The guidelines should impose no fixed discount and no nationality-based proxy for patent quality.¹⁷

The account should distinguish legal conclusions, established facts, evidential inferences and assumptions adopted because proof is incomplete. For each decisive input, a short matrix could identify the proposition, the supporting material, the burden under applicable law, the objection and the consequence if the proposition remains unproved. Sensitivity analysis could test whether a disputed input would materially change the result. The matrix would not reverse the burden of proof or turn missing evidence into a presumption of essentiality. Articles 23, 28 and 29 already regulate evidence, tribunal-appointed experts and production. An adverse inference for non-production without sufficient justification differs from a penalty for a legitimate privilege or confidentiality objection, and both parties must be able to address the decisive material.¹⁸

An expert determination also needs a precise question. The Rules permit legal as well as factual or technical issues and make a determination binding unless the parties agree otherwise in writing. A technical sample should therefore not inadvertently settle the whole legal dispute. An optional annex should invite the parties to specify the question, its binding or non-binding effect and the treatment of the result in any arbitration. The report of a tribunal-appointed expert and a separate binding expert determination should not be presented as interchangeable. Nor does calling a determination “binding” automatically make it an arbitral award enforceable under the New York Convention.¹⁹

3.5 The reach and limits of the result

Sections 2.6 to 2.7, 2.9, 3.5 to 3.7 and 4.2

Section 2.7 requires clarification. Article 35(2) UPCA provides that a patent may not be revoked or limited in mediation or arbitration. Articles 35 and 36 of the Arbitration Rules and Article 21 of the

¹⁶ *Unwired Planet v Huawei* [2020] UKSC 37, 26 August 2020, [112]–[122]. The Supreme Court interprets ETSI non-discrimination as part of the general FRAND obligation and rejects the hard-edged requirement advanced in that case. That construction should not be attributed without analysis to a different SSO undertaking or legal system.

¹⁷ ETSI IPR Policy, Annex 6, cl 3.2. *Tesla*, [17]. *Huawei*, [69]. These sources support the distinction between declaration and proven essentiality or validity. The proposed evidential matrix, sampling safeguards and sensitivity analysis are recommendations of this contribution and are not rules established by those judgments.

¹⁸ Arbitration Rules, arts 17(3), 23(1)–(2), 28, 29(1)–(5) and 48. Discussion Paper, § 2.3. Article 23(1) places the burden of proving non-admitted facts on the party relying on them, according to applicable law, and art 29(5) permits an adverse inference for failure to produce without sufficient justification.

¹⁹ Expert Determination Rules, arts 2, 7(3)(viii), 14–15, 18 and 20. Arbitration Rules, art 28. New York Convention, 10 June 1958, arts I–II and V. Whether a particular decision is an arbitral award is a question of legal classification and does not follow from the word “binding”.

Mediation Rules separately address settlements and consent awards, including terms obliging a patent owner to limit or surrender the patent or to agree to its revocation, and a joint request for UPC confirmation. Such an obligation differs from revocation by the neutral. Whether a tribunal may consider validity incidentally, with effects between the parties, depends on its mandate and on the applicable arbitration law, and institutional guidance cannot establish universal arbitrability. Nor does confirmation of a settlement automatically convert a contested validity award into a decision binding third parties.²⁰

Suggested replacement clarification:

The parties should distinguish the effect of their agreement or an award between them from any alteration of patent status requiring action by a competent authority. Article 35(2) UPCA remains applicable. The procedure for requesting UPC confirmation of a settlement or consent award does not confer a general power on an arbitral tribunal to revoke or limit a patent, and should not be presented as automatic confirmation of a contested award.

For global disputes, the proposed schedule should identify the applicable limits on arbitrability and the likely places of enforcement. An award may determine agreed worldwide licence terms without thereby adjudicating the status of every foreign patent against third parties. *Unwired Planet* illustrates the distinction between determining commercial licence terms and deciding foreign patent validity, although the legal basis of a judicial determination must still be distinguished from the consent supporting an arbitration. Institutional guidance cannot remove the safeguards of the New York Convention concerning scope, due process, arbitrability and public policy.²¹

Recent UPC proceedings require the same restraint. The order of the Court of Appeal in *Vivo v Sun Patent Trust* upheld the deferral to the main proceedings of the admissibility question concerning a FRAND-related claim. It did not finally resolve the existence of a general power to determine global rates. Nor should a court's assessment of a FRAND defence be conflated with the conclusion of a licence. The guidelines can explain how parties may agree a global arbitral mandate without making its utility depend on a broader claim about UPC jurisdiction.²²

Article 50 of the Arbitration Rules permits agreements concerning parallel proceedings, including injunctions. Such agreements should identify the disputes and persons covered, their duration, exceptions for urgent protection, obligations to seek court approval where required and the consequences of breach or termination. They cannot themselves bind a court or a competition authority. Similarly, Article 23 of the Mediation Rules suspends limitation only to the extent permitted

²⁰ UPCA, art 35(2). Arbitration Rules, arts 35–36. Mediation Rules, art 21. Discussion Paper, §§ 2.7 and 3.5. The PMAC confirmation provisions expressly refer to Rules 11.2 and 365 of the UPC Rules of Procedure. They concern settlements and consent awards.

