

## USING ALTERNATIVE DISPUTE RESOLUTION METHODS TO RESOLVE INTELLECTUAL PROPERTY DISPUTES IN JORDAN

BASHAR H. MALKAWI\*

### I. INTRODUCTION

Before the rise of Islam there was no formal judicial system in the Arab World.<sup>1</sup> Disputes which arose between the members of a tribe were customarily settled by referring the disputes to the leader of the tribe.<sup>2</sup> In resolving disputes, the leader always resorted to amicable means, including mediation. The leader endeavored to reach a solution of a particular dispute in such a way as to maintain solidarity among his people on the one hand and to maintain his honorable position on the other. Moreover, because of the commercial and trading relations among these Arab tribes, all parties found it necessary to conduct dealings and to settle disputes arising out of those dealings in a flexible manner. Accordingly, since early times, these tribes have become aware of and applied certain forms of mediation and arbitration.

As the rise of Islam was accompanied by a call for peace, it was only natural for Islam to call for settlement of disputes in an amicable manner. Islamic law includes express provisions relating to amicable settlement of disputes. The Qur'an states "if ye fear a breach between them twain [i.e., husband and wife], then appoint [two] arbiters, one from his family, and the other from hers; if they wish for peace, God

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\* Bashar H. Malkawi is Associate Professor of Law at the University of Sharjah, U.A.E. He holds an S.J.D in International Trade law from the American University, Washington College of Law, and an L.L.M in International Trade law from the University of Arizona College of Law.

1. See Faisal Kutty, *The Shari'a Factor in International Commercial Arbitration*, 28 LOY. L.A. INT'L & COMP. L. REV. 565, 589 (2006).

2. *Id.*

will cause their conciliation; for God hath full knowledge, and is acquainted with all things.”<sup>3</sup> One may say that amicable means for settlement of disputes, particularly commercial disputes, are deeply rooted in Arab customs and traditions and have long been implemented in practice.<sup>4</sup> In Islamic jurisprudence, mediation and arbitration are considered preferable to litigation before courts of law.

The Islamic culture disfavors the adversarial process of litigation. The Arabic tradition has always preferred *Sulh*, which embodies the concepts of settlement and reconciliation, over formal litigation.<sup>5</sup> Negotiations and compromises are the traditional path.<sup>6</sup> The preference for *Sulh* is often a reflection of larger social and cultural perceptions of conflict. In Arab countries, the notion of conflict typically carries a highly negative connotation.<sup>7</sup> Viewed as disruptive and dangerous to social cohesion, conflict represents something to be avoided.<sup>8</sup> Understandably, this mindset makes formal litigation, with its inherent adversarial elements, an unpopular dispute resolution mechanism in Arab countries.

In other cultures, litigation is considered the preferred mode for settling differences. For example, the United States is well known for its litigious society and having among nations the highest number of

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3. QUR’AN 4:35.

4. See Charles N. Brower & Jeremy K. Sharpe, *International Arbitration and the Islamic World: The Third Phase*, 97 AM. J. INT’L L. 643, 643 (2003) (discussing historical instances of Arab dispute resolution); see also S. Breckenridge Thomas, *International Arbitration: A Historical Perspective and Practice Guide Connecting Four Emerging World Cultures: China, Mexico, Nigeria, and Saudi Arabia*, 17 AM. REV. INT’L ARB. 183, 206-12 (2006) (explaining that arbitration under Sharia includes parties, the arbitrator, law and procedure, and evidence); Joshua F. Berry, *The Trouble We Have with the Iraqis Is US: A Proposal for Alternative Dispute Resolution in the New Iraq*, 20 OHIO ST. J. ON DISP. RESOL. 487, 504 (2005) (stating that mediation has historically been the primary source of dispute resolution in the Muslim world).

5. See Walid Iqbal, *Courts, Lawyering, and ADR: Glimpses into the Islamic Tradition*, 28 FORDHAM URB. L.J. 1035, 1037-38 (2008).

6. See Rosa María González Tirados, *Negotiation. A-Z Guide*, 48 MGMT. DECISION 849, 1023-27 (2010) (indicating that Arabs prefer to establish personal relations and resolve issues through mediation or continued negotiation).

7. See Mohammed Abu-Nimer, *Conflict Resolution Approaches: Western and Middle Eastern Lessons and Possibilities*, 55 AM. J. ECON. & SOC. 35, 46 (1996).

