WTO Alternative Procedures to Resolve Industrial Property Disputes: French Law Perspectives

Mahmoud Ismail
Applied Sciences Private University, Amman, Jordan
m_turabi@asu.edu.jo

Abstract

Although the increase in global trade relations, undoubtedly offers prosperity and other benefits, it also brings with it various kinds of international commercial disputes. The reality is that countries need to build collaborations, reduce trade obstacles and always pursue new markets. Commercial disputes are currently arising more often in the field of industrial property, therefore, it is crucial to have rules that runs the movement of trade. This is quite the role of the Dispute Settlement System of the WTO and the other mechanisms that are covered by international trade agreements.

This research studies the impact of alternative dispute resolution for trade disputes wherein trade barriers were enacted for industrial property reasons. Such disputes have been directed through the WTO dispute settlement mechanisms, which contain solid mechanisms that are supposed to resolve disputes on commercial industrial property concerns. The research presents and explains the available WTO modes of alternative procedures. The focus of this research is to address the types of alternative means of resolving international commercial disputes.

Keywords: WTO, Arbitration, Mediation, Industrial property, International Commerce.

1 INTRODUCTION

The research deals with the application of alternative procedures for settling industrial property disputes in the international sphere, which are disputes that usually result from international commerce interactions, the alternative procedures also come in the commercial and international context, these two adjectives require an introductory interpretation, as the adjective "commercial", which follows the "alternative procedures", must not be interpreted narrowly as in national law, because in the international sphere, it extends to "all economic relations" (Hautot, 1992), in a more comprehensive context than the concept of trade confined to merchants in pure business, It is commercially considered “any international arbitration between enterprises over a dispute of an economic nature” (Giorgini, 2011), this is according to Fauchard (Fouchard, 1999), even if it is not in line with the known definition of a commercial transaction, in general, the use of the adjective "commercial" with the alternative international procedures serves in distinguishing the latter from international arbitration and mediation within the international political framework.

The wide claim of the term industrial property is mentioned in the Paris Convention. Industrial property covers a variety of types of which are stated here. These contains patents, industrial designs, trademarks, service marks, layout-designs of integrated circuits, commercial names and designations, geographical indications and protection against unfair competition.

A dispute must therefore have an economic nature in order for arbitration and mediation to become commercial, nor does the commerce nature of alternative procedures depend on the fact that considered disputes are of a commercial nature or on the commercial relationship between the parties (Meyer, 2002), so in this sense, most international commercial disputes are subject to international arbitration or mediation.

In the same context, the illustrative Interpretations of the “UNCITRAL Unified Law on International Commercial Arbitration” (Jarvin, 1989) extend the interpretation of the term "commercial" to "trade-related issues, whether contractual or not, and any contracts for the exchange of commodities, services, distribution, commercial representation or construction”.

By approaching the internationality of alternative procedures with the internationality of contracts, it is observed that the relation related to the existence of a foreign element (Fadaz, 2008), and by approaching the nature of disputed rights with alternative international procedures, we enter into the circle of international trade.

According to the World Trade Organization (WTO), global rules of the commercial transactions must be modelled with the aim of performing and facilitating international trade at the same time, an example, the preamble to the “TRIPS Agreement” expressly refers to “the need to frame the principles, rules and scopes of international trade and trade of counterfeit products”, where it became obligatory for the members of the (WTO) after the declaration of the "TRIPS Agreement", to amend their internal laws to comply with the "TRIPS Agreement", which means that it is possible to resort to the dispute settlement system of (WTO) in the event of international trade disputes (Schmidt-Szalewski, 2006), noting that the (WTO) is the international legal entity that replaced the General Agreement on Tariffs and Trade (GATT), in (1994), where it expanded its scope of application to include all international trade disputes.

Based on the foregoing and as a prelude to the following, it can be claimed that the integration between international commercial disputes and alternative procedures is more flexible in the international sphere, and has a rigid legal infrastructure, where in (1994), the World Intellectual Property Organization (WIPO) established a center for international arbitration and mediation, which is an international institution that provides specialized services in the field of alternative dispute resolution procedures in the fields of technology and industrial property.