²¹ *Unwired Planet*, [58]–[66]. New York Convention, arts I–II, V(1)(a)–(e) and V(2). The grounds include invalidity of the arbitration agreement, inability to present a case, excess of submission, procedural defects, setting aside or suspension, non-arbitrability and public policy, subject to their respective requirements.

²² UPC Court of Appeal, *Vivo v Sun Patent Trust*, 16 March 2026, UPC_CoA_904/2025 and UPC_CoA_905/2025, [17]–[22]. The source is the signed judicial order reproduced by UPC Law rather than the commentary published on that site. The order confirms the deferral of an admissibility issue and does not finally determine a general jurisdiction to set worldwide royalties.

by applicable law. The annex should distinguish contractual standstill obligations from the legal effect of commencement on limitation and prompt a check of the relevant dates and jurisdictions.²³

4. ADDITIONAL RECOMMENDATIONS

4.1 Confidentiality and a useful public practice

Sections 1.6, 2.4, 4.5 and the proposed case-law resource

The announced initiative of the PMAC and the EPO for a global FRAND case-law resource could support informed comparison. Its value will depend on the distinctions its records preserve. A settlement proposal, an interlocutory order, a judgment on a FRAND defence and an award determining a licence should not appear as equivalent “FRAND decisions”. The announcement describes an initiative to develop the resource rather than an already complete corpus.²⁴

For outcomes lawfully publishable under the Rules, I propose a short record identifying the procedure, the legal basis, the mandate, the question, the effect and, where available, the material methodological premises. It must distinguish a reasoned merits decision from an agreed outcome. Article 35(1) of the Arbitration Rules excludes merits reasons from a consent award, and Article 40(2) of the same Rules and Article 18(2) of the Expert Determination Rules allow reasons to be waived under their respective conditions. A publication template cannot manufacture adjudicative reasoning or treat agreement as a finding that the terms are FRAND. It should label the absence of reasons and any resulting limits on comparison.²⁵

Where anonymisation removes indispensable context, a bare royalty figure may mislead more than it informs, and the record should suppress or qualify it accordingly. Independently constructed hypothetical examples could explain methods where confidential cases cannot, provided they are labelled as illustrations and do not reconstruct protected disputes.

The publication regimes must remain separate. Article 47(7) of the Arbitration Rules allows a written objection through the CCMS within sixty days of notification of the award, whereas Article 19(6) of the Expert Determination Rules runs from the date of the determination. The guidelines should identify each trigger, the notice arrangements and the anonymisation and confidentiality conditions, without silently harmonising the periods. The template must not demand identification of an otherwise anonymous dispute. Where a proposed explanatory record exceeds the applicable publication

²³ Arbitration Rules, art 50. Mediation Rules, arts 23–24. Article 23 expressly makes the suspension of limitation dependent on applicable law. A party undertaking, an institutional procedural order and a judicial stay are different acts.

²⁴ PMAC consultation announcement, 25 September 2026. It announces work with the EPO towards a global FRAND case-law resource. The taxonomy and metadata proposed here are recommendations and do not describe an existing complete corpus.

²⁵ Arbitration Rules, arts 35(1), 39(3), 40(2) and 47. Expert Determination Rules, art 18(2). A consent award gives no reasons beyond consent, and reasons for other awards or expert determinations may be waived under the respective provisions. The guidelines cannot require a reconstructed merits decision where none exists.

permission, separate authority is necessary. Mediation confidentiality supplies no corresponding general entitlement to publish the substance of a settlement.²⁶

Publication should not imply precedent. The Centre could periodically compare reasoning, identify unresolved questions and explain changes to the guidelines through a version history and a consultation process. It should also disclose the selection limits of any dataset, since an opt-out corpus may systematically omit particular kinds of disputes. Accessible reasoning would support coherence. Numerical uniformity extracted from an incomplete sample would not.

4.2 Practical conditions of participation

Sections 1.7, 2.8 and Annexes 1 and 2

Party autonomy becomes more credible when participants can understand the cost and consequences of the process. The annexes should offer a proportionate initial budget, staged disclosure, suitable remote participation and a choice between a short issue-specific procedure and a broader portfolio determination. The existing expedited procedure provides a starting point, and a global dispute does not necessarily justify unlimited evidential expenditure.²⁷

Neutral selection should give weight to the legal systems implicated by the undertaking and its enforcement, as well as to technical and economic competence. Transparent information about appointment practices, conflicts and experience across different licensing positions would help the PMAC establish confidence without implying that a neutral represents a constituency. Participation in the same standards ecosystem makes careful conflict assessment particularly important, although mere professional familiarity should neither be concealed nor treated as automatic disqualification.²⁸

The Working Group could test the annexes against three hypothetical files: a bilateral renewal, a pool licence with disputed representative authority and a supply-chain dispute with overlapping licences. A pilot could record completion time, duplication avoided, issues clarified and the reasons for abandoning the forms, without exposing protected negotiations. These are proposed evaluation measures and do not claim demonstrated efficiency gains. Simplification should follow wherever an item produces administrative burden without improving a material decision.

