

“Alternate Dispute Redressal in Intellectual Property”

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ABSTRACT

With the advancement in the world of intellectual property several problems are arising day to day, some of the mechanisms for solving the problems relating to IP are discussed in this article.

The main purpose of this article is to focus on the different patterns (mechanism) used in the field of intellectual for the dispute resolution. The article will further lay stress on the working and feasibility of ADR both nationally and internationally.

The article will proceed to throw the light about the reasons that, why an owner or user of intellectual property rights might prefer to resolve disputes concerning rights by means of ADR?

Is the mechanism of ADR is actually practiced and accepted by the different economies of the world or not and is there a need for more powerful mechanism of ADR as we are using today?

How far WIPO is successful in achieving the Moto of maintaining peace through ADR?

Is there any benefit showered by the ADR on both the owners and the users of the intellectual properties?

INTRODUCTION

With the advancement in almost every field, the IP has also established itself as the most valuable commodity in the global market and as a result there is also a ratio of controversy related to it. Usage of intellectual property may sometimes give rise to a controversy because of its availability for the limited period to the creator. The matter then goes to the court and results in unnecessary delay, there is a need to look to the other solutions and mechanisms for sharing the burden of judiciary. ADR is the mechanism that helps in providing speedy justice for the enforcement of IP. This paper explores the usage and significance of ADR in protection of IP.

ALTERNATIVE DISPUTE RESOLUTION MECHANISM

ADR is a simple mechanism for the resolution of dispute in IP. IP includes copyright, trademarks, trade dress, patent etc. various methods that are used for peaceful resolution of dispute in IP are arbitration, mediation, conciliation, settlement which acts as an alternative to court based litigation.

There are several acts in India which also provides for the peaceful settlement of dispute through ADR –

1. The arbitration and conciliation act, 1996
2. The civil procedure code, 1908: section 89 provides for the amicable settlement of dispute through ADR mechanisms
3. The constitution of India: ADR in India was founded on the constitutional basis of articles 14 and 21 which deals with equality before law and equal protection of law.
4. The legal services authority act, 1987

Even where the alternative dispute resolution methods fail to be the effective choice for the determination of disputes related to intellectual property rights, they can be used for narrowing down the issues for contestability in a traditional model of litigation.

COMMON TYPES OF ADR

Mediation:

The most popular ADR technique used in intellectual property disputes is mediation. Mediation is a mechanism whereby the parties meet, possibly face to face, to discuss their positions with a neutral or mediator. The mediator, or neutral, may be agreed-upon between the parties, or may be appointed by a process defined by the parties. In mediation, the actual parties often negotiate directly. The process is having non binding effect, and its success depends on the willingness of the parties. Mediation can be used as part of a greater dispute resolution process that may even include litigation, or as a stand-alone dispute resolution mechanism.

Arbitration:

Another option for intellectual property disputants is binding arbitration. Arbitration is usually more structured than mediation, and the parties may opt to have one or three panelists decide the issues. Often, the terms of binding arbitration are set out in the license agreement or in another agreement by way of an arbitration clause. An arbitration agreement or clause will typically include a method for determining the panel, the applicable law, the location of hearings, and a list of issues or any exceptions to issues that may be arbitrated.

Med-Arbitration:

One unique approach to ADR is the use of a mixture of mediation and arbitration. For instance, the parties may agree in advance to first attempt mediating a dispute, then, if mediation fails, to submit any unresolved issues to arbitration. The parties may use the same neutral or mediator for the mediation and the arbitration, or select a new neutral or mediator for the second process.

Early Neutral Evaluation (ENE):

Particularly useful in expensive patent and licensing disputes, early neutral evaluation ("ENE") occurs early in litigation. Each party presents a brief and then orally argues an abbreviated version of its case to the evaluator (who is a skilled litigator, familiar with the relevant legal issues) with all attorneys and parties present. The ENE may ask questions of the attorneys and parties. After the session is complete, the ENE prepares a summary for the parties, outlining who is likely to win on the merits and projecting the cost of attorney's fees if the case should continue through litigation. The ENE shares this information with the parties and may help to facilitate mediation, if requested.

Summary Jury Trial:

Similar to early neutral evaluation, summary jury trial may be ordered by courts in very complex litigation or used voluntarily in disputes involving complex factual issues. The primary difference is that a representative "jury" is called to hear the factual issues in dispute in a much abbreviated format. Once a verdict is reached, parties may talk to the "jury" to find out why individuals voted the way they did. This technique is often used to analyze the strength of a case and to determine how certain arguments will play with a jury. Sometimes a summary jury trial will lead parties to conclude that the issues are too complex for a lay jury. Summary jury trials often lead to other forms of ADR or settlement.

DISADVANTAGES OF NOT PRACTISING ADR MECHANISM

IP can be large and complex and often involves high degree risk. Resolving the disputes relating to the IP often proves detrimental to both business houses and the parties relating to it. Some of the major disadvantages are as follows:

➤ Long duration to arrive at a resolution:

The procedure followed by the court in resolving dispute is very lengthy and time consuming. It is a big failure in providing speedy justice to the seekers or the disputant parties.