The focus of this research is to address the types of alternative means of resolving international commercial disputes.

Bearing in mind, that patriotism and belonging to territories with sovereign borders were previously characteristic of trade disputes, but globalization and the opening of borders to the flow of goods and services developed the trans boundary global trade, highlighting the role of international trade dispute rights, so it became necessary to regulate the latter at the international level, as it is in national laws, as the first combination of industrial property rights and alternative international procedures is organized through the regulation of the commercial field in the "TRIPS Agreement", where this part of the agreement relates to the regulation of commercial activity resulting from the exploitation of industrial property rights, and it is noted that the "TRIPS Agreement" is the only agreement in (WTO), which the states are forced to sign it, if they were to accede the organization, and once a state had acceded the organization, it is under the obligation to provide minimum protection for industrial property, subject to sanctions, and to adopt the alternative dispute settlement procedures, whereas other than this agreement, other conventions under the (WIPO) have no binding status.

2 SUBORDINATION OF INDUSTRIAL PROPERTY ON THE WORLD TRADE ORGANIZATION'S APPROVED DISPUTE RESOLUTION SYSTEM

The convention of (WTO) establishment is the most complete multilateral convention on industrial property, and it defines arbitration and mediation as essential means of dispute resolution, the subjection of industrial property to the dispute resolution system of the (WTO) is based on the "TRIPS Agreement", which attempts to found a centralized international dispute resolution system, where Article (64.1) of the "TRIPS Agreement" provides that disputes between member states of the agreement can be resolved by arbitration, in accordance with Articles (XXILI) and (XXII) of the "GATT" Agreement of (1994), and Appendix No. (2) of the "TRIPS Agreement" stipulates that applications for reconciliation and recourse to alternative procedures must not be regarded as dispute instruments but as resolution instruments. France recognized the alternative procedures of the (WTO), as it ratified the Marrakesh Convention and amended its national laws to be in line with the convention, through the enactment of Law No. (102/94) dated (5/2/1994) (Galloux, 2003), and in a decision related to the patent dispute, the French Constitutional Council recognized that the dispute is subject to the rules of the (WTO) for dispute resolution and the need to monitor the compatibility of the internal laws of member states with (WTO) conventions (Décision Nº 99-422, 1999).
This decision took place on the occasion of Article (22- bis) of the French Finance and Social Security Law, which the Council considered inconsistent with France's international obligations, which was signed by the European Commission, and subsequently turned into National Law No. (96/1106) issued in France on (18/12/1996) to amend the Industrial Property Law in favor of the (WTO) conventions.

2.1 Resolution of Industrial Property Disputes through Traditional Alternative Procedures

The more international institutions flourish and expand, the more the importance of industrial property rights at the international level, as it is a direct relationship that leads to the parties' propensity to alternative means of dispute resolution, which takes into account within its system and the nature of the provided solutions the commercial considerations. Arbitration is an effective and required method, while some prefer mediation, as these two alternative methods here are the main elements in the function of the Arbitration and Mediation Center of (WIPO), as this center specializes in the resolution of commercial disputes arising out of

industrial property rights, such as the dispute arising from a patent exploitation license contract, Trademark, computer material production, distribution contract, franchise contract, coexistence contract, or Trademarks compatibility agreement, where any individual, company or enterprise of any nationality and wherever may reside may resort to the center, and lodge a complaint against any individual, enterprise or company of any nationality and wherever they may reside, and they may choose any law in the world in order to resolve the dispute, and although the function of the center carried out in a special litigation or reconciliation process governed by the contract law, it does not take place in an atmosphere of legal vacuum, as many legal systems overlap to determine the law applicable to the subject matter of the dispute, the applicable law to arbitration or mediation proceedings and the law applicable to arbitration or mediation agreements (Labgold, 2022).

