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## المجلة العلمية للملكية الفكرية وإدارة الابتكار

دورية نصف سنوية محكمة يصدرها

المعهد القومي للملكية الفكرية

جامعة حلوان

العدد الرابع

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**الهدف من المجلة:**

تهدف المجلة العلمية للملكية الفكرية وإدارة الابتكار إلى نشر البحوث والدراسات النظرية والتطبيقية في مجال الملكية الفكرية بشقيها الصناعي والأدبي والفني وعلاقتها بإدارة الابتكار والتنمية المستدامة من كافة النواحي القانونية والاقتصادية والإدارية والعلمية والأدبية والفنية.

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**The role of institutional mediation in fostering  
Intellectual property disputes resolution**

**Osama Ahmed Attalla**

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**The role of institutional mediation in fostering  
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**Introduction:**

Mediation now has its own potentials which include, among others, existence of laws and rules regulating the process, formal integration into the court system, formal criteria to regulate mediators, formal qualification requirements for mediators, rules and regulations clarifying the role of stakeholders, etc<sup>1</sup>.

Intellectual property disputes are notoriously difficult for both parties, likely due to the complicated, sometimes technical nature of the dispute subject matter in addition the Difficulties strained in Intellectual Property Litigation like the Expenses and Length of IP trials<sup>2</sup>. Integrated mediation strategy is required as a key factor in securing the value of technologies and associated intellectual property (IP) rights developed in research and development (R&D)<sup>3</sup>.

In Egypt, resolving disputes using all traditional ADR mechanisms is rare throughout the country. Despite mediation is still

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<sup>1</sup>KAMIL ABDU OUMER, MODERNIZATION AND INSTITUTIONALIZATION OF MEDIATION TO RESOLVE COMMERCIAL AND INVESTMENT DISPUTES IN ETHIOPIA, Thesis, Faculty of Law ADDIS ABABA University, 2013, p76.

<sup>2</sup>Stephanie Chi, THE ROLE OF MEDIATION IN TRADEMARK DISPUTES, p3. Marion M. Lim, ADR of Patent Disputes: A Customized Prescription, Not an Over-the-Counter Remedy, 6 Cardozo J. Conflict Resol. 155, 169 (2004).

<sup>3</sup> Scott Blackmand and Rebecca M. McNeill, Alternative Dispute Resolution in Commercial Intellectual Property Disputes, 47 Am. U. L. Rev. 1709, 1726 (1998). David Allen Bernstein, A Case for Mediating Trademark Disputes in the Age of Expanding Brands, 7 Cardozo J. Conflict Resol. 159 (2005).

Kevin M. Lemley, I'll Make Him an Offer He Can't Refuse: A Proposed Model for Alternative Dispute Resolution in Intellectual Property Disputes, 37 Akron L. Rev. 306 (2004).



at its infant stage, to cope with the growing investment and commercial sector, mediation should be more institutionalized.

This paper will be divided into two sections. Section 1 will focus on the recognition of institutional mediation as a concept, on its main features and aspects but not on its evolution throughout the past decades. In Section 2, application of institutional mediation on IP disputes arena, will be introduced.

### **Section one**

#### **Conception of institutional mediation**

The nuances and fundamental differences between institutional mediation and ad hoc mediation became no longer at stake because this long established dichotomy has been challenged by many practices as well as some scholars. This section will try to grasp the value of institutionalization of mediation.

Ad hoc mediation is a process in which the mediator/s and rules and regulations governing the process are selected by parties in dispute only for their specific dispute. The rules and the mediator are usually elected and the mediation facility is provided after the occurrence of the dispute between the parties.<sup>1</sup>As there is no institution involved in it<sup>2</sup>.

The term “institutionalization” has more than its plain simple literal meaning. It may refer to any entity, both public and private, which is using the alternative dispute resolution methodologies in their

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<sup>1</sup> Blanke, G. 9 275 *Institutional versus Ad Hoc Arbitration: A European Perspective* 275 ERA Forum. (2008), (Feb. 17, 2018) <https://doi.org/10.1007/s12027-008-0055-6>

<sup>2</sup> Aksen, G. *Ad Hoc versus Institutional Arbitration*, The ICC International Court of Arbitration Bulletin (Feb. 17, 2018) <https://scholar.google.com/scholar>.

operations, such as business conducting<sup>1</sup>. Therefore, this definition covers also mediation as a profession<sup>2</sup>.

Institutional mediation, on the other hand, is a mediation process under a permanent entity using its facilities and procedural rules. The term institutionalization refers to having an organization with its own establishing laws, working procedures, code of conduct for those working in it, etc<sup>3</sup>.

