STUDY OF THE LEGAL NATURE OF INTERNATIONAL COMMERCIAL ARBITRATION AND MEDIATION IN INTELLECTUAL PROPERTY DISPUTES: THEORETICAL AND PRACTICAL ASPECTS, MAJOR TREND

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ABSTRACT

The purpose of the study is the foreign experience in alternative dispute resolution (hereinafter ADR - alternative dispute resolution). The influence of arbitration proceedings on the general state of private international law. The author investigated not only foreign experience, but also a direct comparison of the effects of arbitration in general. The author applied both empirical (comparison) and theoretical (analysis) research methods in order to maximize the study of aspects and phenomena of the ADR institutions. In the course of the study, a number of shortcomings and specific features of the arbitration dispute resolution in IP disputes of each of the states under study were identified.

Keywords: arbitration, alternative dispute resolution, mediation, arbitration centre, international private law.

Access to the courts is indispensable in the areas of criminal, administrative, and constitutional law because the courts are important guarantors of justice in these areas. But litigation is not always necessary or appropriate in the private sphere, namely in matters governed by civil and contract law. Equal partners in these relationships have the option of resolving their disputes themselves or using other methods of dispute resolution. These methods are an alternative to litigation, which, while useful and important to society, is a very formal, costly, time-consuming and complicated process for the disputing parties. The need to find other means that are simpler, cheaper, faster, and more effective has led to the use of "informal justice" to resolve legal disputes. The methods of such informal jurisdiction are known as alternative dispute resolution (ADR).

Alternative dispute resolution should be understood as the resolution of disagreements and confrontations with the help of alternative forms, which are understood as procedures and methods of dispute resolution used outside and inside the judicial system.

This institute is at the stage of intensive development in the territory of our state, and as evidenced by the normative legal base already exists and the Law of Republic of Uzbekistan "On the Arbitration Courts" from 2006 is in force, as well as the Draft Law "On Mediation" is at the stage of development and consideration. This shows the interest of the state in the use and direct implementation of ADR. With the economic changes in the past years and international trade agreements, the number of new legal disputes has increased significantly. National courts of general jurisdiction are overwhelmed with civil cases. Ordinary litigation has become too expensive for most citizens. In such circumstances, society needs less expensive, more flexible alternatives to litigation. It is worth emphasizing that, as the extensive practice of developed countries (USA, England, Sweden, Singapore and others) shows, this benefits not only the citizens, but the state as well.

Let us consider the alternative dispute resolution practices of some selected countries. First of all, let us consider the practice of the United States of America. They have a fairly extensive practice in this area, which has gained momentum since the 1970s. Today in the USA the use of ADR is regulated by almost two thousand normative acts, adopted both on the federal and local levels, and American lawyers use about 20 different variants of alternative procedures for

dispute resolution. But the most common and frequently used ones are mediation (negotiation), mediation (participation of a third party expert who can give an advisory opinion) and arbitration (Ottolenghi S., 1991). Also in the U.S. it is already established to mix and match different ways of settling disputes out of court. More specifically, so-called "hybrids" are made up of elements of various alternative dispute resolution models. For example, such as:

- mediation - arbitration, meaning the settlement of a dispute by means of a mediator-arbitrator who, if the parties fail to reach an agreement, is authorized to resolve the dispute by arbitration;

- "mini-trial" or "mini-dispute", a widely used method for resolving commercial disputes that gets its name from its outward resemblance to court procedure and is a dispute resolution involving corporate executives, lawyers and a third independent person presiding over the hearing of the case;

- independent expert fact-finding - a procedure for the parties to reach an agreement based on the opinion of a qualified professional who has examined the case from a factual standpoint;

- ombudsman - the resolution of disputes involving deficiencies in government agencies and private organizations by an officially authorized person investigating the circumstances of a case on the complaints of interested persons;

- a private judicial system or "for hire" judge, which provides dispute resolution through retired judges at a fairly high fee, who have the power not only to conciliate the parties but also to render a binding decision.