8. *Id.*

lawyers per capita.<sup>9</sup> In contrast, Arab countries generally have very few lawyers per capita.<sup>10</sup> This is a simple indication that if a country has a high number of lawyers, that country would be inclined to be more litigious.

The purpose of this essay is to examine the feasibility and working of the conciliatory means for settlement of intellectual property (IP) disputes in Arab countries. The principal mechanism this essay is concerned with is arbitration, the most commonly used method. Arbitration is the private, non-judicial adjudication of a commercial dispute, usually by a panel of one or three private arbitrators appointed by the parties, which results in a binding outcome.<sup>11</sup> The other dispute settlement mechanism this essay addresses is mediation. Mediation (or conciliation) is the process by which a neutral third party assists disputing parties in reaching a voluntary resolution of their dispute.<sup>12</sup> Collectively, arbitration and mediation are known as alternative dispute resolution (ADR).<sup>13</sup>

This essay discusses two specific issues relating to the use of ADR for the resolution of IP disputes: (1) whether ADR is a preferable method for dispute resolution for owners or users of intellectual property rights (IPR); and (2) whether disputes involving IPR are arbitrable. My discussion of the first issue is not specific to any particular country. However, discussion of the second issue will focus on the state of the law in Jordan as a case study for other Arab countries.

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9. See KHOSROW FATEMI, *INTERNATIONAL TRADE IN THE 21ST CENTURY* 227-28 (1997) (explaining that the United States leads the world by a wide margin on the total number of lawyers and lawyers per million).

10. For example, Jordan has only 700 lawyers in total. *Id.* at 228 tbl.15.4. Although Egypt has 30,000 lawyers, it has approximately eighty percent fewer lawyers per capita than the United States. *Id.*

11. See Benjamin F. Tennille, Lee Applebaum & Anne Tucker Nees, *Getting to Yes in Specialized Courts: The Unique Role of ADR in Business Court Cases*, 11 PEPP. DISP. RESOL. L.J. 35, 49 (2010).

12. *Id.* at 48.

13. *Id.* at 44 (“ADR’ is an umbrella term used to encompass a wide variety of practices. . . . The most common forms of ADR associated with business and commercial disputes include arbitration, neutral evaluation, judicial settlement conferences, and mediation.”).

## II. REASONS TO CONSIDER ADR FOR INTELLECTUAL PROPERTY DISPUTES

As a general principle, IPR are territorial in scope.<sup>14</sup> Although Jordan's IP laws are not explicit on this issue, it is understood that these laws do not apply beyond the country's borders.<sup>15</sup> At the same time, licensing contracts concerning IP extend rights and obligations beyond a single nation's territorial boundaries. In the event of a dispute, which could involve the laws of many nations, ADR offers parties a range of valuable advantages over litigation. An owner of IP may use ADR to settle an IP case for many of the same advantages or reasons that ADR generally offers in non-IP cases.

ADR offers parties certainty of the law used to govern the dispute. IP licensing contracts generally involve parties from different countries. These contracts may involve the laws and courts of several countries, which can create ambiguity in terms of the governing law and proper jurisdiction.<sup>16</sup> Therefore, one of the primary reasons for including a contractual clause mandating ADR rather than litigation of any IP dispute is to provide the parties with the certainty that, in the event of a dispute, they will be submitting their dispute to a single forum for resolution rather than to potentially several different fora in

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14. See Curtis A. Bradley, *Territorial Intellectual Property Rights in an Age of Globalism*, 37 VA. J. INT'L L. 505, 514-15, 520 (1997) (explaining that in the United States courts generally do not apply their patent and copyright statutes to conduct that occurred abroad unless some act of infringement happened within the United States).

15. See Patent Law of Jordan No. 32 of 1999, *amended by* Law No. 71 of 2001, art. 21, Official Gazette No. 4520 (2001); *see also* Jordanian Copyright Law No. 22, Official Gazette No. 3821, No. 22 of 1992, *amended by* Law No. 52, art. 8, Official Gazette No. 4508 (2001). Like many other countries, Jordan grants legal rights to IP products within its border. See generally Alexander Peukert, *Territoriality and Extraterritoriality in Intellectual Property Law*, in BEYOND TERRITORIALITY: TRANSNATIONAL LEGAL AUTHORITY IN AN AGE OF GLOBALIZATION (forthcoming Oct. 2012), available at [http://www.jura.uni-frankfurt.de/ifrv1/peukert/forschung/Territoriality\\_and\\_Extraterritoriality\\_in\\_Intellectual\\_Property\\_Law.pdf](http://www.jura.uni-frankfurt.de/ifrv1/peukert/forschung/Territoriality_and_Extraterritoriality_in_Intellectual_Property_Law.pdf).