Originally, the parties are free to choose the law applicable to the subject matter of the dispute, but if the parties do not agree on a specific law, the arbitral tribunal shall determine the applicable law as it deems appropriate, and it may also rule by principles of justice if the parties agree on this, and the law applicable to arbitration or mediation procedures means the law which will determine the arbitration ability of the subject matter of the dispute, the additional protection for the parties, the course of the arbitration or mediation process or the implementation of the arbitration award. The parties may choose the law applicable to the arbitration or mediation proceeding, but it is most probably the law applicable to the arbitration is the law of the country in which the arbitration takes place, so that when the parties choose the place of arbitration, they tacitly choose that country's law application to the arbitration process, if they choose Geneva, for example, then they are choosing the Swiss law, however, it is not inevitable that the law applicable to the arbitral proceedings will be the same as the law applicable to the subject matter of the dispute, as the Swiss arbitral tribunal can apply to the subject matter of the dispute the English law that the parties have agreed to apply to their relations in the event of a dispute, as for the (WIPO), the arbitration agreement is considered legally valid when it meets the conditions of form and subject set forth in the law applicable to the arbitration.

In considering the dispute, the arbitral tribunal at the arbitration center obtains its validity within the limits agreed upon by the parties to the arbitration agreement as a condition or as provided, and in return, the decision of the arbitral tribunal will be decisive, final and ready to be enforced, Article (38), paragraph (b) and (c), of (WIPO) Arbitration Rules contain the guidelines for the arbitral tribunal in performing its function, whereby the arbitral tribunal must respect the rules of balanced procedures, and can decide the validity of the arbitration agreement between the parties, the bottom line is, the internationality and neutrality of the (WIPO) arbitration center allows for the establishment of private system, relatively independent of national law. In practice, the determinants of national laws for the function of the center depend on the concept of each country towards the relationship with external arbitration, or rather international arbitration, as in France, the French judiciary recognizes the independence of arbitration awards issued by the center or other international centers from national law (CA de Paris, 1991).

2.2 Resolution of Industrial Property Disputes through Electronic Alternative Procedures

E-alternative procedures facilitate the resolution of intellectual property disputes, in particular for the vulnerable party in the relationship, which does not endure the prolonged procedures in more than one country, but the remote arbitration or mediation has its risks and disadvantages, so firstly, it must reassure the parties to the dispute to resolve it by remote arbitration or mediation, in terms of maintaining the confidentiality and integrity of information transmitted

online, and the seriousness and impartiality of remote proceedings, then the legal validity of e-alternative proceedings must be ensured in the light of intellectual property rules.

E-alternative procedures in the aspect of industrial property are related to international trade on the one hand, and on the other hand they are linked to the (WIPO) directives for the development, convergence and harmonization of national laws governing alternative procedures and protective means of industrial property rights, e-alternative procedures are the outcome of the development of the institutional activity of the world's arbitration and mediation centers, but they find their most important application in the Arbitration and Mediation Center of (WIPO), which will be the research model for studying the e-alternative procedures that have been developed as a method for resolving disputes through judicial institutions (Schultz, 2005).

In (1991), the use of the Internet moved from the Universities Academic Research activities to open-ended commercial efforts scope, but the idea of resolving disputes using remote communications methods was initiated in (1980) for mediation over telephone, initially, the Internet was a law-free zone of communication and interaction due the absence of Internet legislation, then the matter developed, and e-contracts began to emerge, and legislations have begun to attempt to regulate these contracts, and this was the starting point for the notion of online arbitration and mediation, noting that some e-alternative procedures have been excluded from the concept of arbitration, even if it is called arbitration, and in order to accurately define e-alternative procedures, it is necessary to distinguish them from the traditional methods.

Delving into the topic of e-alternative procedures, an interesting term will be noted, that is "Non-binding Arbitration" (Schweber, 1989), which is an arbitration procedure that does not have binding force as in the case of a traditional arbitration award, as well as the term “Conditionally Binding Arbitration”, which is that the parties to the dispute can acceptance or rejection within a specified period, and finally, the term “Non-binding Factual Arbitration”, which the parties resort to, in order to obtain a non-binding arbitration award, accordingly, e-arbitration has changed the concept of legal arbitration, which is usually binding (Cachard, 2002), this makes the concept of arbitration flexible, as it can be expanded and narrowed at the will of the parties to the dispute, but how is it correct to rely in defining a legal concept on the will of the public who are not specialists in law? "The concept of arbitration is now more diverse and its type is determined by the will of the parties" (Ndiaye, 2006) said writer "Nadiaye", it seems clear from her statement that she is in favour of changing the concept of arbitration, but her viewpoint was not based on jurisprudence evidence or judicial rulings, but rather on the services provided by e-alternative procedures, thus, those concerned in this matter had two options, either to endorse Ms. "Nadiaye's" viewpoint or to judge the futility of using traditional arbitration online!

