The Use of Alternative Dispute Resolutions in Intellectual Property Disputes

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Abstract

This essay explores how and why the use of alternative dispute resolution (ADR) mechanisms in intellectual property (IP) disputes have become more popular with putting an emphasis on the role of World Intellectual Property Organization (WIPO). The research also analyses the frequently benefited methods of ADR and compares and contrasts the benefits and harms of ADR mechanisms. In order to provide a materialized investigation, this essay discusses the use of alternative dispute resolution in specific intellectual property fields with examples of IP cases in various fields of business with final awards issued by the WIPO. Lastly, the paper presents recent legal developments regarding to the use of ADR mechanisms in Turkey via portraying amendments to the Turkish legal regulations.

Keywords: intellectual property, alternative dispute resolution (ADR), World Intellectual Property Organization (WIPO), arbitration, expedited arbitration, mediation

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ADR	Alternative Dispute Resolution
CDR	Commercial Dispute Resolution
EU	the European Union
ICT	Information and communication technology
IFPMA	International Federation of Pharmaceutical Manufacturers and Associations
IP	Intellectual property
IPO	Intellectual Property Office
IT	Information technology
ITC	International Trade Commission
JAMS	An institution providing alternative dispute resolutions
LESI	Licensing Executives Society International
NYSBA	New York State Bar Association
UNCITRAL Rules	United Nations Commission on International Trade Law Rules
WIPO	World Intellectual Property Organization

I. INTRODUCTION

Alternative dispute resolution (ADR) predicates a vast number of dispute resolution processes where conflicting parties endeavor resolving the legal controversy with the help of a neutral third party. Use of ADR in intellectual property (IP) disputes refer to the use of these mechanisms in the IP related disputes such as trademarks, patents, copyright protection or information and communication technology. According to a report of World Intellectual Property Organization (WIPO), which is the most well-known and pioneering institution in IP-related disputes, cases in which ADR methods are benefited in the field of IP law constitutes 93% of total disputes have arisen out of listed subject matter[1]. At this point, it is essential to demonstrate that alternative dispute resolution does not describe a single approach or method, but comprises many practices for settling disputes between parties[2]. Therefore, methods namely negotiation, early neutral evaluation, mediation, arbitration, online settlement procedures, expedited arbitration, expert determination and many others, where usually an objective third party settles a dispute can be perceived as an ADR. However, ADR methods may differentiate as binding and consensual, where binding methods result in mandatory awards for parties and consensual methods allow shaping of agreement and require joint approval of parties to enter in force[3]. Since ADR mechanisms portray a different nature of remedy than court litigation and has become more popular in IP-related disputes in recent years, this change should be analyzed in the view of alteration in the legal regulation and economic transactions around the world.

In the extent of this research paper, the utilization of alternative dispute resolutions in the intellectual property will be investigated considering the nature of intellectual property and alternative dispute resolutions, change in the preference of dispute resolution systems in IP disputes, the developments with regard to formation of institutionalized private resolution centers, the applicability of specific alternative dispute resolutions to intellectual property, advantages and disadvantages of ADRs for intellectual property conflicts, the use of ADR mechanisms in specific fields of business and legal status of Turkish regulation in the scope of the preference of ADR mechanisms.

II. AN EMPIRICAL ANALYSIS ON THE POPULARIZATION OF ADR

The utilization of private methods of dispute resolution of intellectual property disputes rather than public national litigation has been argumentative plane of focus as private mechanisms have been preferred more by the parties compared to the past. Adding a circle of ADR methods in breakdown of IP disputes has become an ordinary frame of mind in the era of digitalization and globalization. Considering that there is none ensured consensus on whether ADRs or national litigation systems are the most legally effective and efficient

[1] World Intellectual Property Organization, "*Resolving IP and Technology Disputes Through WIPO ADR – Getting back to business*", https://www.wipo.int/edocs/pubdocs/en/wipo_pub_799_2016.pdf, 2016
[2] Scott H. BLACKMAN; Rebecca M. MCNEILL, "*Alternative Dispute Resolution in Commercial Intellectual Property Disputes",* The American University Law Review Vol:49, p.1709-1733, 1998
[3] *Id.* p.1711

pathway, nature and influence of this emerging remedy is subject to research and analysis. In order to achieve a comprehensive research, character and definition of ADRs should be analyzed in detail demonstrating the reasoning behind the frequent use of ADRs.

Although refraining from national litigation is referred as an "alternative" track, methods which are listed above became the primer election with the development of technology and disputes arising in the international scope. This sudden change is an element of surprise in the legal perspective considering the static entity of law and jurisdiction systems. One of the main grounds for such a change can be expounded with the territoriality of intellectual property rights. Despite the fact that IP disputes burst in international extent, efforts of preventing the violation and counterfeiting of those rights are governed by laws of individual countries, which are commonly formulated under numerous multilateral and bilateral treaties among and between the participant countries such as Paris Convention for the Protection of Industrial Property, Patent Cooperation Treaty or Berne Convention for the Protection of Literary and Artistic Works. As if the disengaged and dissipated nature of IP protection is not complicated enough with the possibly conflicting and wide range in the source of legal norms, the countries are inclined to designate their stand according to their location in the fierce competition of intellectual inventions. Since most copyright protection is determined under the domestic laws of various nations rather than by treaty[4], the scope of protection alters between industrialized and industrializing nations. Patent and other intellectual property protection is significantly territorial and receiving a patent or most types of protection is not applicable in other countries[5]. Obtaining an international protection requires a serious cost and effort because national laws of every country recognized intellectual property in changing conditions and content. Concordantly, industrializing nations are not willing to protect intellectual property rights at equal level to industrialized countries in order to prevent the exploitation of their economies via industrialized nations' companies. According to a study completed in 1986 by the International Trade Commission (ITC) inadequate intellectual property caused a loss of $23.8 billion to the U.S companies[6]. When the development in the borderless commercial transactions and invention of IP-related goods is taken into consideration, it can be observed that insufficient coverage of intellectual property enables pirating local businesses survive via preventing domination of economically powerful licensors and provides highly attractive benefits for IP pirates and consuming nations[7]. Such aware and distinct deficiency in IP regulations can be evaluated as the most cost-effective manner for a developing country via deriving any benefits from inventions without the shield of restraints, trademark or patents[8] but also creates a huge difference of national perspective regarding protection of goods in international identity. Therefore, the popularization of ADR mechanisms in IP-related dispute is not an outlier twist since

