

ORIGINAL SCIENTIFIC PAPER

BENEFITS AND LIMITATIONS OF INTERNATIONAL ARBITRATION IN INTELLECTUAL PROPERTY LAW DISPUTES

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Summary: *In this paper, the author analyzes the benefits and limitations of international arbitration in disputes that are subject to intellectual property rights. Intellectual property law disputes have special characteristics. In the event of a dispute with an international element, there is a problem with the jurisdiction of state courts due to the principle of the territoriality of intellectual property rights. The titular of the right must initiate court proceedings in all countries individually, leading to delays in procedures, multiplication of costs and uneven judicial practice. For these reasons, the author analyzes alternative dispute resolution through arbitration to determine whether this method of dispute resolution is more acceptable to foreign courts.*

The author particularly pays attention to the WIPO Center for Arbitration and Mediation as a permanent arbitration institution whose primary activity is the resolution of disputes in the field of intellectual property rights.

Key words: *intellectual property law, international arbitration, WIPO Arbitration and Mediation Center, WIPO arbitration rules.*

1. INTRODUCTION

The initiation of proceedings before state courts is a common way of resolving disputes. Alternatives to state courts for foreign parties are arbitration and other alternative dispute resolution (ADR) modes. ADR is a comprehensive term that refers to multiple non-controversial methods of dispute settlement between the parties. Examples of ADR are arbitration, mediation, neutral evaluation,

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negotiation, reconciliation, etc.² We will not specifically discuss the types of ADR in this article.

The parties themselves, when concluding a contract, determine how they will resolve any future dispute. They can determine in the contract itself that the dispute will be resolved by the competent state court. If parties belong to different sovereignties and do not determine the jurisdiction of a state court, jurisdiction may also be subject to the rules of applicable private international law. However, the parties may contract and the jurisdiction of an ad hoc or institutional arbitration by providing for an arbitration clause in the contract itself which will entrust the future dispute to arbitration. Also, at the time of the dispute, parties may conclude an arbitration agreement by which the dispute arises to entrust certain arbitration to the settlement. Based on that agreement, the parties constitute the arbitral tribunal as an independent authority authorized to resolve the dispute. The arbitral tribunal consists of persons called arbitrators who have been chosen by the parties or the appointing authority.³

The arbitral method of resolving disputes is neither new nor unknown.⁴ Numerous international contracts in the field of goods traffic, e.g. contracts for the sale, as well as the activities of international and interstate investment works, banking and insurance, transport law branches, concessions, intellectual property rights contracts and know-how and other affairs meet with arbitration clauses on dispute settlement.⁵ However, disputes that have an infringement of copyright or an industrial property right with an international element have recently been increasingly addressed before ad hoc or institutional arbitration. State courts have become slow and inefficient. Procedures take several years, case law is uneven, and parties increasingly lose trust in state courts. Intellectual property rights are territorially limited to the territory of the State in which they are recognized and may exist in parallel in several States. In disputes with an international element, judicial protection is not effective enough, and arbitration is an alternative solution. The arbitration of a party may, in one proceeding, resolve a dispute involving intellectual property protected in more than one country, thereby reducing the cost and complexity of multiple litigation and the risk of inconsistent results.⁶

2 Marc Jonas Block, „The Benefits of Alternate Dispute Resolution for International Commercial and Intellectual Property Disputes”, *Rutgers Law Record*, Vol. 44 (2016-2017), 2.

3 Maja Stanivuković, *Međunarodna arbitraža* (Belgrade: JP Službeni glasnik, 2013), 18.

4 For the historical development of trade arbitration, see: Gary B. Born, *International Commercial Arbitration, Second Edition*, Kluwer Law International, 2014, 24-63.

5 Miodrag Trajković, *Međunarodno arbitražno pravo* (Belgrade: Faculty of Law, University of Belgrade, Association of Lawyers of Yugoslavia, 2000), 8.

6 Marc Jonas Block, „The Benefits of Alternate Dispute Resolution for International Commercial and Intellectual Property Disputes”, 7.