The researcher does not agree with Ms. "Nadiaye's" opinion, and he believes that arbitration has one concept, which is the traditional concept that carries the characteristic of binding its parties when issuing its award, and appending an electronic adjective to it refers to the means, i.e. the means of communication, nothing more or less, knowing that in France, in order to consider the Center’s awards as international arbitration, the subject matter of the dispute must be related to international trade, it should be noted that e-arbitration is not in any way a judicial process, and cannot be compared to judicial procedures that some countries allow to be completed online, as e-arbitration is an automatic dispute resolution process, known as (Auto-regularisation) (Longworth, 2000), which occurs in industrial property disputes, and it is not

limited to holders of industrial property rights, but also includes rights users and commercial intermediaries (Poullet, 2002).

3 THE SUBORDINATION OF INDUSTRIAL PROPERTY DISPUTES ON MODERN DEVELOPED E-SYSTEMS

E-alternative procedures are traditional alternative means implemented through modern means of communication, which are mostly the Internet, e-mail, chat rooms, virtual halls, or video conferences, and if privacy and confidentiality are an advantage of alternative procedures over the traditional judiciary, e-communication almost loses this advantage, because online communication raises the issue of preserving the privacy of e-arbitration and e-mediation processes.

The institution conducting the arbitration or mediation bears the burden of maintaining the confidentiality of the arbitration and mediation processes from beginning to end, especially information exchanged and rewards issued, as there are many international centers that resolve disputes online, such as the (Virtual Judge), where this center performs online mediation to resolve disputes, most notably industrial property (Ruwet, 2003), where the center focuses on the disputes of Internet users with service providers, as these disputes were often related to industrial secrets, while the center refrained from resolving financial or accounting disputes, another example is (Cyber Tribunal), a center concerned with resolving e-disputes that were presented to the Research Center of the Faculty of Public Law at the University of Montreal in (1998), where the mechanism of the center's operation was to provide mediation to the parties to the dispute, and in the event that the parties did not agree to resolve the dispute, the center turned to arbitration, as the center focused its attention on e-commerce disputes, commercial competition, trademarks, and modern knowledge rights, but it avoided any intersection with the national or international public order, while the center ceased functioning in (1999), which paved the way for a new center, which is (Electronic Solutions), as this center is a Canadian institution that provides e-services in the field of resolving disputes related to domain names, where the center is distinguished by the (ICANN) recognition, which relied on it in implementing the dispute resolution mechanism submitted to it under the rules of the "Uniform Domain Name Dispute Resolution Policy –UDRP" , while in France there is the (IRIS), which is an institution for resolving disputes by e-alternative procedures methods, and it focuses on mediation.

3.1 The Distinguished Status of the Arbitration and Mediation Center of (WIPO)

The Arbitration and Mediation Center of (WIPO) is an integrated body with (WIPO), but it is somewhat independent, and seeks to protect industrial property rights at the international level, and so not only does it resolve industrial property disputes by mediation and arbitration, as Its services extend to the organization and registration of these rights, especially Patents, Trademarks, Designs and Models in states signatories to (WIPO) agreements, to avoid the duplication registration of such rights by more than one person. In the field of arbitration and mediation, the center offers four types of e-alternative procedures, namely: Mediation, Arbitration, Expedited Arbitration and Mixed Procedures (Arbitration and Mediation), which will be address respectively (Ferland, 2022).

E-Mediation at the (WIPO) Center: When parties to a dispute resort to mediation by the (WIPO) Center, they intend to use the center's industrial property mediation rules, the center handle the applications of mediation in disputes related to licensing contracts, trademark exploitation, patents, trademark compatibility, and distribution contracts...etc. Certainly,

resorting to the mediation of the (WIPO) Center must be mentioned in a clause in the contract, or in a subsequent agreement to the dispute, and this must be explicitly stated (Hollande and De Belfonds, 2002), where resorting to the center's mediation takes place quickly and at low costs (De Leval, 2002), and after approving the litigants' application for center mediation, the center appoints mediators who initiate contact the parties to the dispute, and if the parties agree on a solution, they shall sign a settlement contract.