5. CONCLUSION

The PMAC can improve FRAND dispute resolution by connecting the undertaking, the procedural mandate and the legal effect of the result. The principal objections are manageable. The mandate schedule need not require unnecessary joinder, confidentiality safeguards need not conceal pre-existing evidence, and transparency need not create artificial precedent. Optional, revisable

²⁶ Arbitration Rules, art 47(6)–(7). Expert Determination Rules, art 19(5)–(6). Mediation Rules, art 25. Anonymised publication under the first two provisions is subject to confidentiality, to the absence of identifying information and to the relevant objection mechanism. Separate permission is needed where a proposed record falls outside the applicable publication provision.

²⁷ Arbitration Rules, arts 17(4), 20, 29, 39–41 and 48. Discussion Paper, § 2.8. These proposals concern the use of existing procedural options and do not change the Fee Schedule.

²⁸ Arbitration Rules, art 9(1)–(3). Mediation Rules, art 12. Independence, impartiality and disclosure obligations should inform appointments alongside relevant competence, and the proposed experience profile is not an additional eligibility rule.

instruments would make these distinctions operational while preserving the authority of parties, neutrals and courts. Their success should be assessed in use rather than assumed from the attraction of consensual procedure.

PROPOSED OPTIONAL ANNEXES

These short forms implement the recommendations above. They supplement existing case-management documents, have no independent jurisdictional effect and may be shortened or combined. “Agreed”, “disputed” and “not applicable” should be available for each field. Completing a field does not waive a jurisdictional or substantive objection.

Annex A. Obligation, mandate and intended effect

A1. Legal basis and institutional scope. Identify the SSO policy and declaration, the relevant versions and dates, the asserted promise and its beneficiaries. Identify the European patent or supplementary-protection dispute and the nexus supporting any Related Dispute. Record disagreement and how it will be resolved.

A2. Persons and authority. Identify each party and principal, the representative’s authority to negotiate, settle or arbitrate, the evidence of consent and any proposed joinder. List material non-parties only where needed to delimit relief or implementation, without inferring that every economically affected person must participate.

A3. Perimeter and laws. Record portfolios, products, territories, period, supply-chain level, cross-licences, releases and claimed overlap. Distinguish the laws asserted for the undertaking, the licence and the arbitration agreement, the seat and procedural law, and the relevant mandatory rules. State each neutral’s question and any reserved issues.

A4. Interim and final effect. State whether the result will be a settlement, an expert determination, a consent award or a contested award, and specify its binding effect and required implementation. Identify payment or security, adjustment and refund terms, court applications, parallel proceedings, limitation checks and likely enforcement jurisdictions. Record review dates and responsibility for each action.

Annex B. Information and procedural transitions

B1. Sequence and neutrals. Identify the sequence, the participants and the role of each neutral, including any prior access to joint meetings or caucuses. Record the consent required for that sequence and any agreed written reservation of withdrawal under Article 19(6) of the Mediation Rules.

B2. Categories of material. For each category of material, record its origin and purpose: pre-existing evidence, mediation-specific proposal or admission, jointly commissioned expert work, procedural fact or determination. Identify confidentiality, privilege and third-party restrictions separately. No category label itself decides admissibility.

B3. Transfers. State the permitted recipient, the purpose and the legal basis for each transfer, the required written consents and any necessary court permission. Specify redactions and access limits. A public or ordinary evidential source should be identified where available, and protected mediation material must not be recreated through an informal summary.

B4. Status in the later procedure. Specify whether prior work is binding, rebuttable evidence or merely a settlement aid, with the basis for that status. Ensure an opportunity to challenge material relied upon later. A termination record should disclose only authorised procedural facts and contain no mediator certification of willingness or reasonableness.

Annex C. Publication and comparison record

C1. Publication authority. Identify the applicable rule or separate consent, the permitted level of anonymisation, the objection trigger, the calculated deadline and the notice mechanism. Confirm that publication will not reveal the identity of the parties or of the dispute, protected information or third-party material without authority.

C2. Nature and effect. Classify the item as a procedural order, an interim decision, a merits decision, an expert determination, a settlement or a consent award. State the legal basis, the question, the scope and the binding effect at a level compatible with anonymity. Record whether reasons were given or waived, since agreement is not proof of adjudicated FRAND compliance.

C3. Reasoning, where available. Record the valuation method, the material comparator adjustments, the denominator or sample definition, the assumptions and the uncertainty. Explain any omission that prevents reliable comparison, and omit a number where its publication would imply unjustified comparability.

C4. Status and limits. Date and version the record, and identify corrections and known review or enforcement developments where publishable. State that the item is not binding precedent and that an opt-out corpus is not representative of all disputes. Label hypothetical examples separately.