“institutionalization” refer to any entity (governmental or otherwise) which, as an entity, adopts ADR procedures as a part of doing business. Some examples include schools that develop peer mediation programs, courts that establish rules to govern referral to ADR procedures, and government agencies that incorporate ADR processes in developing rules and regulations.<sup>4</sup>”

As a consequence, the institutional mediation, not as the name suggests, refers to three shapes, the first one relates to mediation held inside organizations, as it is most often seen systematically in modern hospital or educational settings, the second one is involved in the state justice forums, the third one is focused, in the generic term of institutional mediation, on organizations specialized in providing alternative dispute resolution processes<sup>5</sup>.

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<sup>1</sup> Press S. (1997). Institutionalization: Savior or Saboteur of Mediation. 24 no.4 Florida State University Law Review, 903-918.

<sup>2</sup> Mosten F. S. (2004) .Institutionalization of Mediation. Vol. 42 issue 2, Family Court, 292-303.

<sup>3</sup> Roger E. Hartley (2002), Alternative Dispute Resolution in Civil Justice Systems, American Legal Institutions, LFB Scholarly Publishing LLC, New York, p 9

<sup>4</sup> Press S. op.cit., p 905

<sup>5</sup> To define institutional arbitration, some scholars consider the administration of the process by the institution, others focus primarily on the institutional rules, and yet others regard both components as equally important.

Institutionalization of mediation can be embedded in governmental form<sup>1</sup>. Government may provide financial support to mediation centers, which would allow them to make their public assistance more accessible to wider population.

Government may also support research in the area of mediation. Institutionalization of mediation leads to establishing mediators' training centers with the aim at providing the minimum and common standards for fulfilment of mediator's profession within particular country. In addition to the private entities which create and organize mediation training, there are governmentally established entities providing such programs.

In addition to individual mediators, organizations providing mediation services may also adopt, partially or as a whole, particular Code of Conduct. Moreover, they can also establish control mechanism evaluating the organization's mediators' commitment towards this code, if they are willing to do so.

State recognition on the mediation process<sup>2</sup>, is embodied in legalizing mediation. Issues that should be covered in legislations, mediation rules and agreements, are varied controversially.<sup>3</sup>

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See Ulrich G. Schroeter, AD HOC OR INSTITUTIONAL ARBITRATION? A CLEAR-CUT DISTINCTION? A CLOSER LOOK AT BORDERLINE CASES, 2017, p145.

<sup>1</sup> Martina Ambrozová, GOVERNANCE AND DEVELOPMENT OF ADR METHODS IN SLOVAK REPUBLIC AND ESTONIA, Tallinn 2018, p 21.

<sup>2</sup> Lukasz Rozdeiczer & Alejandro Alvarez de la Campa, Alternative Dispute Resolution Manual: Implementing Commercial Mediation, The World Bank Group, Commercial Small and Medium Enterprise Department , USA, 2006, p 38

<sup>3</sup> Law reform commission, Alternative dispute resolution: Mediation And Conciliation, Law reform commission , Dublin , 2010, p 33

The Institutionalization of mediation in a legal system requires lots of activities, as pre-conditions, according to some point of views<sup>1</sup>, which represent a diagnostic phase that magnifies the role of mediation<sup>2</sup>.

These pre-conditions are, firstly, the existence of appropriate legal environment that tolerates the existence of mediation mechanisms<sup>3</sup>. Secondly, there should be legally sanctioned code of conduct for mediators<sup>4</sup>, for examples, principles like confidentiality need to be sanctioned by law.

Thirdly, The existence of a legal frame work that integrates mediation centers in to the court system. The reason behind this is that, mediation centers have no power to enforce agreements between parties. So, there should be a legal base for the enforcement of the decision through the court system<sup>5</sup>. In addition, there should be legal rule that suspends period of limitation during the mediation period<sup>6</sup>.

Fourthly, the existence of adequate professionals is also another mandatory pre-condition. Institutions offering mediation should provide list of professional mediators as well as running appropriate trainings. In addition, there should be guidelines as to the accreditation and selection of mediators like minimum standards of mediation trainings<sup>7</sup>.

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<sup>1</sup> Ibid.