16. See Graeme B. Dinwoodie, *Developing a Private International Intellectual Property Law: The Demise of Territoriality?*, 51 WM. & MARY L. REV. 711, 723 (2009) ("Courts routinely are entangled in questions of jurisdiction, choice of law, and (perhaps to a lesser extent) recognition and enforcement of judgments, the basic fields of private international law.").

different jurisdictions. Without an arbitration provision in the contract, one party may file a lawsuit in each of the several different jurisdictions having power to apply its laws to the parties or contract at hand.

Arbitration and other ADR mechanisms tend to provide speedier resolutions of disputes compared to litigation.<sup>17</sup> This typically occurs either because the arbitration and ADR proceedings are able to commence without delay or because of the flexibility in administering arbitration and other ADR proceedings. The speed of dispute resolution is an important consideration when it involves IPR. This is because litigation can take much longer than the length of time the product is protected. For example, if the dispute concerns a patent that is protected for a period of twenty years, court proceedings can last longer than the period of protection, rendering the case or patent useless.<sup>18</sup> Arbitration and other ADR mechanisms can significantly reduce the costs of settlement. The typical IP litigation often spans several years with attorney fees and damage awards commonly in hundreds of thousands or millions of dollars.<sup>19</sup> Thus, compared to litigation, there are cost savings associated with arbitration and other ADR mechanisms.

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17. See Aaron Pereira, *Licensing Technology to the BRICS: The Case for ADR*, 11 CARDOZO J. CONFLICT RESOL. 235, 246 (2009) (quoting Julia A. Martin, *Arbitrating in the Alps Rather than Litigating in L.A.: The Advantages of International Intellectual Property-Specific Alternative Dispute Resolution*, 49 STAN. L. REV. 917, 918 (1997) (“‘Businesses need to know when a dispute is likely to be decided’ to determine whether they can build a new plant, market their new drug, or find other ways to generate profit. Business people often simply cannot afford to wait for traditional litigation, especially international litigation, and therefore opt for ADR.”)).

18. See Patent Law of Jordan No. 32 art. 17; see also JORDANIAN JUDICIAL COUNCIL, ANNUAL REPORT ON COURT CASES 65-68 (2011), available at <http://www.jc.jo/sites/default/files/ar-2011.pdf>.

19. Litigation costs are so high because litigation is a highly competitive and adversarial process that encourages the parties to exaggerate their claims. See Michael J. Meurer, *Controlling Opportunistic and Anti-Competitive Intellectual Property Litigation*, 44 B.C. L. REV. 509, 514-16 (2003); see also Murray Lee Eiland, *The Institutional Role in Arbitrating Patent Disputes*, 9 PEPP. DISP. RESOL. L.J. 283, 284-85 (2009) (stating that patent litigation is expensive and frequently lasts for more than ten years; many cases cost two to five million U.S. dollars to litigate).

IP disputes often involve proprietary know-how with respect to a patented invention or a trade secret with other proprietary information. Bringing a lawsuit against a trade secret infringer presents a risk of losing the confidentiality of that trade secret and its value.<sup>20</sup> For example, the trade secret owners may disclose information beyond the scope of what is necessary to establish their case or the actual misappropriation. Accordingly, secret information which was not infringed upon could be jeopardized. By the same token, a defendant defending himself against an owner's claim may be forced to disclose and identify trade secrets under his possession to prove that they vary from those owned by the owner or that the trade secrets were acquired independently. In such a situation, the defendant endangers his own trade secrets by disclosing them to an ill-intentioned plaintiff. Because arbitration and mediation are by definition private, the confidentiality of such information is typically easier to ensure than in public court adjudication.<sup>21</sup> In arbitration and mediation, even the existence of the dispute can remain confidential if that is the parties' preference.

IP disputes often arise between parties that have, or are likely to have, an ongoing business relationship.<sup>22</sup> For example, parties in the dispute may have a license relationship in existence prior to the dispute. In such a situation, the parties may appreciate the opportunity to use a mechanism that is much less formal and aggressive than litigation.<sup>23</sup> This method allows the parties to work out their differences without souring their relationship or ability to work together in the future.