In the last decade, arbitration has gained rapid momentum in its introduction into dispute resolution, and for the resolution of various disputes involving economic and civil actors, other than criminal cases, which are not handled by international commercial arbitration. In the beginning of the article, we discussed alternative dispute resolution in general terms, and in this case, we should narrow it down to arbitration and mediation in the field of intellectual property. Noteworthy is the fact that mediation is one-step in the terms of a contract to resolve a dispute that has arisen. For example, the parties in a judicial clause in a contract stipulate that if no amicable agreement or compromise is reached with mandatory mediation or negotiation process, they proceed to arbitration. On the one hand, this is very prudent, because the parties

try to reach peace in amicable ways and ways without substantial costs and by involving only one mediator. On the other hand, it takes quite a long period, during which one of the parties may suffer substantial losses and damages.

In turn, it should be noted that arbitration is a private, non-judicial review of a commercial dispute, usually by a panel of one or three private arbitrators appointed by the parties, which leads to a binding outcome. Mediation (or conciliation) is a process by which a neutral third party attempts to assist the disputing parties in voluntarily resolving their dispute. Taken together, arbitration and mediation (and other private dispute resolution mechanisms such as negotiations, enforcement meetings, and mini-trial processes) are known as "alternative dispute resolution" (i.e., alternatives to the public courts) or "ADR". All methods, including arbitration, are consensual - the parties must have agreed to the procedure before they can be compelled to participate in the procedure, and before the public courts will set aside the procedure. Arbitration and other forms of ADR are generally not enforced. Although an IP dispute can be resolved through litigation, parties are increasingly referring disputes to mediation, arbitration, or other alternative dispute resolution (ADR) procedures (Briner, R. 1994: 28). ADR is suitable for most IP disputes, and in particular between parties from different jurisdictions, and has the advantage of empowering the parties by increasing their will and control over the dispute resolution process. If settled well, alternative resolution can save time and money. In addition, its consensual nature often results in less adversarial processes, allowing the parties to begin, continue, or strengthen profitable business relationships with each other.

Let us consider the practice of alternative dispute resolution in some individual countries. The brightest example of the successful implementation of ADR in Asian countries we can cite Singapore, which, in turn, is a world leader in the provision of services for alternative dispute resolution with the participation of a mediator. In addition to the existing judicial mechanisms of dispute resolution, including traditional arbitration and mediation procedures, they offer a wide variety of ADR. The Singapore International Arbitration Centre and the Singapore International Mediation Centre are excellent institutions for ADR. Parties who intend to settle their disputes through ADR in Singapore also have access to state-of-the-art support facilities such as the Ministry of Justice's Mediation, Arbitration and Mediation Training Centre (Maxwell Chambers), the world's first integrated dispute resolution facility. It is the world's first integrated dispute resolution complex (an example often sought to be followed) with

world-class hearing rooms and offices of leading international dispute resolution institutions (Rustambekov, I. 2018: 143).

Vienna, Austria, is a frequently chosen venue for international arbitration. Accordingly, the Vienna Rules (the Rules), which are applicable to disputes between parties from anywhere in the world in proceedings conducted in any language and under any applicable substantive law, offer - in accordance with generally accepted principles in international arbitrations - another and quite competitive alternative to other international arbitration rules. At the beginning of 2012 the Board of VIAC (Vienna International Court of Arbitration) began discussing the necessity and desirability of revising the Rules. At the same time, a broad survey of those who have resorted to international arbitration was conducted, with the participation of several hundred arbitration practitioners. Around 60 per cent of the replies came from foreign practitioners and 40 per cent from Austrian practitioners. The existing Vienna Rules have been praised for their simplicity and flexibility. Nevertheless, the provisions concerning multi-party arbitration, consolidation of arbitrations and the joinder of third parties as co-plaintiff or co-defendant have been criticized.