2. SUSTAINABILITY OF INTERNATIONAL ARBITRATION FOR SOLVING DISPUTES IN THE FIELD OF INTELLECTUAL PROPERTY RIGHTS

The rapid development of new technologies has led to the adjustment of the intellectual property regime. The technological revolution has elevated the technology of information technology and communications, biomedical research and development of new drugs, digital technology, new materials of specific characteristics, artificial intelligence and virtual trade in cybernetic space.⁷ The spread of globalization, the development of international trade, and the growing exploitation of intellectual property rights lead to disputes that often include multiple jurisdictions, including technical issues, complex regulations and sensitive information. In these circumstances, parties often look for flexible ways to resolve disputes that can adapt to their needs and allow them to control the time and cost of the proceedings.⁸

When concluding a contract, parties do not have to anticipate the manner of resolving possible future disputes. In the event of a dispute, each party may initiate a procedure before the competent state court. They do not have such a possibility in the case of arbitration proceedings. In order for one party to initiate an arbitration procedure, arbitration as a means of resolving disputes must be previously agreed upon by an arbitration agreement between the parties. Also, the dispute must be arbitrary in order for the parties to dispose with it. The condition of arbitrability fills a dispute that is of such nature that under applicable law can be dealt with by arbitration.⁹ Certain States allow the settlement of disputes in the field of intellectual property rights through arbitration, and others do not.¹⁰ In the United States until 1983, disputes concerning infringements of intellectual property rights were not arbitrary, as the courts considered that these rights were of public interest and that only state courts could resolve disputes concerning such rights. By amending US legislation, disputes in the field of intellectual property rights can also be resolved by private arbitrations.¹¹

Multinational companies have a need to protect their copyright, patents, trademarks and other industrial property rights in various countries of the world.

7 Kamil Idris, *Intelektualna svojina moćno sredstvo ekonomskog rasta*, The Intellectual Property Office of Serbia and Montenegro (Belgrade: 2003), 27.

8 Heike Wollgast, „WIPO alternative dispute resolution – saving time and money in IP disputes“, *WIPO Magazine* (November 2016), 32.

9 Stanivuković, *Medjunarodna arbitraža*, 101.

10 For the arbitrariness of disputes in the field of intellectual property rights in developed countries, see: Kenneth R. Adamo, „Overview of International Arbitration in the Intellectual Property Context“, *The Global Business Law Review*, Vol. 2 (2011), 16-19.

11 Philip J. McConaughay, „ADR of Intellectual Property Disputes“, *SOFTIC Symposium*, 2002, 8.

Also, due to the inability to independently exploit their rights, they conclude licenses with companies in other countries. The safeguards mechanisms provided by state courts in less developed countries are unreliable due to corruption in the local judiciary. That is why multinational companies are responsible for contracting private dispute resolution mechanisms such as arbitration. This allows them to reduce the risks of negative consequences in possible disputes.

3. BENEFITS AND LIMITATIONS OF INTERNATIONAL ARBITRATION IN INTELLECTUAL PROPERTY LAW DISPUTES

3.1. Benefits of international arbitration

The advantages of resolving disputes that have intellectual property rights before international arbitrations are reflected in the avoidance of complex, extensive tribunals in several states, applying different state law, in choosing the personality of the arbitrators, the autonomy of the parties during the proceedings, saving time and costs, confidentiality of disputes, neutrality and etc.

International arbitration allows parties to conduct one procedure involving multiple jurisdictions in front of one body and thereby avoid multiple complex court procedures in several states that would be certain due to the territorial effect of intellectual property rights. These court disputes would multiply costs more and the outcomes would be uncertain as national courts are not bound by court decisions from other states nor apply the same law.

In front of national courts, parties can not influence the choice of personality of a judge who will judge in their case. Often such judges do not have a sufficiently specialized knowledge in the field of intellectual property rights that will enable them to make a quality judgment. Therefore, they need a longer period of time to elaborate adequate regulations themselves, which in many cases goes to the detriment of the parties, because the procedure is too long. Parties to the arbitration proceedings may influence the selection of arbitrators by choosing neutral arbitrators who possess specific knowledge and experience in the field of intellectual property rights. Special arbitrators will make a quality arbitration decision for a short period of time, which will save both time and money. For example, in a case related to complex biotechnology, parties may choose an arbitrator or three arbitral tribunal having experience in this scientific field in place of a judge who does not have such a scientific experience. The choice of professional arbitrators is an advantage for parties to an arbitration procedure

who are not available to them in case they institute proceedings before a state court.¹²

In arbitration, parties have bigger autonomy. They may determine the number of arbitrators, the manner of their appointment, the substantive law, the language of the proceedings and the place of arbitration. The advantage of arbitration is that it is neutral, unlike national courts, which can be biased towards a party with its affiliation or nationality. The parties may agree to arbitration whose decision is binding or whose opinion is only advisory.