[4] Margaret A.BOULWARE et al., *An Overview of Intellectual Property Rights Abroad,* Houston Journal of International Law Vol:16 No:3, p.441-459, 1994
[5] *Id.* at 459.
[6] Camille A. LATURNO, *International Arbitration of the Creative: A Look at the World Intellectual Property Organization's New Arbitration Rules,* Global Business & Development Law Journal Vol:9, p.356-390, 1996
[7] Marshall A. LEAFFER, Protecting *United States Intellectual Property Abroad: Toward a New Multilateralism,* Iowa Law Review Vol:76 No:5, p.273-306 (1991).
[8] A. Samuel ODDI, *The International Patent System and Third World Development: Reality or Myth,* Duke Law Journal Vol.1987 No:5, p.831-878, 1987

territoriality of these rights creates an unreliable standard deviation in the protection of intellectual goods.

Another reason in the proliferation of ADR mechanism is related to developments in the applicability of international arbitral awards rather than nature of intellectual property rights or disputes. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, or commonly referred as the New York Convention, is a significant multilateral legal documents enabling enforcement of awards in the IP-related dispute resolutions efficiently. Article I of the Convention procures that the recognition and enforcement of arbitral awards made in the territory of a State other than the State, where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. Even though the New York Convention was signed in 1958 and entered into force in 1959, its impact needed to mature in the course of time with the increment of transnational IP disputes and the number of parties to the Convention. Furthermore, the Convention makes it possible for states to initiate the reciprocity principle meaning that a contracting state may refrain from implementing the requirements if the recognition and enforcement of awards are not done in the territory of another state. As noted above, national litigation systems are heavily confined to the borders and interests of the nations, but used to be the sole option in terms of enforceability before it became usual for two parties from different nations recognizing and enforcing foreign arbitral awards. Increasing number of contracting states and reciprocity clause turned arbitral awards into trustworthy legal pathways rather than vain attempt, eliminated the handicaps of national jurisdictions and offered a straightforward method of enforcing a foreign judgment. At the present time, 166 countries are contracting states of the New York Convention[9] with mostly accession and the membership trend inclined significantly with the development of technological inventions of intellectually-protected goods and cross-border commercial transactions. When the signatories of the Convention is checked over, it can be seen that countries that are advanced intellectual property producers, such as the U.S, China, Japan, Germany and many others[10], have already ratified the recognition and enforcement of foreign arbitral awards paving the way for more frequent employment of arbitration in the field of intellectual property. Therefore, it can be stated that enabling the enforcement of awards of private methods of dispute resolution has been a substantial milestone in the popularization of ADRs, and this development should not be kept irrelevant to the analysis of ADR mechanisms in the intellectual property law.

III. INTERNATIONAL ORGANIZATION OF INTELLECTUAL PROPERTY DISPUTES IN PRIVATE MECHANISMS

When it comes to ADR mechanisms, one of the toughest challenges to overcome is providing a worldwide coherence of the protection of intellectual property with states that have a variety of interests and approaches regarding to the notion of intellectual property. As

[9] List of contracting states with the dates of ratification or accession can be viewed at the "http://www.newyorkconvention.org/list+of+contracting+states"

[10] See https://www.wipo.int/edocs/infogdocs/en/ipfactsandfigures2019/ for the countries who composed most intellectually protectable goods in terms of patents and utility models, trademarks and industrial designs in 2019.

it has been discussed, states are very likely to have their own stand depending on their acquisition from intellectual property. However, without creating a credible and unbiased atmosphere, it would be impossible to convince litigants to opt for ADR rather than national litigation since the former one was emerging and the latter was familiar to the parties with its rooted legal tradition. Hence, investigating international organization of ADR mechanisms in IP law is critical to comprehend the existing *status quo* between ADR and national litigation. In this regard, it would be impossible to describe every institution where ADR methods for IP related disputes are taken care of since there are lots of centers operating at the local or global level, such as JAMS or CPR. Nevertheless, one specific institution plays a key role of the international organization of the intellectual property disputes and its field of application is worldwide.

A. World Intellectual Property Organization (WIPO)

WIPO is the only self-funding UN specialized agency which is established in 1967 with the WIPO Convention, and aims to create a cooperation of IP rules and policies around the world via fora by providing cross-border services regarding to registration and protection of IP norms. The institution enters into almost every aspect of relations in the scope of intellectual property but main functions of the institution can be summarized as creating uniform regulations by administrating treaties and finding solutions via ADRs for international IP disputes. At the present time, WIPO has 193 member states leading to an international forum on the IP matters[11].

As it has been demonstrated earlier, multinational structure of IP interferes with territoriality of intellectual property rights and interests of nations. In this aspect, creating an international cooperation at least in the fundamental provisions of intellectual property is vital for eliminating the dangers of provisions of IP-related national regulations. Otherwise, it would be impossible to generate a system that protects effort and creativity of inventors and provides enforcement, if necessary, in a world-embracing manner. Within this context, there are currently 26 WIPO-Administrated treaties[12] about IP protection, global protection system and classification of IP rights enabling countries to meet on a basic common ground in terms of comprehending intellectual property. These treaties include famous and fundamental regulations such as WIPO Copyright Treaty, Berne Convention, Patent Cooperation Treaty and Strasbourg Agreement. When it is kept in mind that WIPO has almost complete governance on the produced intellectual property goods with its 193 members, guiding countries to regulate their national legislation in accordance to international fundamental cooperation was a vital achievement of the institution. As the member countries ratified the administrated treaties, the WIPO paved the way for the unification of IP norms, at least in the scope of backbone norms and prevented a probable turmoil among its member states. When these 26 treaties are investigated, it could be perceived that they have tendency of defining and understanding the basics of IP norms and forming the required atmosphere for a forum for

[11] See https://www.wipo.int/about-wipo/en/ for more information regarding to general and internal structure of the WIPO.