E-Arbitration at the (WIPO) Center: The center renders a judgment in an arbitration case that is binding on all parties to the dispute, and enjoys the power of the res judicata, but it will not gain the implementation force until after approaching the National Court to request determination of the execution of arbitral award, the rules of e-arbitration procedures are freely set by the arbitrators, and they are not bound to apply a particular law, and it must not be forgotten that the arbitrators themselves were often selected by the parties to the dispute, where such commutatively in instruments between the arbitrators and the parties to the dispute leads to balance in the relationship, and despite what has been stated above, that arbitrators are not bound by particular laws, they are obligated in any case to respect the principles of ordinary judiciary, such as the principle of the right of defense, and the arbitrator has powers similar to those of the judge powers and his binding decisions recognized in the New York Convention on the Enforcement of Foreign Arbitral Awards of (1958).

Expedited Arbitration at the (WIPO) Center: It is an arbitration in the understandable sense, but its procedures are simpler, faster, and cheaper, and there is one arbitrator, not an arbitral tribunal, and the arbitrator must issue a decision no later than eight months after the commencement of the procedures, and in this arbitration, there is no hearing of the parties, but only the submission of files, and it is competent in small disputes involving minor rights.

The Mixed E-Procedure between Arbitration and Mediation: Here, the parties first resort to mediation, if the parties do not agree on a solution, they or one of them may transfer the dispute to arbitration, and one party's initiative to transfer the dispute from mediation to arbitration is binding on the other party, since from the outset it was accepted to enter into the mixed procedure.

3.2 Resolution of Industrial Property Disputes through (ICANN) Under (UDRP)

"ICANN" arbitration has been excluded from the traditional concept of arbitration, but has now been restored as an e-alternative method for resolving trademark disputes with domain name, via the "Uniform Dispute Resolution Policy", called (UDRP), the Uniform Policy is an innovative legal formation that differs from the traditional alternative procedures for arbitration and mediation, it is a mechanism that combines three forms of decisions-making (administrative, judicial and arbitral), and although the Uniform Policy is based on internal laws in its details and rules, it does not belong to both the formal and substantive conditions of any national law., it is a process of resolving disputes of an international and independent nature, and it does not even refer to the national trademark laws, although it the primary target of protection.

According to "Ms. Borev" and "Mr. Fouchu", the "UDRP" is "an international legal agreement on domain names, based on general principles with a legal formula that is difficult to enforce under a single law, but based on good faith and the legitimacy of custom", whereas, the primary objective of establishing (UDPR) of (ICANN) is to combat (cybersquatting), i.e. to register a domain name similar to trademark with the sole aim of reselling it to the real trademark holder (Fauchoux, and Beaurain, 2000), and except for the well-known trademark, trademarks enjoy protection within the country in which they are registered and do not extend to international protection, which means that (UDPR) provides trademark protection service in a territory originally devoid of national trademark protection coverage, as the Internet is global extension

in nature, and the provision of online protection provides the trademark with international protection, even though the trademark is not necessarily well-known, which is an enhancement of national trademark law. Many disputes arose due to the registration of the sub-extension (e.g.: .com), which is the international base for e-commerce practices, and to resolve these and other disputes, and to prevent repeated infringements of trademarks in the Internet domain, (WIPO) established the (UDRP) in (1999), based on the report and recommendation of (ICANN).

When (ICANN) decides through its specialists in the dispute submitted to it, it publishes its decision online, and the resolution of the dispute ends in this case with a binding decision for the parties to the dispute, provided that the decision does not exceed three possibilities.