A significant advantage of arbitrage can be time and cost savings.¹³ Multiple procedures in different countries would definitely be exhausting and cost more. The speed of resolving disputes is extremely important for disputes concerning computer software, patents for microelectronics or biotechnology, because the procedure before a state court can last longer than the life cycle of a product.¹⁴ Arbitration is flexible and allows the parties to adjust the dispute resolution process to limit costs. There are arbitration costs and costs of parties.¹⁵ However, there are complex arbitration proceedings that take many years, and depending on which arbitration institution is being conducted, neither arbitration proceedings are inexpensive. In this respect, this advantage of the arbitration dispute resolution process must not be decisive and should be examined on a case-by-case basis.

International arbitration may enable the design of specific dispute settlement mechanisms. Its flexibility enables the parties to create mechanisms for resolving disputes that suit their particular needs. Many contracts that contain intellectual property rights such as licenses create long-term business relationships. During the execution of the contract, the parties may face various problems. In some cases, like the pharmaceutical industry, the parties do not want to terminate the contract, even though a dispute has arisen. Instead of terminating the contract, they seek a way to resolve the dispute that will remain between them. This is facilitated by international arbitration. For example, may establish an international tribunal in a state of rest that will be available to resolve any dispute that may arise during the execution of the contract. In this case, the parties would turn to a tribunal that would be familiar with the dispute and would probably resolve any issue in the short term. Such a solution exists before the WIPO concerning the dispute arising from the co-existence of the trademark agreement.¹⁶

12 Adamo, „Overview of International Arbitration in the Intellectual Property Context“, 13.

13 For an exhaustive overview of the length of court proceedings and the time needed to complete them in developed countries, see: Judith Schallnau, „Resolving IP Disputes – costs in court litigation, WIPO mediation and arbitration“, *IPR Helpdesk Bulletin*, No. 7 (2012), 9.

14 McConnaughay, „ADR of Intellectual Property Disputes“, 4.

15 Schallnau, „Resolving IP Disputes – costs in court litigation, WIPO mediation and arbitration“, 8.

16 Trevor Cook, Alejandro I. Garcia, *International Intellectual Property Arbitration*, Kluwer Law International (Alphen: 2010), 32.

The advantage of international arbitration is confidentiality (secrecy). Disputes in the field of intellectual property law often involve know-how, business secrets, and other law-enforcement information. Since arbitration is by definition a private way of resolving disputes, it is easier to preserve the confidentiality of the information disclosed in the proceedings than is the case with the judgments of state courts.¹⁷ Using arbitration and its confidentiality, the parties can more easily overcome the dispute and continue their business relations without the public and other business partners getting familiar with the problems that have arisen.

Neutrality is characteristic of arbitration which allows parties to choose a forum that is not bound by any legal system and thus avoid local corruption or underdeveloped legal system of the state that would be competent in case of litigation. One of the parties may want to avoid engaging in an unknown legal system, to avoid the costs of translating documents, engaging local legal representatives, traveling expenses and witness compensation.¹⁸ Customers can choose the rules of procedure that are adequate for them.

International arbitration decisions are characteristic of simplicity. They are final and not subject to legal remedies. Two-stage can be arranged exceptionally. Only a few institutional arbitrations allow an appeal to a first instance arbitration decision.

The important advantage of international arbitration decisions is their recognition and enforcement in most countries of the world as well as court decisions without examining the merits. Under the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, known as the New York Convention, such arbitration decisions are enforced in all States Parties to the Convention as well as court judgments.