[12] See https://www.wipo.int/treaties/en/ for the whole list of WIPO-Administrated treaties that are currently in force.

resolving legal controversies. Moreover, WIPO carries out cooperation with national intellectual property offices to ensure that general approach around the world stays on the intended track. In this regard, WIPO Arbitration and Mediation Center (WIPO Center) was founded in 1994 and another office was constituted in Singapore in 2010 in order to form a bridge of cooperation among the intellectual property offices from different countries[13]. WIPO Center administers legal disputes either routed by national courts or by other adjudicatory bodies, mainly intellectual property and copyright offices (IPOs). At the present time, WIPO has strong bonds with some IPOs, which could be perceived as centers of such intellectual property goods, such as Germany, Republic of South Korea, China and the U.S.[14]. In this regard, WIPO has played an irreplaceable role in both building and maintaining a common ground in intellectual property regulations around the world as it administered fundamental principles and staying in touch with national IPOs.

Providing services for legal remedies from the registration of the IP norms to the issuing final award is also one of the main interests of the WIPO. WIPO Center is the competent body for constituting legal remedy and ensures that via the options of mediation, arbitration, expedited arbitration, expert determination or good offices request fillings. Since methods of ADRs will be analyzed under a different chapter, here only basic listing of those methods will be given to imply the scope of private dispute resolution mechanism of the WIPO Center. However, as a new term, Good Offices alludes to free of charge procedural assistance of the Center regarding IP or technology related disputes in order to provide conflicting parties an opportunity of either direct settlement or submission of WIPO-Administered resolution process[15]. In recent years, there has been a global trend of WIPO ADR mechanisms as a way for dispute resolution as the number of filled requests for listed pathways more than quadrupled from 40 fillings in 2010 to 179 fillings in 2019[16]. In addition, starting from its foundation in 1994, WIPO Center has played administrative role in more than 700 mediation, arbitration and expert determination cases and over 650 good offices requests[17] with its adequate technical and labour force for issuing both procedural and substantive assistance to handle wide range of IP disputes. In addition to its widespread use and expertise, WIPO has also secured its sole position as an authority via putting an extensive effort for promoting the use of ADRs. Such efforts may be exemplified by guidance documents procured by the Center in recent years, namely Guide on Alternative Dispute Resolution for Intellectual Property Offices and Courts and WIPO Mediation Pledge for IP and Technology Disputes[18]. Considering that the latter has already intrigued more than 200

[13] See https://www.wipo.int/amc/en/center/background.html for background and detailed mission of WIPO Arbitration and Mediation Center.
[14] See https://www.wipo.int/amc/en/clauses/national_court.html for the current collaboration of WIPO Center with national courts and see https://www.wipo.int/amc/en/center/specific-sectors/ipoffices/ for the current collaboration of WIPO Center with IP Offices.
[15] See https://www.wipo.int/amc/en/goodoffices/ for the detailed information on the scope of practical use of good offices.
[16] See https://www.wipo.int/amc/en/center/caseload.html for the elaborated review of the caseload of WIPO Center.
[17] *Id*. https://www.wipo.int/amc/en/center/caseload.html
[18] Leandro TOSCANO; Oscar SUAREZ, *An Expending Role for IP Offices in Alternative Dispute Resolution,* Retrieved from https://www.wipo.int/wipo_magazine/en/2019/01/article_0006.html, February 2019

signatories from over 70 countries in such a short time of period[19], WIPO expanded its scale of contributing to the use of alternative dispute resolution mechanisms as a respectable organization.

In this sense, spread in the employment of ADRs in IP disputes should be analyzed in the perspective of not only the unlike approach of nations to IP norms but also the global institutionalization of private legal remedy options such as IPOs, global arbitration centers and especially the WIPO. As these institutions are regulated by respectable and globally-operating WIPO via cooperation and administration of fundamental legal documents, going for ADR lured parties experiencing IP disputes since it offered preferable advantages over national litigation. Thus, it would be a huge mistake of an extensive analysis if roles of private institutions are precluded while perusing the ADR mechanisms in intellectual property law.

IV. METHODS OF ADR

At this point of the paper, it would be beneficial to discuss the frequently practiced methods of ADR in order to embody the impact of those methods in intellectual property. Regarding the ADR mechanisms, it can be stated that they do not describe a single approach or method, but comprise of multiple choice practices for settling IP related disputes in the situation of clash of interests[20]. Therefore, although such methods can be named according to their distinctive features, there can be a vast number of private mechanisms as some of those listed above. However, some of these methods have been preferred more than the others and became the common methods of ADR, namely arbitration, expedited arbitration, mediation and expert determination. Reliable and favored IP dispute-resolving institutions, especially the WIPO, also benefits these methods, so this paper will only discuss selected number of dispute resolution methods.

A. Arbitration

Arbitration is a consensual private dispute resolution procedure where parties opt out court litigation and prefer arbitrator/s who will award a binding decision. Parties may choose arbitration as a clause in their contractual agreement or an existing dispute can be referred to arbitration by means of a submission agreement as well[21]. Furthermore, parties may split the jurisdictional power in the U.S between arbitration and court litigation via disempowering power of arbitral tribunal for certain types of disputes in the U.S, which happened in an interesting IP-related decision (*Oracle America Inc v. Myriad Group)* of the Court of Appeal[22]. With this decision, the point of how an arbitral tribunal can prevail court litigation

[19] *Id*, https://www.wipo.int/wipo_magazine/en/2019/01/article_0006.html

[20] William A. FINKELSTEIN, *ADR in Trademark & Unfair Competition Disputes : A Practitioner's Guide*, CPR/INTA/ 1994

[21] See https://www.wipo.int/amc/en/arbitration/what-is-arb.html for WIPO's description of arbitration as an ADR.