Alternative forms of conflict resolution are developing no less intensively, particularly in Australia. In 1991, the Australian government passed the Court (Mediation and Arbitration) Act, which gave the Family Court and the Federal Court of Australia the right to offer the parties the opportunity to engage a mediator and arbitrator to resolve the dispute. ADR professional organizations include: (i) Alternative Dispute Resolution Lawyers; (ii) Australian Dispute Resolution Association; (iii) Australian Institute of Arbitrators and Mediators (Kenneth, R. 2011: 337).

It is worth noting that if we consider in more detail the essence and features of the main alternative methods of conflict resolution, mediation is quite often used and effective. Thus, in 1995, Argentina adopted the Law "On Mediation and Conciliation" that makes mediation obligatory for all lawsuits; in 1999, the Mediation Institute of the Chamber of Commerce was created in Stockholm. Since 1988, the Canadian Institute of Arbitration, operating since 1974, became known as the Canadian Institute of Arbitration and Mediation (CIAM) and began to work on the development of new programs of training in mediation. In Australia, for example, domestic human rights and anti-discrimination laws provide for ADR as a central component of the process by which violated human rights are redressed.

In general, there is no limit to the handling of intellectual disputes through arbitration, but we can still deduce the following from the work of legal scholars. Only very few legal systems currently exclude arbitration of IP disputes altogether. In any case, this exclusion applies only to rights that are mandatorily subject to registration in a public register, such as rights arising from patents. The South African Patent Act, for example, says that no tribunal other than the trial judge may hear disputes arising under the Act. Also, the world practice considers arbitration with some restrictions licensing and transfer of registered IP rights. In fact, most often referred in arbitration in this area to this subject matter. Disputes over claims for damages resulting from infringement of these rights are equally relevant to arbitration in most jurisdictions because there is no public interest at stake. in such cases, the right to compensation may be waived by its owner. A number of legal systems will also allow disputes relating to the registration of IP rights to be resolved. This is, for example, the case in Spanish law. Notwithstanding the above, some national legal systems have traditionally rejected the arbitrability of disputes concerning the validity of registered IP rights, such as those arising from patents, utility models, trademarks and designs, whose invalidation is left to the state courts. This applies in particular to Germany, where the jurisdiction is to declare patents invalid under Section 65(1) of the German Patent Act (Patentgesetz) by the Federal Patent Court (*Bundespatentgericht*). The German approach to arbitrability in relation to IP was until recently followed by France, where the validity of patents was thought to concern non-unique rights and was therefore not arbitrable. Swiss law has taken a step forward in resolving by arbitration disputes over registered IP rights, since it does not impose the above-mentioned limitation on the effect of arbitral awards on such disputes: a decision on the validity of a trademark or a patent will be recognized by a special institute if it has been enforced by a Swiss court. Full arbitrability of disputes is permitted under Belgian law. It is noteworthy in this case that in some legal systems arbitration is recognized as compulsory. That is, in other words, there are a number of issues which must be resolved primarily through arbitration rather than by a state court. In our opinion, this method is innovative and, in fact, should be implemented in national legislation. This approach has recently been adopted in Portugal, where, since 2011, arbitration has been mandatory for disputes between pharmaceutical patent owners and generic manufacturers who allegedly infringe such patents.

Next, we need to consider intellectual disputes in mediation. The scientific literature notes that the mediator's professional competence consists of a set of knowledge, skills, personality traits, primarily intellectual and emotional-motivational, as well as the ability to manage a conflict situation. Mediation has gained high momentum in the last five years, and the parties increasingly began to turn to this method of dispute resolution as an amicable, peaceful one. Involving an independent third party has allowed the party to simplify the dispute process while saving time and money. It is often said that IP cases are too complex for mediation. But certainly, a discussion between parties who are well versed in the matter, facilitated by a neutral participant, facilitating that discussion is likely to be more relevant to a satisfactory resolution than leaving the matter to be explained secondhand through lawyers to a judge or arbitrator who is extremely unlikely to have a detailed understanding of the business at the heart of the dispute. The complexity of the situation should make it easier to find a creative solution. With mediation, it would also be possible to resolve the dispute by breaking the issues down into different areas and even having parallel discussions about these different issues.