<sup>2</sup> Lukasz Rozdeiczer & Alejandro Alvarez de la Campa, op. cit., p 7

<sup>3</sup> Ewa Wojkowska , Doing Justice: How informal justice systems can contribute, United Nations Development Program, Oslo , December 2006, p 13

<sup>4</sup> Brain Dorini, Institutionalizing ADR: wagshal Vs Foster and mediator immunity, Harvard Negotiation law review, Vol 1 1996, p 185

<sup>5</sup> Shelley M. Liberto, J.D. (2007), p 8

<sup>6</sup> Lukasz Rozdeiczer, op. cit., p 93

<sup>7</sup> Forrest S. Mosten, (2004 ), Institutionalization of mediation, Family court review, vol. 42 no. 2, p185

For this purpose, the United Nation Commission on International Trade Law (UNCITRAL) has put model arbitration and conciliation/mediation rules that can be used either by ad hoc or institutional ADR forums for international disputes. The United Nation General assembly has also, recommended all countries give due consideration“ for the rules adopted by the UNCITRAL.

A mediation center can be a standalone independent center or a mediation center hosed by an existing entity<sup>1</sup>. A standalone mediation center can also be governmental, community-based or private. A governmental standalone mediation center can be established by legislation or administrative order or court order<sup>2</sup>. While to establish non-governmental mediation center, obtaining license may suffice<sup>3</sup>.

Community-based mediation center, also called neighborhood mediation programs, are another example of mediation institutionalization, whether these activities are established by governmental, non-governmental, profit or non-profit organization. Their educative role, encouraging the prevention of conflicts, have in community context a clear overlap with other disciplines, such as psychology and social work<sup>4</sup>.

The private standalone Mediation centers can be business organization or NGO based on the legal environment of the specific country. It can also be international, regional or domestic. Currently,

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<sup>1</sup> Shelley M. Liberto, J.D. (2007) op. cit., p 8

<sup>2</sup> Alaska Judicial Council(1997), Report to Alaska legislators; alternative dispute resolution in Alaska court system, p 10

<sup>3</sup> Shelley M. Liberto, J.D. (2007) op. cit., p 8

<sup>4</sup> See: Blanco Carrasco M. (2016). Mediation and the Social Work profession: particularly in the community context. 29(2), Cuadernos de Trabajo Social, 275-283. Almeida H. (2014). Social and Community Mediation in Europe: Experiences and Models. Coimbra: OCIS/FPCE.

Roger E. Hartley (2002) op. cit., p 22

there are various private ADR centers which are rendering mediation service internationally, regionally and in various domestic jurisdictions.

## **Section 2**

### **applications of institutional mediation on IP arena**

In Egypt, the term mediation is alien to the Civil Code and the legal system in general. There is no legal rule governing institutionalization of mediation, cases that may/may not be subject of mediation, the power to submit for mediation, and that regulate major ADR mechanisms like confidentiality, etc<sup>1</sup>.

It is understood that the institutions which host intellectual property conflicts provide an institutional administrative support in the form of comprehensive case management which, in the case of the best institutions, does not stop when the case is transferred to the appointed neutral. Institutions also tend to play an important role in the selection of the mediator, especially when the parties disagree over the appropriate person or, more usually, when they simply do not know how to find a suitably qualified neutral.

These entities put rules to shape up the important areas of mediator appointment, process, mediator recommendations and decisions, confidentiality, parallel arbitration/litigation, costs and fees.

The legislation governing mediation reflects the policy of the government towards mediation. Issues like cases that may not be subjected to mediation, the place of major principles of ADR in the

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<sup>1</sup> Shelley M. Liberto, The institutionalization of commercial dispute mediation in Morocco: a preliminary need assessment, World Bank Group, Rabat, 2007, p6

legal system, possible institutional forms of mediation centers, etc are usually governed by legislations<sup>1</sup>.

Besides, framing some points like, enforcement of mediated agreements, appointment of mediators, and period of limitation while parties are in mediation, etc<sup>2</sup>.

It is economically based that IP rights are employing as basic assets in many companies. Disputes involving these assets are likely to concern multiple jurisdictions. In addition, IP owners are increasingly engaged in complex contractual relationships which involve parties in different forms of cooperation in research and development, production, or marketing.

As a consequence, in an ordinary court litigation, the judges might not have the specialized knowledge or the technical know-how which would be necessary to properly appreciate and evaluate the interests at stake, especially when it comes, for instance, to cross-examine expert evidence. In addition, IP legislation has not yet been harmoniously adopted at the global level. In fact, the existence of international conventions – such as the Berne Convention – provides only a limited solution to the matter at stake: they are binding only on the States Parties. The element that lacks, therefore, is a global response to the need of protection of an IP right.

Recently, many countries are institutionalizing mediation, either as part of multi-door courthouse project or independent mediation

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<sup>1</sup> Investment Climate Advisory Services of the World Bank Group ( 2011), p 12

<sup>2</sup> Ibid.

project<sup>1</sup>. And the agreements reached are enforced as if they are the decision of the court<sup>2</sup>.