[22] Jacques DE WERRA, *Risks of IP carve-out arbitration clauses*, Journal of Intellectual Property Law & Practice Vol:9 No:3, p.184-185, 2014. Comprehensive legal analysis of the court decision may be found in the journal.

is demonstrated as the Court of Appeal reversed and held that arbitral tribunals can rule on their own jurisdiction as reflected in Art (23) of the UNCITRAL Rules. Therefore, arbitration as an ADR can be preponderant over national courts on the subjects related to their own jurisdiction. Furthermore, arbitration became a necessity in the legal world in terms of IP-related disputes resulting in the foundation of WIPO Arbitration Center in 1994. With this foundation WIPO regulated its own Guide to WIPO Arbitration targeting consistency and predictability of its awards[23]. With a declared report in 2019, it was announced that WIPO Arbitration has a 33% of settlement rate disputes amounting between 15.000 to 1 billion USD[24]. An example case to materialize a process of WIPO Arbitration can be given between a European inventor holding patents in Austrialia, Europe, the U.S. and Canada and an Asian company licensee of patent rights and know-how[25]. The parties included a three-member tribunal WIPO Arbitration clause in their agreement and disagreed on the payment of the renewal fees of the patents. After the Asian company terminated the contract, WIPO appointed three arbitrators with suitable language skills and expertise with the application of European investor for arbitration. After evidentiary exchanges were carried on, arbitral tribunal issued an award 14 months after the commencement of the arbitration. This very short summary of the case portrays the suitability and impact of arbitration in an IP-related discussion via putting experts with proper talents. Hence, it should be noted that arbitration can have a significant place in dispute resolution process, even in the degree of prevailing court litigation and can be a better option depending on the parties and nature of the dispute.

B. Expedited Arbitration

Expedited arbitration is an incipient alternative dispute resolution and is designed by the WIPO. It is mainly another form of arbitration which is completed in a shorter duration and less cost. Expedited arbitration rules are regulated under WIPO Expedited Arbitration Rules after slight modifications to arbitration rules. Mainly, a regular WIPO Arbitration is formed with the steps of request for arbitration, answer to request for arbitration, appointment of arbitrators, statement of claim, statement of defense, further written statements and witness statements, hearings, closure of proceedings and final award. These steps are reduced to request for arbitration and statement of claim, answer to request for arbitration and statement of defense, appointment of a sole arbitrator, hearing, closure of proceedings and final award. The alteration is done via one exchange of pleadings, shorter time limits, sole arbitrator, one hearing and reduced fees. With a case between a European company and an Asian manufacturer, a sole arbitrator appointed by WIPO issued a final award only six months after the commencement of the proceedings[26] depicting the difference between expedited arbitration and expedited arbitration.

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[23] See https://www.wipo.int/edocs/pubdocs/en/wipo_pub_919_2020.pdf for the content of the guide.
[24] See https://www.wipo.int/amc/en/center/caseload.html.
[25] Parties' names were not declared due to the principle of confidentiality. See https://www.wipo.int/amc/en/arbitration/case-example.html A9 case example for the summary of the case.
[26] See https://www.wipo.int/amc/en/arbitration/case-example.html for the expedited arbitration process. Names of the parties were kept confidential.

C. Mediation

Mediation is an alternative dispute resolution in which a neutral intermediary assists parties for reaching a settlement. This process is "party-centered" and a mediator is not a binding decision-maker whose decisions can be enforced. Therefore, it is consensual and interest-based method of dispute resolution. Unlike arbitration, mediation has not been an option that pops into mind when the issue is alternative dispute resolution. Although it is known as less popular, the practice signifies that scope of mediation stepped out of the bounds of family law matters and it is acceleratingly applied to IP-related commercial disputes[27]. Similar to other ADR methods, WIPO also has its own Mediation Rules and carries on the process accordingly[28]. A standard mediation begins with the request of mediation, continues with the steps of appointment of the mediator, initial contacts between the mediator and the parties, first and subsequent, if needed, meetings and conclusion. In this sense, mediation has shown a greater success than arbitration in terms of settlement based on a report of WIPO expounded in 2016. According to the WIPO report, settlement rates of WIPO mediation in 2016 was 70% while it was 40% for WIPO Arbitration at the same year[29]. Therefore, mediation can be perceived as an effective ADR mechanism with a great potential for the IP-related disputes as it provides direct and solution-oriented communication between parties.

D. Expert Determination

Expert determination is another consensual and confidential dispute resolution mechanism where parties choose an expert or experts in the field of dispute and are bound with the determination of the expert(s) unless otherwise is agreed. This method is more informal and expeditious than broader processes like arbitration[30]. WIPO has its own regulated rules for expert determination similar to other procedures. Accordingly, the principal steps in this method are request for expert determination, answer to request for expert determination, appointment of expert, description of the matter by the expert, further submission(s) and determination.

When the nature and development of these alternative dispute resolutions are investigated, their applicability to highly scientific, technical and detailed IP-related disputes is in broad scope. Although each method may differentiate from each other at some points, all of them ensure that parties can receive the legal guidance according to their interest at shorter time with fewer costs. In this regard, the convenience of explained ADR methods bring no surprise that more and more ADR is preferred against national litigation over time and their adaptation for the evolving IP disputes can be harmonized faster than the nation's law procedures. At this point, the question on whether ADRs are inclined to resolve IP disputes

[27] Daniel GIRSBERGER, *International Arbitration: Comparative and Swiss Perspectives,* Nomos Verlagsgesellschaft; 3rd edition, p.43, 2016

[28] See https://www.wipo.int/amc/en/mediation/rules/ for the content of the WIPO Mediation Rules.

[29] WIPO ADR, *Resolving IP and Technology Disputes Through WIPO ADR – Getting back to business*, Retrieved from https://www.wipo.int/amc/en/mediation/rules/

[30] See https://www.wipo.int/amc/en/expert-determination/what-is-exp.html WIPO's understanding of expert determination

emerges. Before conducting any judgment, the advantages and disadvantages of ADR mechanism against national litigation should be analyzed.

V. BENEFITS and HARMS of ADR MECHANISMS

While the popularization of the use of ADR mechanisms is an undeniable fact in recent years, Since IP disputes are idiosyncratic by its nature with its wide range of spectrum, including plenty of economic and moral rights that can be perceived variably depending on the *lex loci protectionis,* the examination of ADRs in IP law should be carried out beyond a simple overview of ADR mechanisms. Under this chapter, this discussion will be held from a comprehensive point of view via comparing both pros and cons of ADRs as it is used in the intellectual property disputes mainly in Europe, but also worldwide.