The earliest proponents of the use of ADR in intellectual property disputes focused more on arbitration. Arbitration was "identified inherently with the extra end of the ADR continuum" and for that, reason may be inherently more attractive to lawyers than mediation of commercial disputes. Unlike mediation, arbitration is a statutory process with certain formal requirements that are not entirely different from litigation, although as a form of ADR it nonetheless retains certain advantages over litigation. These advantages include that the parties have some degree of control over the process, including setting the time and place of the arbitration and appointing an arbitrator with appropriate technical expertise, and that the process itself and the award are confidential to the parties. However, similar to the role of a judge in a lawsuit, the arbitrator's decision is binding and therefore provides certainty. In addition to these features, arbitration is internationally recognized as a means of resolving business disputes and is widely supported by traditional legal systems.

Mediation (also called mediation in practice) is particularly suitable for disputes in which the acceptable outcome for both parties is some form of shared rights, such as a license agreement or supply contract, rather than the "success" for one party and "defeat" for the other that is traditionally provided by litigation. Mediation could also be used as extensively as possible in disputes to protect intellectual rights. Such disputes concern both protection of personal non-

property rights of authors (rights of authorship, right to name, right to inviolability of work) and protection of exclusive rights of authors and other right holders. Such disputes are common in the field of intellectual property, where there may be several rights in the field of intellectual property with one legal entity, and each may belong to another party, as well as separately licensed to other parties. A mediation result in such cases also has the advantage of preserving the ongoing business relationship, while the confidentiality of the process benefits parties who want to keep certain information relating to their intellectual property confidential and possibly also their business reputation. Several other reasons that support the choice of mediation over litigation for many intellectual property disputes. First, although intellectual property law is complex and often very technical, intellectual property litigators are rarely selected for their expertise in intellectual property law. Consequently, intellectual property litigation can be frustrating for all parties involved. Conversely, almost all ADR methods, including mediation, allow parties to a dispute to agree to appoint a "third party neutral," and that third party might be chosen for their expertise in the technical area of a particular dispute.

Second, for most intellectual property laws, trademark law is fundamental, because intellectual property protection is valid for a limited period of time, during which the intellectual property owner has the exclusive right to commercially exploit his or her intellectual property. Once the period of protection expires, the intellectual property enters the public domain, from where it is freely available for any use. Delay in pending cases and the formal judicial process itself, including discovery requirements, exchange of documents, and others. The procedural formalities prescribed by the relevant rules of court contribute to what can be a significant delay and disruption in the protection of the intellectual property owner and economic monopoly. This is particularly important in cases where the disputed intellectual property relates to new "high-tech" technologies and the parties are large international corporations, but is also important for less technologically intelligent inventive property. For example, in *IDA Ltd v. University of Southampton*, in which a dispute arose over ownership of intellectual property rights in a cockroach trap, the judge noted that as a result of the litigation, the disputed patent had not yet been used, even though eight years had passed since the original Patent Cooperation Treaty application was filed.

Third, in today's global economy, many intellectual property disputes involve parties from different geographic regions and jurisdictions. If the parties agree to resolve the dispute using

the traditional court system, i.e. the courts as state courts, the process will be subject to complex conflict of laws rules, and it is possible that multiple court actions will be required in different jurisdictions. Meanwhile, a mediation (or arbitration) agreement can apply to all parties to a dispute regardless of whether they are physically or legally in different jurisdictions.