➤ Costlier as compared to a ADR:

The court procedure is an expensive one as compared to the ADR. At the multiple stages the disputant parties need to invest lump sum amount of money.

➤ Rigidity of result or decision:

The decision given by the court of law cannot be changed it has the binding effect on both the parties , no any terms and conditions can be settled by the parties, once the decision of the court comes out , the parties has to follow the court rulings as it is .

➤ No control over outcome:

The parties have no control over the rulings of the court, it is unamendable.

➤ No predictability of result:

Parties cannot predict the result or the outcome of the ruling of the court. The decision of the court only depends on the wish of the honorable judge/jury.

➤ Negative impact on the business:

Slow trial procedure degrades the parties which lay negative effect on the concerned business of the parties; it affects the good will of the company.

➤ Downfall in the market value:

When any sort of controversy arose in relation to a company or a firm dependent on IP , it affects the market value of the company and so its share degrades .

➤ Negative publicity:

Lengthy procedure of the court leads to the downfall of the reputation of an IP based enterprise and public loses its faith on the company.

➤ Effect business relationships:

It adds to the ill will of the company which affects badly the business relationship with the other firms.

ADVANTAGES OF ADR MECHANISM

The ADR mechanism showers various advantages to the disputant parties for IP resolution. To sum up following are various advantages:

- Quick and efficient resolution of dispute
- Decreased cost
- Flexibility in the decisions
- Control over process
- Control over results

- maintains goodwill of business
- improves new business relationships
- confidentiality
- choice of neutrals or mediators or arbitrators
- no any negative publicity

USAGE OF ADR IN VARIOUS KINDS OF IP

COPYRIGHT LAW AND ADR

Copyright disputes typically involve the issue of whether or not an accused party infringed a copyright. a key issue in such a dispute is usually the question of whether the accused party unlawfully ‘copied ‘or derived his own work from work protected by copyright .resolution of disputes typically involves weighing the evidence of the accused party, access t the original work and degree of substantial similarity between the particular expression of the original work and the accused party’s work. Accordingly the arbiter of the dispute must decide whether the accused party copied the expression fixed in earlier (original) work or not.

SOFTWARE DISPUTES AND ADR

The more complicated subject matter is the disputes involving duplication of computer software and other highly technical issues. As parties recognized the benefit of utilizing an arbiter with a particular technical background and ability to understand the subject matter at hand ADR becomes a more attractive means of resolution. Unlike a trial , ADR allows the parties to determine for themselves the degree to which such information will or will not be made publicly available .this would likely be considered a substantial advantage in disputes regarding computer software, for example , where continued confidentiality is often primary concern.

PATENT LAW AND ADR

Patent disputes, especially those involving complex technological issues, are often particularly well suited for resolution through ADR. Resolution of a patent dispute involves addressing the patents validity and subsequent infringement. To address these issues the decision maker must examine the technical aspects of patent, including the claims and specifications from the perspective of a person “skilled in the art” of the patent’s subject matter. The Patent Act, 1970 particularly under section 103 of the Act makes use of arbitration as a procedure for resolution of dispute. Closer integration of alternate dispute resolution mechanisms in patent infringement suits could be the way forward for appropriate dispensation of justice. In fact many countries have endorsed the inclusion of arbitration as a model for the resolution of patent disputes.ADR

however has the ability to provide a focused, limited and relatively quick procedure without the significant financial cost of litigation. it also provides each side with a chance for a “reality check” .public disclosure of confidential trade secrets or other proprietary information can more easily be avoided in an ADR proceeding if the parties so choose .

TRADEMARKS LAW AND ADR

Many trademark and trade dress litigation cases settle out of court. Alternative dispute resolution can encourage parties to settle their disputes earlier, saving time, money, and valuable business relationships. Trademark and trade dress disputes typically involve a question of "likelihood of confusion Trademark plaintiffs is often involved in claims that allege that the defendant's mark is confusingly similar to the plaintiff's mark.' The trade dress complainant often argues that the defendant's packaging presents his Product in a manner that misleads the public to believe it is the plaintiff's product.

In India, trademark litigation covers an overwhelming landscape in the intellectual property related litigation. The trademark litigation is an inter parties adjudication. That being the case, the modes of alternative dispute resolution can certainly provide an appropriate recourse to the ailing judiciary. Moreover, it is germane to note that in cases of cyber squatting, arbitration plays an eminent role in the streamlined procedure outlined under the Uniform Domain Name Dispute Resolution Policy, 1999 and the Indian Domain Name Dispute Resolution Policy for the adjudication of disputes. This brings to fore the importance of arbitration and the use of other alternate dispute resolution measures for reconciliation of the interests of the trademark owner and the impugned party.