A. Benefits of ADR in IP Disputes

With regard to growing demand of parties' will for ADR, many claims that this method serves better than national jurisdiction system as it coheres with the multinational nature of ADR disputes, procures faster remedies and ensures confidentiality.

1. Multinational Structure of IP Disputes

ADR methods are more convenient for the nature of IP disputes rather than national litigation systems, which are established to be applied in the borders of a state or are planned to be a solution between parties belonging different nationality under specific or pre-ruled circumstances. Concordantly, the matter in dispute in IP cases most of the time occurs between parties who are not experts of other party's applicable law or such disputes are not pre-designed to occur. In this context, any kind of dispute leads to a turmoil as it results in examination of varying law regulations. Similarly, a WIPO report in 2016 notifies that over 70 percent of ADR disputes are international in scope[31]. Furthermore, considering that IP disputes emerges between international companies that are offering service or technology-based products to its transnational customers, the parties of dispute do not intersect in the common ground of nationality but IP-protected notion. In this sense, an arbitral tribunal offers a single forum in which both parties feel themselves in their comfort zone almost the same via annihilating the influence of national interests on the court decisions and the risks of unenforceability of court judgments in a different country. Within this scope, it would not be mistaken to state that in an economic order, where capital and trade already ignore national boundaries, international arbitral practice broadens traditional nature of law via creating a-national approaches arising from borderless IP-disputes[32]. Hence, bringing the parties together at a neutral point is in accordance with the nature of IP disputes, which surface on a global aspect.

[31] Heike WOLLGAST, *WIPO alternative dispute resolution – saving time and money in IP disputes,* WIPO Magazine, Special Issue 11/2016.
[32] Camille JURAS, *International Intellectual Property Disputes and Arbitration: A Comparative Analysis of American, European and International Approach,* Library and Archives Canada, p.13, 2003

2. Cost

One of the main privileges of the parties who are opting for ADR mechanisms is the knowable and predictable costs of the resolution process. Rather than, financing an IP-dispute according to general norms of a national legislation, fees charged in arbitration or expedited arbitration in WIPO are based mainly on the circumstances of the dispute[33]. The institution has a fixed schedule of fees and costs providing the parties the calculation of cost of proceedings. In addition to that costs in private resolution systems are very likely to be lower than national litigation of any country. Therefore, providing less legal costs for parties suffering from disputes procures an impactful advantage to ADRs over public IP-dispute resolutions. Similarly, according to a survey carried out by WIPO, low and pre-determinable costs of ADR were the main priority in the choice of dispute resolution clause of the parties of an ADR[34].

3. Faster Remedy for Parties

In a world in which strong commercial competition among international companies takes place fiercely and hereby a need of prompt legal protection by them is demanded more and more; duration of time required for an IP dispute resolution is crucial. As it was once noted by former president of Center for Public Resources (CPR), James F. Henry, "in an era when product lives are measured in months and litigation is measured in decades"[35], a long and tiresome litigation process does not serve interest of the parties considering that justice delayed is justice denied. Similarly, McConnaughay states that extended disruption of business in the public court adjudication may cause the risk of disabling the use of product in the fields such as computer software, microelectronics patent or a biotech product[36]. The ADR mechanisms mediate in abridgment of duration of a lawsuit via decreasing the number of bodies that feature on decision-making process. In a typical IP court decision, lawyers, experts, witnesses, plaintiffs, defendant and judge try to finalize a court decision in a law system that is usually buried under heavy case workload. However, ADR institutions decrease the acting bodies by using expert arbitrators instead of judges and experts. Unlike the courts, the ADR institutions such as WIPO, CDR or Unified Patent Court[37], consist of arbitrators who are experts on the subject matter and deal with relatively less amount of case workload. In this aspect, according to the survey carried out by WIPO in 2016, around 60% of respondents, who are parties to either international or domestic contracts, declared that one of

[33] See https://www.wipo.int/amc/en/arbitration/fees/ for the whole list of Schedule of fees and costs implied by WIPO.
[34] See *supra 36*, https://www.wipo.int/edocs/pubdocs/en/wipo_pub_799_2016.pdf
[35] Somnath DE, "*The Use of Dispute Resolution to Resolve Intellectual Property Conflicts – A Survey of Emerging Trends and Practices*, HNLU Paper Series, 2012.
[36] Philip J. McCONNAUGHAY, *ADR of Intellectual Property Disputes*, Softic Symposium, 2002
[37] Unified Patent Court is founded with regulation (EU) No: 1257/2012 of the European Parliament implemeting enhanced cooperation in the area of unitary patent protection. However, it is not in force due to some restriction of the EU member states, such as Spain and Portugal and Brexit. See more on Jacques DE WERRA, *New Developments of IP Arbitration and Mediation in Europe: The Patent Mediation and Arbitration Center Instituted by the Agreement on a Unified Patent Court (UPC)*, Revista Brasiliera de Arbitragem, p.17-35, 2014

the their preferences for ADR was due to the faster remedies[38]. Moreover, such institutions operate based on their own regulations which in one aspect particularly aim to shorten the lawsuit process via enhancing new rules. In this regard, WIPO put in order a new set of rules in 2014 that apply to all arbitration and meditation procedures and expert recommendations[39] and renewed these set of rules in a way that should be effective beginning from January 1, 2020[40]. These set of rules are constitutively put forward based on developments of UNCITRAL Rules in 2010. This change demonstrates that general efficiency on IP disputes on a worldwide scheme is targeted since UNCITRAL Rules are in effect in most of the countries globally. With the initial change in 2014, WIPO introduced a specific form of arbitration, namely expedited arbitration, whose purpose was to conclude IP disputes in a shorter time frame and decreased cost. Expedited arbitration method has reached out a great success in such a way that a sole arbitrator issued by WIPO issued its final award only in six weeks after the proceedings were commenced[41]. Thus, it can be noted that ADR mechanisms serve in the benefit of the parties in dispute better than the court litigation, where they can issue a final award in such a short span of time against litigations than might last long for several years and even decades.