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20. See Timothy S. Durst & Cheryl L. Mann, *Behind Closed Doors: Closing the Courtroom in Trade Secrets Cases*, 8 TEX. INTELL. PROP. L.J. 355, 356 (2000) ("A trade secrets case can present trade secret's owners with a daunting paradox. The objective of trade secret litigation is to protect the owner's trade secrets, but the litigation process itself can threaten the secrecy that is the essence of the property right at issue.").

21. See Danny Ciraco, *Forget the Mechanics and Bring in the Gardeners*, 9 U. BALT. INTELL. PROP. L.J. 47, 76 (2000).

22. See Scott H. Blackman & Rebecca M. McNeill, *Alternative Dispute Resolution in Commercial Intellectual Property Disputes*, 47 AM. U. L. REV. 1709, 1726 (1998).

23. See 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. 287, 311-13 (2004).

### III. THE STATUS OF USING ADR FOR IP DISPUTES IN JORDAN

Despite references to amicable means of settling disputes in Islamic culture, few arbitration cases actually occur in Jordan.<sup>24</sup> The use of ADR to settle IP issues in Jordan is still lagging. There are several reasons—legal and non-legal—which contribute to this state of affairs.

The question of which matters can be arbitrated becomes problematic when one considers IPR.<sup>25</sup> Some hold the view that all issues involving IPR in Jordan are arbitrable.<sup>26</sup> However, there is evidence suggesting that matters relating to infringement, validity, and other issues are not arbitrable.<sup>27</sup> In contrast to this view, as will be shown below, courts and state administrative agencies in Jordan have exclusive jurisdiction to hear certain IP cases.

There is no specific statutory language in Jordan's IP laws guaranteeing the arbitrability of copyright, trademark, and patent cases. Jordan's IP laws favor courts rather than private arbitrators to resolve disputes concerning IPR. This view is evidenced by the Jordanian Copyright Law, which provides that in case of suspicion that a violation of the provisions of the law is being committed by a business which prints, reproduces, produces, or distributes works, the court can be petitioned to investigate the case.<sup>28</sup> The copyright,

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24. See Guisepppe De Palo & Linda Costabile, *Promotion of International Commercial Arbitration and other Alternative Dispute Resolution Techniques in Ten Southern Mediterranean Countries*, 7 CARDOZO J. CONFLICT RESOL. 303, 313 (2007) (“[F]ew arbitrations actually occur in Jordan, likely because its society is more civil-service oriented than business-minded . . .”).

25. See M.A. Smith et al., *Arbitration of Patent Infringement and Validity Issues Worldwide*, 19 HARV. J.L. & TECH. 299, 305 (2006) (“The question of whether a particular subject matter is arbitrable is often referred to as a question of ‘objective arbitrability.’”).

26. See L.M. Daradkeh & Ala Elden Kasawneh, *The Capability of Intellectual Property Disputes of Being Settled by ADR: Theoretical and Practical Approach under Jordanian Law*, 4 INT’L J. INTELL. PROP. MGMT. 283, 290 (2011) (explaining that disputes arising over IPR can be resolved by ADR and it is possible to apply both arbitration and mediation laws to resolve IP disputes as far as Jordan is concerned).

27. *Id.* at 292-93.

28. Jordanian Copyright Law No. 22, Official Gazette No. 3821, No. 22 of 1992, amended by Law No. 52, art. 36, Official Gazette No. 4508 (2001).

patent, and trademark laws provide for penal sanctions in case of infringement.<sup>29</sup>

Under Jordan's IP laws, there is no explicit distinction between invalidity of IPR raised as a defense to an infringement claim and an attempt to revoke the entire IPR; in which case only the former may be arbitrable.<sup>30</sup> Moreover, issues of lapse of protection and cancellation of a registered IPR fall within the jurisdiction of the High Court of Justice, Court of First Instance, or the Patents Registrar.<sup>31</sup> These issues require entry into a public register and inherently involve public interest. Therefore, the ultimate authority for determining IPR lies in the state authority or judiciary.