3.2. Limitations of international arbitration

In addition to the significant advantages, arbitration as a means of resolving disputes also has gaps that give intellectual property right holders a reason to give up arbitration.

The wrong choice of arbitrators can cause many problems. In the event of the necessity of quick action, the wrong arbitrators on the side who wants to sabotage or delay the arbitration will develop the procedure that will make the arbitration irrelevant. Also, wrong arbitrators may go beyond the jurisdiction of arbitration.¹⁹

¹⁷ McConaughay, „ADR of Intellectual Property Disputes“, 4.

¹⁸ Cook, Garcia, *International Intellectual Property Arbitration*, 27.

¹⁹ *Ibid.*, 35.

In the case of the need to take emergency protection measures such as interim measures which requiring the cessation of a violation of rights, intellectual property rights holders consider that protection before state courts is faster and better. In cases of extreme urgency which can cause serious damage to one party, the state court can react quickly, while arbitration can not be constituted at that time. The State Court has its own coercive apparatus, while the arbitration must rely on the voluntary conduct of the parties.

The lack of arbitration is that there is a contractual nature and the arbitral tribunal has no mechanisms to force third parties to do any act or not. The arbitration tribunal must rely on voluntary adherence to orders from third parties.²⁰

The right holder may have the need to make the decision on the violation of his rights publicized. In this way, third parties are introduced to the injuries and can have a deterrent effect on them. Judgments from civil proceedings are public and can be published in the media. Arbitral decisions are secrets. It is necessary for both sides to agree to publish the arbitration decision, which is hard to expect from the loser in the proceedings.

3.3. The choice between ad hoc and institutional arbitration

Parties may choose to ad hoc or institutional arbitration when choosing an arbitration.

Ad hoc arbitration is formed to resolve a dispute, and after that hers function is exhausted. The advantage of ad hoc arbitration is that its formation, rules and organization is determined by the will of the parties and according to their needs. The disadvantage of such arbitrations is that for the purposes of resolving the only dispute, practical and administrative details such as the delivery of letters, the provision of adequate premises for hearings, etc. should be considered.²¹ Ad hoc arbitrations are vulnerable at the stage of constitution and are subject to sabotage by a party that does not want to constitute an arbitral tribunal. For this reason, the International Trade Law Commission (UNCITRAL) has adopted UNCITRAL Arbitration Rules²² adapted to ad hoc arbitration and may be contracted by the parties already in an arbitration agreement (arbitration clause) as the rules of procedure in their dispute. Ad hoc arbitrations are similar to resolving disputes in the field of intellectual property rights. The parties may constitute ad hoc arbitration and elect arbitrators who are experts in this field, regardless of their nationality. They can agree on the rules of procedure they

²⁰ *Ibid.*, 30.

²¹ Gašo Knežević, Vladimir Pavić, *Arbitraža i ADR*, Faculty of Law (Belgrade: University of Belgrade, 2009), 23.

²² See detailed: David D. Caron, Lee M. Caplan, *The UNCITRAL Arbitration Rules A Commentary, Second Edition* (Oxford: Oxford University Press, 2013).

want. They are most often contracted by UNCITRAL Arbitration Rules adapted to ad hoc arbitration. The problem with ad hoc arbitration is that there is no administration that will serve the arbitration tribunal, and the costs are not predetermined or predictable.

Institutional arbitration is represented by institutions providing arbitration services. They exist independently of the disputes arising, have their permanent arbitration rules, lists of arbitrators, premises and their own administration. Institutional arbitrations are in charge of correspondence with the parties, submit written documents and hand over the premises to the arbitrators in order to be able to conduct the procedure without delay. They charge for these services the price provided in their tariffs. There are general institutional arbitrations such as the International Arbitration Tribunal of the International Chamber of Commerce in Paris, the International Arbitration Association of the American Arbitration Association, the London International Arbitration Court, the International Commercial Arbitration Court of the Russian Federation Trade and Industry Chamber, the Chinese Economic and Trade Arbitration Commission, and dr. There are also specialized institutional arbitrations dealing only with certain types of disputes such as the London Association of Maritime Arbitrators, the Sports Arbitral Tribunal with headquarters in Lausanne, the WIPO Arbitration and Mediation Center, and others.²³ Among the institutional arbiters for resolving disputes in the field of intellectual property rights, the most important are the International Arbitration Tribunal of the International Chamber of Commerce in Paris, the International Center for the Dispute Resolution of the American Arbitration Association and the WIPO Arbitration and Mediation Center.