4. Confidentiality

One of the advantages for arbitration and mediation for parties is the ability of customization of procedures according to the parties' desire. In contrast to national litigation, there are no invariable or pre-defined procedural measures during the lawsuit process and parties can agree upon specific changes in order to protect their social identity and trade secrets. As in practice, confidentially is often benefited by the parties since it allows them to focus on the merits of the dispute without concerning on its public impact[42]. In this regard, the WIPO Arbitration and Expedited Arbitration Rules host the confidentiality-related norms, such as Art. 75, which ensures that "*no information concerning the existence of an arbitration may be unilaterally disclosed by a party to a third party."* Although this general obligation is subject to exceptions and limitations[43], it sets a base for the confidentiality principle in the ADR mechanisms which could not be provided in court litigation. Similarly, Article 54 of the WIPO Arbitration Rules regulates the protection of trade secrets and other information that could be kept confidential by the parties. Since confidentiality may be an absolute necessity for the parties that fear the possibility of their know-how or patentable product to be stolen or further improved by a third-party, the ability of ADR mechanisms ensuring privacy during the lawsuit can be an untranscendable advantage of ADR over national jurisdiction. Furthermore,

[38] See *supra 31,* https://www.wipo.int/wipo_magazine/en/2016/si/article_0010.html

[39] Peter MICHAELSON, "*The New 2014 WIPO ADR Rule Set: Flexible, Efficient and Improved"*, NYSBA New York Dispute Resolution Lawyer, Vol. 7, No. 4 (Fall 2014), p. 32-35, 2014

[40] See Exp. Arb. Article 10,11,12,36,37,47 and 57 for renewed terms in the process of arbitration and Exp. Arb. 14 for mandatory sole arbitrator in expedited arbitration via https://www.wipo.int/amc/en/arbitration/expedited-rules/

[41] https://www.wipo.int/amc/en/arbitration/what-is-exp-arb.html

[42] Ignacio DE CASTRO, Andrzej GADKOWSKI, "*Confidentiality and Protection of Trade Secrets in Intellectual Property Mediation and Arbitration",*Trade Secrets Procedural and Substantive Issues, p.79-90, 2020

[43] More on general overview on the confidentiality principle and its limitations and exceptions could be found Art. 75-78 WIPO Arbitration Rules (Art. 68-71 WIPO Exp. Arb. Rules)

since the value of IP disputes can mostly be defined in millions of dollars, this supremacy of ADR puts it in a unique position where confidentiality cannot be definite in the older way of resolving IP-related cases.

B. Harms of ADR Mechanisms

As a radical way of altering resolution process in the IP-disputes, ADR mechanisms may also lack some features that national litigation systems offer *ipso facto.* The main potential harms of selecting ADR rather than national courts can be listed as deficiency of state supremacy and hereby chance of appeal, being less useful in legal systems that offer quick resolution to IP disputes and intangibility of precedent court decisions.

1. Lack of State Supremacy

The pathway of ADR is paved by the institutions that work on a local or global perspective. In this sense, none of the alternative dispute resolution methods can be concluded under the state supremacy, but selected conflict-resolution authority. In this sense, these methods can be criticized in a way that they cannot fulfill the parties' desire for remedy completely since the parties may be suspicious about the law enforcement procedures and the deficiency of constitutional court decisions for ADR institutions. Although the issues of impartiality of credibility of ADR centers are of the essence for their existence, lack of state supremacy and an option for appeal are inescapable. In this regard, the emergence of state courts that are expertised on IP disputes and deal with only IP-related disputes can be a breakpoint from ADRs. At this point, many countries possess their own courts for intellectual and industrial property rights, where they can implement their own sovereignty with a possibility for applying higher courts. However, De WERRA criticizes this point of view and states that creation of specialized intellectual property courts can only ultimately contribute to the growth of international arbitration since limited jurisdiction of such courts is likely to be detrimental for their utility[44]. At this point, the author uses an example of French Cour de cassation jurisdiction[45] about mixed patent and know-how license agreement where disputes relating to patents and to unfair competition claims relating to the patents must be submitted to the exclusive jurisdiction of specific courts. However, in this dispute, the court decided that the case did not fall under the authority of specific courts, as it is not related to patent law, but it is rather under the jurisdiction of non-patent courts. Although, De WERRA implies on the possibility of turmoil detecting the competent court, absence of further legal remedies via appeal is still absent in ADR mechanisms. The foundation of expert courts on IP disputes can be a way out of this deficiency being independent from the judicial lack of harmony.

2. Debate on the Effectiveness of ADR in Rapid Litigation

One of the advantages that are put forward by ADR methods is receiving quick final awards instead of waiting for years. Although the slow-paced legal systems are the customary

[44] Jacques DE WERRA, *Arbitrating International Intellectual Property Disputes Time to Think Beyond the Issue of (Non-)Arbitrability*, International Business Law Journal (Issue 3 2012), p.299-312,
[45] See http://legimobile.fr//fr/jp/j/c/civ/com/2011/6/7/10-19030 for the jurisdiction in detail in French.

around the world, some countries are a lot more efficient and can come up with a final award on IP disputes among its counterparts. Therefore, if the parties can put faith in their own legal systems, it might be harder for them to be convinced for applying ADR institutions rather than their own familiar legal remedies. However, since minority of legal systems can work in this efficiency and IP-disputes mostly come into existence in international level, the ADR mechanisms are likely to be favored against national jurisdiction.

3. Desire of Precedent Court Decision

There may be occasions where the party who claims its IP-rights was revoked and looks for correction of its public right rather than faster remedy or economic interests[46]. Considering the importance of credibility in the eyes of customers and business transactors, losing reliability could be deadly and way more devastating than losing some money. For instance, an alleged infringer who is producing so-called infringed product may look for clear and complete public vindication to be purged in the eyes of its customers more than any financial benefits. Especially for the countries where *stare decisis* is essential, such as the U.S or the UK, the power of national courts for creating a precedence outweighs a final award that can be given at the end of an ADR. Therefore, desire of precedent court decision might be a disadvantage of ADR against national litigation as the system of precedence cannot be as well-based as in a state court jurisdiction in private mechanisms due to confidentiality principle and less deep-rooted arbitral award history.