While Jordan's IP laws are silent on the arbitrability of IPR, the Jordanian Arbitration Law widens the scope of arbitration. Arbitration can cover any legal dispute regardless of the legal nature of the relationship, which is the subject matter of the dispute. The disputing parties can refer any dispute, whether civil or commercial, contractual or non-contractual, to arbitration.<sup>32</sup> However, arbitration is not permitted in matters that cannot be conciliated.<sup>33</sup> The arbitration law does not clarify or provide examples of what matters cannot be conciliated, but these matters likely include crimes, divorce, bankruptcy, and other matters relating to public order.

The Jordanian Arbitration Law does not have specific provisions for IP disputes. In principle, therefore, there is no legal obstacle that bars an arbitral panel from ruling on IP disputes. Nevertheless, it remains unclear if all issues involving IPR, including validity of IP or ownership of IPR, are arbitrable.<sup>34</sup> Also, an open question arises as to

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29. See Patent Law No. 32 of 1999, amended by Law No. 71 of 2001, art. 32, Official Gazette No. 4520 (2001); see also Jordanian Copyright Law arts. 51-52.

30. See Patent Law No. 32 art. 30 (Jordan).

31. *Id.*

32. See Arbitration Law No. 31 art. 3, Official Gazette No. 4496 (2001) (Jordan). The different schools of Islamic legal thought also have different opinions regarding the type of matters that may be arbitrated; however, all four schools of Islamic thought agree that arbitration cannot be used in disputes where a judge alone is competent to decide. See Khalid Rashid, *Alternative Dispute Resolution in the Context of Islamic Law*, 8 VINDOBONA J. INT'L COM. L. & ARB. 95, 104 (2004).

33. See Arbitration Law No. 31, art. 9 (Jordan).

34. In contrast, the U.S. Patent Act authorizes voluntary, binding arbitration of patent validity and infringement issues. See Patent Act, 35 U.S.C. § 294(a) (2006). Decisions made under the Patent Act are not binding on anyone other than the

whether IP issues can be subject to arbitration absent an underlying contractual arrangement. One can assume that disputes relating to contractual rights and obligations, such as amounts of royalty paid in a license agreement, scope of license, and guaranties, can be arbitrable. This assumption is based on the fact that these are purely private issues related to the interpretation of an agreement; private issues are governed by a licensing agreement, unlike public interest issues—such as validity and revocation questions—which fall within the jurisdiction of the Patents Registrar of the Ministry of Trade, the National Library Department for Copyright, or the Registrar of Trademarks.<sup>35</sup>

At any rate, Jordanian courts have not ruled on whether IP issues can be arbitrated. Additionally, there is no data in Jordan that provides for settlement rates or other data on IP disputes resolved through ADR.<sup>36</sup> It remains to be seen whether courts in Jordan will permit IP disputes to be arbitrated, and whether courts will interpret arbitration clauses to encompass some or all IP claims.

Many Jordanians prefer to use the courts because they retain the right to appeal a judicial decision, if the court misapplies the law or makes some other mistake. The Jordanian Arbitration Law reflects this preference by excluding appellate review.<sup>37</sup> Nevertheless, the absence of formal appeals does not mean arbitral decisions are never reviewed. Such review exists, but is limited to correcting gross errors.<sup>38</sup> For example, the Jordanian Arbitration Law allows an award to be set aside if the panel acted beyond its authority.<sup>39</sup> In sum, the Jordanian Arbitration Law authorizes limited review of arbitral decisions and thus an arbitration award can be vacated.

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parties to the arbitration. *Id.*

35. See Patent Law No. 32 of 1999, amended by Law No. 71 of 2001, art. 30, Official Gazette No. 4520 (2001); see also Jordanian Trademark Law No. 34 of 1999 art. 11, Official Gazette No. 4389 (1999).

36. The number of cases settled through court-administered mediation in 2010 reached 1892 cases; those cases involved labor, insurance, lease, and banking disputes. See JORDANIAN JUDICIAL COUNCIL, *supra* note 18, at 27-28. No figures are available as to how many IP cases settled through ADR, whether court-sponsored or otherwise.

37. See Arbitration Law No. 31 art. 48 (Jordan).

38. See *id.* art. 49.

39. *Id.*

In addition to the legal barriers hindering the use of ADR to settle IP disputes in Jordan, there are other reasons why ADR mechanisms are not as commonly used as one might hope. In terms of generating IP, Jordan and other Arab countries lag behind the rest of the world. For example, the number of patents registered by Arab countries in the United States is far less than other countries.<sup>40</sup> In view of the disparity in the number of registered patents and other IP products between Arab countries and other countries, some doubts can be raised as to the utility of using ADR by Arab individuals to settle any disputes.