The first is to reject the complainant's application, and the second is to cancel the domain name and return it from the private zone to the free zone and it becomes available for registration by any other person, or transfer of a domain registration that is deemed infringer to the trademark, from the infringer's record to the aggrieved trademark holder, also ,ordinary judiciary is certainly the alternative course to be resorted to in such kind of disputes, but in this case, the national law on industrial property or trade and illegal competition will be applied by the national court, and through a prompt reading of Article (4), paragraph (A-A), it is noted that (ICANN) requires that the complainant against the domain name be the owner of a trademark, service mark or industry in order to consider the complaint under the (UDPR), however, the special court of (ICANN) did not stop at this interpretation, as in (22/5/2000) in the lawsuit of the domain name "jeannettewinterson.com", the domain name "jeannettewinterson.net", and the domain name "jeannettewinterson.org", where in the lawsuit, the British writer "jeannette winterson", whose books were distributed in (21) countries, demanded that the aforementioned domain names be transferred to him and removed from the name “Mrs. jannette winterson", which is an ordinary lady and is not widely known, while according to, "Mr. David Percans", the expert who considered the dispute, he sensed a minimum of notoriety and justified need to provide the lady's name in the sub-extension (com, net. and org), although she had no direct right of marketing as with the British writer which bears the same name, the expert ruled not to transfer the domain names and to keep the name of the lady who registered first.

Taking advantage of the narrative of the above lawsuit is not in the (ICANN) expert's decision, but taking advantage of the fact that the (ICANN) accepted the British writer to file his complaint, and for the court to consider and decide without the author being a trademark holder, and accordingly, Article 4, paragraph (A-A) of the (UDPR) must be broadly interpreted to cover all industrial property rights.

Litigation procedures with (ICANN) should be conducted as follows (Lastenouse, 2001): The trademark right holder, for example, submits the application to (ICANN-accredited) E-Dispute Resolution Center, this complaint is then sent to (ICANN) via e-mail, where it must explain what the domain name similar to, i.e. the trademark and legitimate interest associated with the disputed domain name and where the bad faith lies, the center then contacts the defendant to provide his responses to the complaint and consider the three elements mentioned in the complaint, which are suspicion, legitimate interest, and bad faith, and when the (ICANN) decision is issued, the parties are notified online, and in the event that the parties do not seek a decision from a national court to reverse (ICANN 's) decision within (10) days of the date of (ICANN 's) decision, the decision becomes final and not subject to appeal, thus, the registration

unit that has registered the complainant against whom the decision has been issued , the (ICANN) will instructed it to transfer or cancel his domain name.

ICANN's dispute resolution method is a unique case in the field of the spontaneous dispute resolution, and it controls the power to use the granted right, in terms of retaining it or deregister it (Majone, 1996), as it frees the single will and restricts or neutralizes the judicial authority, the spontaneous settlement is the ability of the operating system to resolve its defects, flaws, and disputes without the intervention of others, and although arbitration (ICANN) is close to the concept of spontaneous arbitration, judiciary (CA Paris, 2004) and jurisprudence (Cruquenaire, 2001) are stable in not being regarded arbitration, so resorting to (ICANN) arbitration does not prevent access to judiciary , as in the case of ordinary arbitration, let alone the different operating mechanism. It should be noted that (ICANN's) decisions are relatively binding, where they are binding on (Registrar), who has the technique to remove the disputed domain name from the registry's (Whois) database (Cruquenaire, 2002).

4. CONCLUSION

It is broadly recognized that industrial property disputes admit referring to international alternative disputes resolutions.

The wide claim of the term industrial property is mentioned in the Paris Convention. Industrial property covers a variety of types of which are stated here. These contains patents, industrial designs, trademarks, service marks, layout-designs of integrated circuits, commercial names and designations, geographical indications and protection against unfair competition.

The WTO mechanism of disputes settlement modes provide dispute resolution services in commerce conflicts imposed on industrial property concerns. WTO alternative modes offer procedures that are designed to deliver a whole dispute resolution framework for parties to a commercial dispute.

Based on the previous, it can be claimed that the integration between international commercial disputes and alternative procedures is more flexible in the international sphere, and has a rigid legal infrastructure, where in (1994), the World Intellectual Property Organization (WIPO) established a center for international arbitration and mediation, which is an international institution that provides specialized services in the field of alternative dispute resolution procedures in the fields of technology and industrial property.

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