VI. USE of ALTERNATIVE DISPUTE RESOLUTION in SPECIFIC INTELLECTUAL PROPERTY FIELDS

Since IP law is a concept that is basically protecting competence of human in terms of creativity, it has a wide scope of application such as, art and cultural heritage, life sciences and information and communication technology. These fields totally differentiate from each other by their nature and conduct of business. Hence, the application of such mechanisms should be analyzed regarding to the field that the private resolution mechanisms are intended. In this chapter, the organizational structure and procedural steps followed by the WIPO during the utilization of ADR mechanisms for various fields will be analyzed in order to materialize the practical use of such methods in real life. With implementing adapted approach, WIPO generates efficiency through ADR mechanisms and matches the needs' of parties in complex and rapidly-evolving legal disputes.

A. Art and Cultural Heritage

Art and cultural heritage disputes may include specific subject matter such as copyright, traditional cultural expressions or cultural property or non-legal issues of cultural, ethical or historical nature.[47] In this regard, traditional knowledge or traditional cultural

[46] See *supra 36.*

[47] See https://www.wipo.int/amc/en/center/specific-sectors/art/ for the detailed information regarding methods followed by WIPO in art and cultural heritage disputes.

expressions, judicial or arbitral processes require more sensitivity as the parties are more likely to be stranger and diverse from each other with differential cultural values[48]. Likewise, some may state that indigenous people and traditional communities may be aggrieved side of an ADR mechanism, which is designed to operate on a cross-border scope; their preferences may not find reciprocity if only general rules are enforced on them. Another opinion states that ADR is more capable of recognizing altering value systems, recognizing legal and non-legal components of a dispute and providing remedies which are culturally appropriate[49]. Concordantly, WIPO follows its general and flexible Mediation, Arbitration, Expedited Arbitration and Expert Determination Rules which can be applicable also to art and cultural heritage disputes. Moreover, WIPO completed specific arbitration proceedings regarding to cultural disputes, such as an arbitration of an artist promotion dispute. In this dispute, a European art gallery and a European artist finalized an agreement for promoting the artist in the international market. The agreement included a WIPO arbitration clause and parties opted for the clause after three years as the cooperation began to relapse. The three-member tribunal encouraged parties for settlement as they believed there could be a potential for settlement after the parties submitted their pleadings. As a result, the tribunal issued a final award which ended the cooperation agreement and included a provision of issuing some works to the museum in the settlement document[50]. Another role that WIPO plays in cultural disputes is maintenance of open-ended panels, namely WIPO Art and Cultural Heritage Panel of Neutrals. In this panel, WIPO offers workshops on procedural guidance and training that is enabling a range of mediators, arbitrators with the expertise of art and cultural heritage, who can be appointed by the parties in further disputes.

B. Life Sciences

Life sciences are a favored specific sector for ADR mechanisms in the WIPO Center. In this context, it was noted that fifteen percent of arbitration and meditation cases are related to life sciences which were dealt by the WIPO[51]. Life sciences can cover a broad set of sub-sectors, such as biosciences, pharmaceuticals, chemical industries and medical equipments and include possible stakeholders like biotech companies, universities, research institutions and associations. Unlike cultural heritage disputes, life sciences cases mostly relate to commercial matters, which are contractual most of the time, and can be about patents, designs, trademarks or know-how. Similarly, flexible rules of arbitration, mediation, expedited arbitration and expert determination are also applicable to life sciences disputes. Beginning from its foundation, the WIPO Center has portrayed as an administrating institution providing neutrality. A case between a French biotech company and a

[48] Jane E. ANDERSON, *WIPO Background Brief 8: Alternative Dispute Resolution for Disputes Related to Intellectual Property and Traditional Knowledge, Traditional Cultural Expressions and Genetic Resources*, Geneva, Switzerland: World Intellectual Property Organization, 2015

[49] See *supra 47.*

[50] Names of parties are not given due to confidentiality principle. See https://www.wipo.int/amc/en/arbitration/case-example.html#a10 for details of the case.

[51] See https://www.wipo.int/amc/en/center/specific-sectors/lifesciences/ for the extensive information regarding the use of ADR mechanisms for life sciences disputes.

pharmaceutical company can be given as an example. In the case, French company was the holder of several patents for medical uses and agreed to cooperate with the pharmaceutical company, who had expertise in the utilization of the compounds. The parties decided in their contract as a sole arbitrator would be competent in all disputes arising between them under WIPO Arbitration Rules. After several years, the biotech company claimed that pharmaceutical company intentionally procrastinated the development of a specific bio-compound, terminated the contract and initiated arbitration procedures for substantial damages. After that, the parties have chosen one of the experts suggested by the WIPO and attended in a three-day hearing. In these meetings, the arbitrator was convinced that the biotech company was not entitled for contract termination and maintaining the contract could be beneficial for both parties. At the end of three days, parties were willing to accept the arbitrator's settlement assessment and continued to carry out cooperation in the development of medical compounds[52]. Moreover, WIPO promotes trainings and workshops on the procedural guidance and possesses a WIPO Life Sciences Panel of Neutrals, where parties may choose an expert for their case[53]. Lastly, the institution collaborates with correlated stakeholders and entities, such as International Federation of Pharmaceutical Manufacturers & Associations (IFPMA) and Licensing Executives Society International (LESI) to optimize ADR proceedings in technical life sciences field.