IP disputes rarely arise in a contractual relationship because disputes generally arise when an individual or a company violates IPR through unauthorized use, copying, or imitations.<sup>41</sup> In these circumstances, the authority to grant immediate injunctive relief and impose criminal sanctions is vested in the state.<sup>42</sup> Parties seeking injunctive relief to prevent copyright, patent, trademark infringement, or trade secret disclosure have to wait until an arbitration panel is formed. This can be a lengthy process, especially if the parties employ frivolous delay tactics.<sup>43</sup> The right holders are thus inclined to pursue their rights through courts, which are readily available to issue injunctive relief.

Availability of expertise is another reason affecting the use of ADR to settle IP disputes. In arbitration and other ADR mechanisms,

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40. Raj Bhala, *Discovering Great Opportunity in the Midst of Great Crisis: Building International Legal Frameworks for a Higher Standard of Living: Doha Round Betrayals*, 24 EMORY INT'L L. REV. 147, 180 (2010) ("Between 1980 and 2000, Israel registered 7,652 patents in the United States and South Korea registered 16,328 patents in the United States. In that same twenty-year period, Saudi Arabia led the Arab-Muslim world in registering patents in the United States with . . . 171. Egypt had seventy-seven, Kuwait fifty-two, the United Arab Emirates thirty-two, Syria twenty, and Jordan fifteen.").

41. See Robert M. Hirning, *Contributory and Vicarious Copyright Infringement in Computer Software: Harming One Form of Intellectual Property by Protecting Another*, 6 CHI.-KENT J. INTELL. PROP. 10, 21-23 (2006).

42. The Court of First Instance may issue an order for the cessation of the infringement of the work, confiscation of the work, confiscation of the revenues, or destruction of the reproductions of the work or the copies made of it. See Jordanian Copyright Law, arts. 46-47.

43. See D. Alan Redfern, *Arbitration and the Courts: Interim Measures of Protection—Is the Tide about to Turn?* 30 TEX. INT'L L.J. 71, 83 (1995); see also Alain Frécon, *Delaying Tactics in Arbitration*, 594 DISP. RESOL. J. 40, 46-47 (2005).

parties are able to select the arbitrators and mediators who will hear and consider their disputes.<sup>44</sup> IP disputes may involve complex technologies or difficult issues of valuation; thus, the lack of qualified Jordanian experts/arbitrators in the domain of IP makes proceedings less efficient and the outcomes less acceptable.<sup>45</sup> Jordan could attempt to address this lack of expertise by establishing a center to train staff—judges and arbitrators—on complex infringement cases and other IP issues. Indeed, the Arab Intellectual Property Mediation and Arbitration Society (AIPMAS) was formed in 2003, in Jordan, to handle IP arbitration.<sup>46</sup> Before 2003, Jordan had no institutional framework for arbitrating IP disputes. The AIPMAS is still a young institution that needs time to develop. In the meantime, Jordanian parties involved in IP cases can enlist well-known institutions outside Jordan to resolve their disputes through arbitration and other ADR mechanisms, which provide services such as selecting qualified arbitrators from a roster.<sup>47</sup>

Many of Jordan's IP laws are relatively new. The laws were recently modified and enacted on the eve of Jordan's accession to the World Trade Organization (WTO) in 2000.<sup>48</sup> It is necessary for

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44. See Martin A. Frey, *Does ADR Offer Second Class Justice?* 36 TULSA L.J. 727, 733-35 (2001) (explaining that in mediation and arbitration the third party is neutral and is invited to participate in the process).

45. Jordanian judges also lack sufficient understanding of the complicated legal and technological issues involving IP cases. See Tabbaa & Partners, *Developing a Sustainable IP Judicial Training Program 5* (USAID Concept Paper, 2007) ("Although the public is confident when it comes to judicial fairness and integrity, this confidence falls short when assessing judges' technical capacity and ability to deal with novel laws and issues such as IPR. . . . [J]udicial enforcement in IP cases [in Jordan] remains poor and courts take years to settle conflicts and often provide remedies wholly-inadequate to the goal of deterrence of criminal acts.").