The fourth reason has to do with the complexity of the business environment surrounding many intellectual property disputes. As stated earlier in the document, a single "work" as it is known in copyright law, or an "invention" in patent law, can actually give rise to several separate intellectual property rights with the possibility of multiple licensing and transfer of those rights. Unlike litigation, mediation allows parties to a dispute to choose a third-party expert to serve as mediator, circumvents the formal litigation process and its inherent delays, and there is an opportunity to resolve the dispute in one proceeding rather than through a series of courts in different jurisdictions. Mediation also makes it possible to find flexible "solutions" to the dispute that not only reaffirm the parties' strict legal positions, but also, if necessary, reaffirm their ongoing business relationship and preserve any useful synergy between them (Basedow & Kono & Metzger, 2010: 401). Finally, the confidentiality of mediation can be beneficial to businesses seeking to preserve business relationships and reputations. This feature, of course, can also be seen as a disadvantage, since precedent is not set for guidance in future disputes, and any flaws or inconsistencies in the law are not made public. Also, the owner of intellectual property does not receive public confirmation of the validity and ownership of the intellectual property, which may serve as a deterrent to future infringers. Unlike litigation, mediation allows the parties to a dispute to choose a third-party expert to mediate, bypasses the formal judicial process and its inherent delays, and there is also the possibility to resolve the dispute in a single proceeding, rather than through a series of courts in different jurisdictions. Moreover, mediation makes it possible to find flexible "solutions" to the dispute, which not only confirm the strict legal positions of the parties, but also, if necessary, confirm their ongoing business relationship and preserve any useful synergy between them.

Finally, the confidentiality of mediation can be beneficial to businesses seeking to preserve business relationships and reputations. This feature, of course, might be seen as a disadvantage, since the precedent is not created to guide future disputes, and any deficiencies or inconsistencies in the law are not made public. Moreover, the owner of the intellectual property

does not receive public confirmation, validity and ownership of the intellectual property, which may serve as a deterrent to future infringers.

Mediation can be a useful process for certain categories of intellectual property disputes. Although the specifics of the mediation process itself may vary, in general, some form of mediation will be preferable to litigation in disputes where the parties wish to maintain an ongoing business relationship or are willing to consider some form of joint ownership or licensing agreement, the intellectual property in question. Mediation, however, will not be appropriate in all cases. In particular, the confidentiality of mediation means that there is no precedent set and there is no public deterrence. If mediation is offered, it should be optional, and the procedures should be very carefully spelled out. Law-based mediation processes can provide the worst of both worlds--demonstrating enough formality to intimidate the weaker parties, but not providing a reasoned and impartial solution. Moreover, in disputes in which one party wishes to assert ownership and complete control of its intellectual property, such as disputes involving unauthorized downloads of copyrighted works, any suggestion of mediation by the parties as an alternative to the traditional litigation process is inappropriate (Fawcett & Torremans, 2011: 226). The following is a relevant table to illustrate the specific differences between litigation and alternative dispute resolution (arbitration and mediation).

Specifics of IP disputes	State court	Arbitration and mediation
Internationality	-Multiple proceedings under different laws with the risk of conflicting results -Possibility of an actual or presumed domestic trial in favor of the party that is suing in its own country	-Trial conducted once under the law as determined by the parties -The arbitration process and the arbitrator's nationality may be neutral with respect to the law, language, and institutional culture of the parties
Experience and specialized knowledge	A judge may not have sufficient experience in a particular field	Parties may choose arbitrators or mediators with relevant experience

Urgency	-Procedures are often delayed -Injunctive relief is available in some jurisdictions	-Arbitrator(s) and parties may shorten the procedure -WIPO's specialized arbitration may include interim measures and does not preclude injunctive relief
Final and binding decision	Possibility of appeal	Limitations on filing an appeal
Confidentiality and reputational risk	Public proceeding	Process and decision completely confidential

Table 1

Arbitration and mediation offer cross-border parties' real opportunities beyond traditional judicial intervention, especially in the area of intellectual property, where each dispute is different and distinct. Recent advances in arbitration and mediation allow for private and confidential proceedings without prejudice to enforcement, injunctive relief or the right of appeal.

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