Institutional mediation provides many axes of change in the conception of mediation in general and in the Intellectual Property environment. As, the aspects of institutionalization achieve the targeted objectives of mediation. The institutionalization and legalization of mediation have contributed to the development of problem-based approaches to mediation<sup>3</sup>. This institutionalization incentivizes disputing parties to prefer mediation.

There are many institutions and organizations with global influence have been created for the primary aim of resolving IP disputes. there are the American Arbitration Association (AAA-ICDR), the International Chamber of Commerce (ICC), the World Intellectual Property Organization (WIPO) European Max Planck Group on Conflict of Laws in Intellectual Property (CLIP). These global providers dominate the landscape together with various more regionally based institutions such as SMC<sup>4</sup> and CEDR<sup>5</sup>.

These institutions are preferred by the international business community as it provides them various services. Such as providing a specific mediation procedure, experienced panel of mediators and expertise that provide a quick and effective dispute resolution process<sup>6</sup>.

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<sup>1</sup> Shelley M. Liberto, op. cit., p123.

<sup>2</sup> Investment Climate Advisory Services of the World Bank Group (2011), p12.

<sup>3</sup> Alexander, Nadja, The Mediation Metamodel: Understanding Practice, CONFLICT RESOLUTION QUARTERLY, vol. 26, no. 1, Fall 2008, p104.

<sup>4</sup> Singapore Mediation Centre (SMC)

<sup>5</sup> Centre for Effective Dispute Resolution (CEDR)

<sup>6</sup><https://blog.iplayers.in/promoting-institutional-adr-to-make-india-a-hub-of-arbitration/>



All mediation codes of conducts deal with pillars of mediation procedure, containing the grounds for mediator's competence acquirement, basis of fees setting, describing mediator's importance of conduct or further requirements which are commonly accepted as necessary for proper conduct of any mediation procedure. Code of ethic covers rather the process of mediator's decision making than the performance of their roles.

There are several administrative issues that should be resolved before a mediation program is put into place. (Limitations on confidentiality- responsibility of mediator-steering the mediator's attention)<sup>1</sup>.

Institutional mediators, supposedly has a clearly defined role, follow clear procedures and methods, keeps confidences and remains neutral, leading to well-structured quality of the normal function of the institution.

Centers have their own admissibility criteria for cases to be mediated and they also have case referral forms which parties shall fill. Once cases are admitted, the center simply manages the process. Unlike the court system, the centers simply provide facilities like forums, menu of mediators, and rule of procedures.

### **Importance of institutionalization of mediation:**

It is supposed that these institutions provide better facilities and quick disposal of dispute. Their activities create awareness regarding mediation as the best mode for dispute resolution<sup>2</sup>.

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<sup>1</sup> <https://adrr.com/adrl/essay1.htm>

<sup>2</sup> Bibek Debroy and Suparna Jain (2016) *Strengthening Arbitration and its Enforcement in India – Resolve in India*.

Institutionalization provides some certainty to those who are resisting mediation, in some cultures<sup>1</sup>, or those who are, in some cases, reluctant because of the highly complex fact patterns often involved and the technical nature of some IP laws. As well as, the skepticism that a mediator can understand the problem and be effective. Mediation is generally more accepted when expert mediators in IP are available to the parties, such as through the World Intellectual Property Organization (WIPO).

The World Intellectual Property Organization's (WIPO) Arbitration and Mediation Center (the Center) offers ADR procedures to parties worldwide on a not-for-profit basis, thus facilitating the resolution of IP and commercial disputes<sup>2</sup>.

Besides, there are some noticeable merits gained by submitting for institutional mediation, when experiencing online mediation.

Online contractual disputes, which are available online, are usually solved by online ADR<sup>3</sup>, like domain name disputes<sup>4</sup>. For example, online mediation as a part of the UDRP process, is seen as a commercially sensible solution for both parties. This means that this processes have been legally institutionalized.

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<sup>1</sup> Like Brazilian culture.

<sup>2</sup> Fact Sheet Alternative Dispute Resolution (ADR) mechanisms, European IPR Helpdesk, 2014 WIPO Mediation, Arbitration and Expedited Arbitration Rules which entered into force on June 1, 2014, and some developments in the use of WIPO ADR in the area of R&D, p2.

<sup>3</sup> E. Casey Lide, Note, ADR and Cyberspace: The Role of Alternative Dispute Resolution in Online Commerce, Intellectual Property and Defamation, 12 OHIO ST. J. ON DISP. RESOL. 193, 222 (1996).