46. Wei-Hua Wu, *International Arbitration of Patent Disputes*, 10 J. MARSHALL REV. INTELL. PROP. L. 384, 389 (2011). The activities of the AIPMAS include training courses, publications, and using ADR means to settle IP disputes. *The Activities of AIPMAS*, ARAB INTELL. PROP. MEDIATION & ARB. SOC'Y, [http://www.aipmas.org/page.aspx?page\\_key=activity\\_of\\_society&lang=en](http://www.aipmas.org/page.aspx?page_key=activity_of_society&lang=en) (last visited June 19, 2012).

47. See Mladen Singer, *Commercial Arbitration as a Means for Resolving Industrial Property and Transfer of Technology Disputes*, 3 CROAT. ARB. Y.B. 107, 112-14 (1996) (citing the American Arbitration Association and WIPO Arbitration Center).

48. Jordan had been on the United States watch list for quite some time, where

Jordan to continue to publicly demonstrate that it effectively enforces IPR. The Jordanian government's efforts to protect foreign IP interests in Jordan have been front-page news.<sup>49</sup> Through this publicity, Jordan sends a deterrent message to potential infringing third parties. IP disputes, however, receive the greatest publicity when litigated in the courtroom. Moreover, many lawyers in Jordan automatically resort to litigation to resolve IP issues.<sup>50</sup> The choice to litigate may also be due to the lack of familiarity with ADR methods. Therefore, Jordanian laws and practices seem to encourage IP holders to pursue violators through public judicial vindication.

Jordanian ADR is still in its early stages of development. Some ADR mechanisms, such as court administered conciliation and mediation, have recently been adopted in Jordan.<sup>51</sup> For example, the Mediation Law for Settling Civil Disputes ("Mediation Law") was enacted in 2006.<sup>52</sup> Commercial disputes are included in this law.<sup>53</sup> By virtue of the Mediation Law, a "Mediation Directorate" is established and composed of a number of judges from both the Court

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the United States has closely watched Jordan's IP regime. See Gary G. Yerkey, *Intellectual Property: U.S., Jordan Hold Talks in Effort to Avoid Sanctions over IP Protection*, 15 INT'L TRADE REP. (BNA) 661 (Apr. 15, 1998). The situation worsened during the 1998 discussion on whether Jordan would be targeted with trade sanctions under Special 301 of the 1988 Omnibus Trade and Competitiveness Act for failing to adequately protect U.S. copyrights, patents, and trademarks. *Id.* Compliance with TRIPS and the un-listing from the U.S. watch list of Special 301 helped Jordan accede to the WTO. See Gary G. Yerkey, *U.S. Removes Jordan from 'Watch List' of Special 301 Nations Failing to Protect IP*, 16 INT'L TRADE REP. (BNA) 2047 (Dec. 16, 1999).

49. See Suha Ma'ayeh, *Improved IPR Enforcement Gets Mixed Reviews*, JORDAN TIMES, May 10, 2001, at 10; see also, Press Release, U.S. Embassy, U.S. Embassy Donates Two Vehicles to the Jordan Standards and Metrology Organization (Mar. 2011), available at [http://jordan.usembassy.gov/pr\\_030111.html](http://jordan.usembassy.gov/pr_030111.html) (describing how JSMO will use these vehicles to inspect imported goods to ensure their compliance with Jordanian standards and to conduct market surveillance to identify and confiscate counterfeit items).

50. Telephone Interview with Mazen Irsheidat, President of Jordan Bar Ass'n (Jan. 12, 2012).

51. See Mediation Law for Settling Civil Disputes No. 37 art. 3, Official Gazette No. 4595 (2003) (Jordan).

52. See *id.*

53. *Id.* art. 3.

of Cassation and Court of First Instance.<sup>54</sup> In addition to these judges, the Minister of Justice may nominate “Special Mediators” and private mediators approved by the court to settle referred disputes.<sup>55</sup> These “Special Mediators . . . are likely to be former elder statesmen or high-ranking judges held in high societal esteem.”<sup>56</sup> Thus, this law provides for three types of mediators as a voluntary alternative to litigation: judges, special mediators, and private mediators.

The comparative advantage of arbitration is neutrality, at least in the sense that arbitrators are not affiliated with a particular nation.<sup>57</sup> The valuable aspect of ADR’s neutrality is the ability of arbitration and mediation to accommodate significantly different legal and commercial practices and expectations, as often exist when the parties to the transaction are from both Western and non-Western traditions. Historically, arbitration, the principal form of ADR, has long been viewed skeptically and with hostility in the Arab world.<sup>58</sup> In arbitrations involving Saudi Arabia and the United Arab Emirates, Western arbitrators rendered decisions that excluded these countries’ legal systems in a humiliating manner.<sup>59</sup> Arab participants are concerned ADR methods may allow Western arbitrators and mediators to dominate over Arab arbitrators and mediators.<sup>60</sup> In

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54. *Id.* art. 2.b.