The International Arbitration Court of the Paris International Chamber of Commerce was founded in 1923 by Étienne Clémentel, who was the first president of the International Chamber of Commerce (ICC) and former French Finance Minister. The purpose of establishing this arbitration was to provide a forum for resolving business conflicts between international trading companies. So far, this arbitration institution has administered in more than 13,000 international arbitration cases involving parties and arbitrators from more than 100 countries.²⁴ The International Arbitration Tribunal of the International Chamber of Commerce in Paris has an impressive list of arbitrators, some of them are intellectual property rights experts. Certain number of cases before this arbitration institution concerned disputes in the field of intellectual property rights.

23 See more: Knežević, Pavić, *Arbitraža i ADR*, 24-25.

24 Marc Jonas Block, „The Benefits of Alternate Dispute Resolution for International Commercial and Intellectual Property Disputes”, 18-19.

The American Arbitration Association was established in 1926, based in New York with the aim of acting as an alternative dispute resolution forum. In 1996, the International Center for Dispute Resolution (ICRD) was established.²⁵ The ICRD has specific rules for dealing with intellectual property disputes. This applies in particular to patents where there is a Resolution on Supplementary Rules on Patent Disputes of 2006.

4. WIPO ARBITRATION AND MEDIATION CENTER

WIPO Arbitration and Mediation Center was established with the World Intellectual Property Organization (WIPO) in 1994, headquartered in Geneva, Switzerland, and since 2010 has an office at Maxwell Chambers in Singapore. It was established as an independent and non-profit international body with the purpose of offering private parties an alternative solution to international trade disputes. WIPO Center specializes in disputes in the field of technology and intellectual property rights, but disputes from other areas can also be brought before it.

WIPO Center helps the parties in the selection of arbitrators, mediators and experts from the Center's database containing more than 1,500 neutral experts²⁶ with specialized knowledge and experience in resolving disputes in the field of intellectual property rights.

WIPO Center is also the leading institution for implementing domain name or cybersquatting disputes under the Uniform Rules for Dispute Resolution on Internet Domain Names (UNRP) and WIPO Supplementary Rules.²⁷ According to the UNRP rules, only cases of classical cybersquatting can be solved, i.e. A small fide is a domain name registration that is identical or similar to the object of another's trademark. The UNRP rules prescribe three conditions that must be fulfilled in order for the arbitration panel to adopt a claim and order a transfer, i.e. re-registration or termination of the domain name registration:

- 1) the registered domain name must be identical to the object of the prosecutor's stamp or be similar to the extent that it can cause confusion and mislead Internet users;
- 2) it must be established that the defendant has no right or legitimate interest in using the name of the internet domain he has registered;

²⁵ *Ibid.*, 16.

²⁶ Information downloaded from the official WIPO site: WIPO Arbitration and Mediation Center, available at: <http://www.wipo.int/amc/en/center/background.html>, 29.11.2017.

²⁷ Christopher Boog, James Menz, „Arbitrating IP Disputes: the 2014 WIPO Arbitration Rules“, *Journal of Arbitration Studies*, Vol. 24, No. 3 (2014), 108.

3) it must be established that the defendant's domain name has been registered and used by a *male fide*.²⁸

This international arbitration institution also has its own special WIPO arbitration rules that were revised in 2014 and which enable the parties to the proceedings to be acquainted with the complete course of proceedings before an arbitrator by an individual or an arbitration panel, but at concluding an arbitration clause, if they have jurisdiction over this arbitration. These rules allow the arbitral tribunal wide discretion in the design of measures to protect confidential information.²⁹ Article 54. WIPO arbitration rules allow the parties to require that certain information be classified as confidential and that arbitration takes measures to protect such information by restricting access to certain individuals only.³⁰