C. Information and Communication Technology

Information and communication technology (ICT) disputes own the lion's share in ADR proceedings in WIPO Center and more than thirty percent of cases at the WIPO relate to the field of ICT[54]. Such disputes are commercial and they need to be solved with a time-efficient manner since technological developments occur at breakneck speed. In this regard, unless a sudden remedy is provided for the parties, their investment and research & development would face the risk of turning to dust. Areas of dispute may be information technology (IT) licensing, telecom infrastructure and unauthorized use of customer data and many others with potential parties, namely telecommunication providers, ICT companies/users, software developers and service providers. Similarly, WIPO benefits its generally applicable rules for the ICT disputes. In a case between a software developer based in the U.S. and a European telecommunication provider, the parties had a controversy on the issue of whether the licensee, European provider, could let certain affiliated parties the access of the software and such an action requires additional fees. Since parties decided that WIPO Mediation was to be used in a future legal dispute, WIPO Center offered potential mediators with proper expertise and parties' preferences. In mediation procedures between the parties, they were able to form a cooperative framework with the help of the mediator, reached a conclusion on significant number of issues and decided to go for direct negotiations for the remaining subjects in controversy after the termination of mediation[55]. Similar to other

[52] See https://www.wipo.int/amc/en/arbitration/case-example.html#a5 for the elaborative explanation of the case.
[53] See *supra* 51.
[54] See https://www.wipo.int/amc/en/center/specific-sectors/ict/ for the relationship between WIPO and ICT disputes.
[55] See https://www.wipo.int/amc/en/mediation/case-example.html#m4 to analyze the details of the dispute.

specific sectors, WIPO also initiates trainings and workshops on procedural guidance and holds ICT Panel of Neutrals with expertise in possible subject matter. Lastly, the WIPO Center created a cobweb of cooperation with stakeholders and entities in ICT, such as International Technology Law Association, International Telecommunications Union and European Telecommunications Standards Institute[56].

VII. A BRIEF RESEARCH ON ADR MECHANISMS IN INTELLECTUAL PROPERTY DISPUTES IN TURKISH LEGAL SYSTEM

Similar to the worldwide approach, intellectual property rights refer to the set of rights, which are granted to creative outputs of human mind in Turkish legal system. The legal regulations regarding IP disputes are not arranged in one single code and there are various codes including articles about intellectual property rights. However, the Law on Intellectual and Artistic Works (No: 5846) and the Law on Industrial Property Rights (No: 6769) are the main legal documents that build Turkish legal system of intellectual property rights. Former legal code specifically regulates intellectual and artistic works, which have economic value such as phonogram and radio broadcasts, audio-visual products, fine arts, and literary works whereas the latter focuses more on patents, trademarks, industrial designs and utility models[57].

As the utilization and importance of intellectual property rights have increased rapidly, the number of IP disputes in Turkish legal regime has also shown an increment. When this fact is taken into consideration with the long processes of lawsuits in Turkey, where a person can receive the final award up to 6-7 years, the popularization of alternative dispute resolution mechanisms have become the trend in IP disputes and also various fields of law. Initially, voluntary mediation was put into operation in 2013 by Law on Mediation in Civil Services (No:6325) as an alternative legal remedy. Later, mediation has become mandatory and was qualified as a cause of action for labour disputes in 2018. Concordantly, mediation, as an alternative dispute resolution, became mandatory with regard to claims for commercial receivables with the Code of Commencement of Execution Proceedings in Monetary Receivables Arising from Subscription Agreements that was published in the Turkish Official Gazette on 19 December 2018, to come into force beginning from 1 January 2019[58]. The code made a change in the Article 5 of Turkish Commercial Code, requiring mandatory mediation in disputes related to commercial receivables where compensation for damages or payment of a certain amount is targeted. Although such a change seems irrelevant to IP disputes, Article 4 of the Turkish Commercial Code state that civil suits falling within the scope of IP related codes are considered as commercial actions[59]. In this regard, mediation has become a mandatory cause of action for IP disputes which are monetary in nature. Accordingly, parties

[56] See *supra* 54.
[57] Yılmaz YORDEM, *Marka Hukukunda Arabuluculuk ve Tahkimin Uygulama Alanı,* Dicle Üniversitesi Adalet Dergisi, Cilt:1, Yıl:1, Yıl:2017, p. 23
[58] Güldeniz Doğan AKKAN, *Mediation now mandatory for monetary-related IP disputes,* World Trademark Review, 2019, p.1
[59] See *supra* 58.

who look for legal remedy in an IP-case with monetary claims have to firstly negotiate with each other under the guidance of a mediator with proper expertise. In the procedure, if the parties cannot reach a settlement after mediation, the judicial process of national litigation would be carried forward. The impacts of such a change in terms of success rate of ADR mechanism or its impact on case load on the Turkish courts are yet to be seen since this change is a very recent development[60]. However, it would be suffice to say that Turkish legal system has also adopted the worldwide trend of using alternative dispute mechanisms in IP disputes by enforcing parties to opt for mediation.

VIII. CONCLUSION

The employment of alternative dispute resolutions in intellectual property disputes has become more popular in recent years. This uncommon change in a legal world, which is supposed to have a static nature, should be subject to analysis to understand the frame of minds of the parties opting for private dispute resolution mechanisms. Increment in the global IP transactions, further products of human ingenuity and ability of the enforcement of the awards of arbitral awards are the detached reasons of wider application of alternative dispute resolutions. Likewise, formation of credible private resolution mechanisms operating in transnational aspect also paved the way for the proliferation of alternative dispute resolutions. Nevertheless, while these developments signify the change, they do not answer if preferring such an alteration is fruitful in legal aspects. Concordantly, there is no unanimous thought between the legal scholars if alternative dispute resolution can answer the requirements of parties in intellectual property disputes. Those who favor private mechanisms express that alternative dispute resolution in intellectual property disputes are beneficial since they cohere with the multinational structure of intellectual property, burden the parties with less cost, ensure faster remedies for people at variance with each other and protect trade secrets and know-how of the parties. Others approving public resolution systems suggest that national litigation is irreplaceable as it is the sole method for implementation of state supremacy, alternative dispute resolutions are inconclusive in countries with rapid litigation and such newly-emerging paths cannot vindicate someone especially in countries with *stare decisis.* While both points of views are based on solid basis, one cannot deny that advantages of alternative dispute resolutions are likely to outweigh its disadvantages in a world where parties are mostly looking for legal remedies to cover up or heal its economic interests as fast as possible. However, it would be erroneous to dictate one of these systems as the sole option since every intellectual property case may differentiate from each other due to being product of human intellectuality. Thus, it would be the best to express that alternative dispute resolutions have earned its place in the legal world and can be a more productive substitution to national litigation. Nevertheless, a foreordained choice of dispute resolution would be impossible and every intellectual property case should be investigated for its convenience for one of these resolution methods.

[60] See *supra* 58.

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