55. *Id.* art. 2.c.

56. Lynn Cole, Nancy Fashho & Ahmad M. Yakzan, *Jordan Leads the Way in Mediation in the Arab Middle East*, INT’L SEC. NEWSL. (Ass’n of Conflict Resolution, D.C.), Jan./Feb. 2008, at 9.

57. See Giles Cuniberti, *Beyond Contract-The Case for Default Arbitration in International Commercial Disputes*, 32 FORDHAM INT’L L.J. 417, 423-26 (2009).

58. See Brower & Sharpe, *supra* note 4, at 643 (explaining that the legal community throughout the Arab world is still manifesting its hostility toward transnational arbitration mainly as a result of the great publicity devoted to the criticism of certain unfortunate arbitral awards).

59. See Alexander Orakhelashvili, *The Position of the Individual in International Law*, 31 CAL. W. INT’L L.J. 241, 258-59 (2001) (quoting McNair, *The General Principles of Law Recognized by Civilized Nations*, 33 BRIT. Y.B. INT’L L. 1 (1957)) (discussing that in the Abu-Dhabi Oil Arbitration, the tribunal did not apply domestic law because “[t]he sheikh administers a purely discretionary justice with assistance of the Koran; it would be fanciful to suggest that in this very primitive region there is any settled body of legal principles applicable to the construction of modern commercial instruments.”).

60. See ABDEL HAMID EL AHDEB, *ROLE OF ARBITRATION IN DISSOLVING INTELLECTUAL PROPERTY DISPUTES*, 12 (2009), available at

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response, certain laws or rules are no longer excluded because of bias.<sup>61</sup> Problematic arbitral awards are a thing of the past and recurrence is unlikely. Today, ADR does not presuppose any particular procedure or method of proceeding; to the contrary, Arab parties view ADR as a neutral means to settle disputes.

#### IV. CONCLUSION

The future of arbitration and other ADR methods to settle IP disputes in Jordan is still not clear. Jordan did not expressly extend arbitration to IP disputes. Jordan's IP laws contain no specific statutory language guaranteeing the arbitrability of copyright, trademark, and patent cases.<sup>62</sup> Also, the Jordanian Arbitration Law does not make specific provisions for IP disputes.<sup>63</sup>

Nevertheless, private parties may contractually agree to settle their disputes through arbitration. It remains unclear if all issues involving IPR, including the validity of IP or the ownership of IPR, are arbitrable. There is no court precedent in Jordan that would provide guidance to determine the extent of arbitrability of IP disputes.

Arbitration allows parties to bypass the backlogged judicial system in Jordan. Arbitration can start immediately and parties can control the arbitration process. Flexibility in selecting arbitrators and procedures reduces time and saves money for the parties involved. Given the benefits, IP practitioners in Jordan should no longer turn automatically to the court system to resolve IP disputes. Although the courts are not the ideal forum, Jordanian authorities should still establish programs to encourage enhancement of expertise in IP cases among judges and lawyers.

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<http://shiac.com/files/shiac%20presentations/Role%20of%20Arbitration%20in%20IP%20Disputes.pdf> (Jordan); *see also* SAMIR SALEH, COMMERCIAL ARBITRATION IN THE MIDDLE EAST: A STUDY IN SHARI'A AND STATUTE LAW 1 (1984) (stating that Arab parties are usually reluctant to arbitrate in a foreign state and under foreign rules of procedure).

61. *See* Amr A. Shalakany, *Arbitration and the Third World: A Plea for Reassessing Bias under the Specter of Neoliberalism*, 41 HARV. INT'L L.J. 419, 448-57 (2000).

62. *See* Mediation Law for Settling Civil Disputes No. 37 (Jordan); Patent Law No. 32 (Jordan); Jordanian Copyright Law No. 22.

63. *See* Arbitration Law No. 31 (Jordan).

Regardless, arbitration and other ADR mechanisms should be the method of first resort in resolving IP disputes whether domestic or international. The demand for arbitration and other ADR mechanisms in Jordan will become more important as IP disputes become more common and the international nature of disputes increase.