WIPO Center commonly solves disputes in the following areas that include intellectual property rights: patents (about 30% of all cases), know-how and software licenses, franchise and distribution agreements, trademark agreements, distribution contracts, joint venture agreements, contracts R & D, technology transfer agreements, technology-sensitive contracts, mergers and acquisitions, including intellectual property rights, sports marketing agreements, release contracts, music and film.³¹

Most cases before the WIPO Center are international disputes, even over 70%. Of the patent-related disputes over 90%, they are international. The value of the dispute ranges from \$ 15,000 to \$ 1 billion.³²

WIPO Center services are available to everyone. They are used by multinational companies, research centers and even universities around the world. He, *inter alia*, cooperates with the national authorities responsible for the protection of intellectual property rights and, at their request, provides expert and administrative assistance.

28 Dušan Popović, „Deset godina primjene UNDP pravila: obrisi ujednačene prakse“, *Strani pravni život*, No. 3 (2011), 174. See Article 4 (a) of the UDRP Rules.

29 Christopher Boog, James, Menz, „Arbitrating IP Disputes: the 2014 WIPO Arbitration Rules“, 112.

30 Вид. Phillip Landolt, Alejandro Garcia, *Commentary on WIPO Arbitration Rules*, WIPO, (Geneva: 2017), 67-70.

31 Heike Wollgast, „WIPO alternative dispute resolution – saving time and money in IP disputes“, 33.

32 *Ibid.*, 33.

5. CONCLUSION

If we look at the right of intellectual property from an international perspective, we will notice that there is a division of states that create this right and those who reciprocate it. This division also coincides with the division of these countries into the level of economic development.³³ Developed countries are protecting their investments in every way. They also do this in a way that their companies avoid the application of national laws of the developing countries by negotiating international arbitration disputes.

One of the main reasons for the choice of arbitration is its secrecy. Confidential information and business secrets that follow intellectual property rights would lose value if disclosed to the public. For these reasons, court proceedings pose a problem for resolving these disputes.

Arbitrage costs are generally high. However, in combination with time, they may be less than court costs. Judicial proceedings, taking into account the first instance and second instance, usually last for a couple of years. During this period, many intellectual property rights can lose their value. For example, patent protection may expire and the right holder loses the sole right to commercial exploitation of his invention. In such situations, the damage caused to intellectual property rights holders may be far bigger than the cost of the arbitration proceeding.

Taking into account all the advantages and disadvantages of international arbitrations in intellectual property disputes, we conclude that the parties must evaluate from case to case whether international arbitration is a more favorable means for resolving possible future disputes or a dispute arising out of a court dispute. We prefer to give international arbitration if the parties have affiliations of different states, they want to keep the confidentiality of the dispute if they want a competent and neutral resolution of the dispute by experts in the field of intellectual property rights, and if the subject of the dispute is to be carried out in the territory of several states.

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³³ Slobodan Marković, *Pravo intelektualne svojine i informaciono društvo* (Belgrade: JP Službeni glasnik, 2014), 321.

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ПРЕДНОСТИ И НЕДОСТАЦИ МЕЂУНАРОДНИХ АРБИТРАЖА У СПОРОВИМА ИЗ ОБЛАСТИ ПРАВА ИНТЕЛЕКТУАЛНЕ СВОЈИНЕ

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Резиме: У раду аутор анализира предности и недостатке међународних арбитража у споровима чији су предмет права интелектуалне својине. Спорови из области права интелектуалне својине имају посебне карактеристике. У случају спора са међународним елементом долази до проблема са надлежностима државних судова због начела територијалности права интелектуалне својине. Титулар права мора да покрене судске поступке у свим државама појединачно, што доводи до одуговлачења поступака, умножавања трошкова и неуједначене судске праксе. Из ових разлога аутор анализира алтернативно рјешавање спорова путем арбитраже како би утврдио да ли је овај начин рјешавања спорова прихватљивији за стране од државних судова.

Аутор посебно обраћа пажњу на *WIPO* Центар за арбитражу и медијацију као сталну арбитражну институцију чија је превасходна дјелатност рјешавање спорова из области права интелектуалне својине.

Кључне ријечи: право интелектуалне својине, међународна арбитража, *WIPO* Центар за арбитражу и медијацију, *WIPO* арбитражна правила.

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