<sup>4</sup> Aashit Shah, (2004), Using ADR to Resolve Online Disputes, Richmond Journal of Law and Technology, vol. 10, p5.

But, looking at the online mediation as an option for the parties, while they can meet physically, is a matter which needs advancing mechanisms. Therefore, another noticeable advantage of institutionalization of mediation as it provides a well-structured online mediation.

Another privilege acquired as a result of embracing institutional mediation is determine the admissibility criteria for **IP dispute to be mediated**.

The need for legalizing mediation can be evident when dealing with questions of what IP disputes eligible for mediation. IP disputes have often a criminal side which, accordingly, become out of the mediation domain, as it is legally stipulated in many jurisdiction, that the conflict must be out of public order to be mediated.

The matter of IP recognition or validity<sup>1</sup> is most questionable in respect of its eligibility for mediation<sup>2</sup>. Furthermore, the administrative and criminal claims do not undergo the mediation processes<sup>3</sup>.

In this context, intellectual property disputes can be broadly divided into three categories<sup>4</sup>. The first category consists of disputes in which the complainant requires to assert their ownership of an

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<sup>1</sup> See Smith Matthew. A. M. Cousté, T. Hield, R. Jarvis, M. Kochupillai, B. Leon, J.C. Rasser, M. Sakamoto, A. Shaughnessy, J. Branch., *Arbitration of Patent Infringement and Validity Issues Worldwide*, 19 HARV. J.L. & TECH. 299 (2006) (exploring the worldwide practical and legal obstacles to the use of binding arbitration in patent cases).

<sup>2</sup> Nagy Ahmed A., *Mediation in Intellectual property disputes*, Morocco, 2012, p100.

<sup>3</sup> Nagy Ahmed A., *op. cit.*, p103.

<sup>4</sup> Lemley Kevin, (2004), "I'll Make Him an Offer He Can't Refuse: A Proposed Model for Alternative Dispute Resolution in Intellectual Property Disputes" 37 Akron L Rev 287 at 297, who asserts there are nine possible scenarios for intellectual property disputes.

intellectual property right and their right to benefit economically from that right. The second is where one or both parties wish to settle a point of law such as the validity of a patent. The previous two categories are unsuitable for mediation. The third category consists of disputes where the parties consider some form of shared rights to be an acceptable or even a preferred result<sup>1</sup>. In these latter disputes, mediation is likely to be most effective.

However, there are some jurisdictions, and subsequently statutes, which mitigate the limitations that legally restrict conducting mediation even in the validity patent disputes<sup>2</sup>.

Yet, litigation sometimes is inevitable regarding the some cases, when Injunctive relief, for example, is needed<sup>3</sup>. This is not an option for mediation methods<sup>4</sup>.

According to the above-mentioned, Institutionalization with its all forms, become necessary, which ranges from incorporating mediation into court programs, government agencies and business and community organizations)to legalization (on aspects of mediation), and innovation (experimentation with a number of different mediation models) have all been identified as major trends that have influenced mediation practice across the world<sup>5</sup>.

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<sup>1</sup> Corbett Susan, Mediation of Intellectual Property Disputes: A Critical Analysis, New Zealand Business Law Quarterly — Volume 17, march 2011, p65.

<sup>2</sup> Ahmed Nagy, op. cit., p 105.

<sup>3</sup> Obtaining emergency relief like a temporary restraining order or preliminary injunction can sometimes be critical to containing the damage of an immediate IP dispute.

See Bennett, op. cit., at 398-99.

<sup>4</sup> Barton Thomas D. & Cooper James M., Symposium Introduction: advancing Intellectual Property Goals through prevention and alternative dispute resolution, California western International Law Journal, Vol. 43, No. 1 [2012], Art. 3, p30.

<sup>5</sup> Narain Rashika & Abhinav Sankaranarayanan, (2018) Formulating a Model Legislative Framework for Mediation in India, p17.

In a nutshell, it is clear that practices of institutionalization of mediation, with its intrinsic elements, has spawned modern multiplied versions of mediation in different countries according to the diversity of application over the world.

### **Conclusion**

Institutional Mediation can be a cardinal factor, with all its forms, to create transformation in the mediation environment for the benefit of intellectual property disputes. Institutionalization can change attitudes toward and reliance upon external authorities, as well as make it the most desirable instruments for resolving IP disputes. Significance of it can be exposed when exposing the enumerated advantages which are employed as preconditions to achieve institutionalization of mediation. Moreover, practices of institutionalization of mediation have spawned modern multiplied versions of mediation in different countries according to the diversity of application over the world.

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