NEED OF ALTERNATIVE MODE OF DISPUTE RESOLUTION IN INTELLECTUAL PROPERTY DISPUTES

The intellectual efforts of the creators of intellectual property are valued on the basis of the sign of the rights affixed to ‘intellectual output’. Intellectual property protection provides a pointer to the creator to exert his powers over third parties, who, without his permission, try to use the fruits of his labor. The rationale for the creation of rights gets defeated if they cannot be enforced. The owners of intellectual property have to be their own watchdogs and take recourse to the Courts for the infringement of their rights. Indian Courts have taken a giant leap towards the development of an intellectual property regime in India; however, the available resources could be put to better and proper use by the Courts in India if the alternate dispute resolution is deployed. Matters related to patent law and copyright law, which involve intersection with science and an understanding of technology, need special adjudicating officers, who can comprehend the interdisciplinary nature of the case at hand with sufficient ease. The limited

nature of protection given to the owner of intellectual property rights, calls for developing mechanisms to execute immediate and swift justice.

While evaluating the performance shown by the Indian judiciary in cases related to intellectual property rights, the Supreme Court of India has in the case of *Shree Vardhman Rice & Gen Mills v. Amar Singh Chawalwala* held that “...Without going into the merits of the controversy, we are of the opinion that the matters relating to trademarks, copyrights and patents should be finally decided expeditiously by the Trial Court instead of merely granting or refusing to grant injunction. In the matters of trademarks, copyrights and patents, litigation is mainly fought between the parties about the temporary injunction and that goes on for years and years and the result is that the suit is hardly decided finally. This is not proper...In our opinion, in matters relating to trademarks, copyright and patents, the proviso to Order XVII Rule 1(2) C.P.C. should be strictly complied with by all the Courts, and the hearing of the suit in such matters should proceed on a day to day basis and the final judgment should be given normally within four months from the date of the filing of the suit.”

Reiterating its stance in *Bajaj Auto Ltd. v. TVS Motor Company Ltd.*, the Supreme Court of India held that “experience has shown that in our country, suits relating to the matters of patents, trademarks and copyrights are pending for many years and litigation is mainly fought between the parties over temporary injunction. This is a very unsatisfactory state of affairs, and hence, we had passed the above quoted order in the case of *Shree Vardhman Rice & Gen Mills v. Amar Singh Chawalwala* to serve the ends of justice. We direct that the directions in the aforesaid order be carried out by all courts and tribunals in this country punctually and faithfully.” It is evident that due to unwarranted delay in the disposal of cases and the costly litigation which could prolong the protection accorded to the work, rather than promoting the progress of intellectually protected work, the aggrieved parties are opting for alternate dispute resolution mechanisms for the advancement of intellectual property rights in India. Moreover, the commercial nature of the transactions involved in majority of intellectual property based litigations, solicits such an approach.

The solution lies in the introduction of alternative dispute resolution mechanisms, for the redressal of grievances related to infringement of protected rights of an intellectual property holder. Alternative dispute resolution mechanisms are less time consuming, efficient and provide flexibility to the right holder. It is important to note that in all the commercial transactions, the route of alternate dispute resolution has already shown its majority over the traditional modes of litigation. Nowadays, contracts related to transfer of intellectual property mostly include the “arbitration-mediation” clause. This highlights the weight of arbitration in commercial intellectual property transactions. In a landmark judgment in the case of *Bawa Masala Co. vs. Bawa Masala Co. Pvt. Ltd. and Anr.*, where a number of legal disputes were resolved through a

process of alternate dispute resolution, the Delhi High Court passed orders for adoption of a process known as early neutral evaluation, in an intellectual property based litigation suit. The Court in this case, under the umbrella of section 89 of the Civil Procedure Code, 1908 mooted for the inclusion of such procedures for amicable settlement of disputes. The Court further said that the early neutral evaluation procedure shares the “same features as a mediation process...the difference is that in case of mediation the solutions normally emerge from the parties and the mediator makes an endeavor to find the most acceptable solution” whereas “in case of early neutral evaluation, the evaluator acts as a neutral person to assess the strengths and weaknesses of each of the parties.” The Court further made a distinction between early neutral evaluation and arbitration by stating that in early neutral evaluation “there is no testimony or oath or examination and such neutral evaluation is not recorded.” The Court also held that early neutral evaluation is “confidential and cannot be used by any of the parties against the other. There is no award or result filed.” This stands as a seminal case, where, Indian Courts have tried to bring alternative dispute resolution machinery for solving intellectual property infringement related matters. This case also highlights the inclination, which Indian Courts have started sharing, towards involvement of alternate dispute resolution measures in resolution of such disputes.

However, use of alternative modes of dispute resolution for determination of intellectual property related disputes, may face some problems. Firstly, since the protection of intellectual property is territorial in nature, the public policy consideration as set down by the Supreme Court of India in the case of *O.N.G.C v. Saw Pipes*, can pose a hurdle towards enforceability of arbitral awards, if made on the mandate of intellectual property related disputes. Secondly, the issue of validity of intellectual property points towards determination of right against everyone. This might pose another roadblock for the use of alternative dispute resolution machinery in intellectual property related disputes. However, the determination of infringement of intellectual property, as it determines the rights between two parties, can certainly be adjudicated by the use of alternative dispute resolution machinery.

CONCLUSION

Statutory rights, which are limited in nature, solicit a different approach for their effective enforcement. The jurisprudence related to the establishment of various quasi-judicial bodies under different intellectual property laws, points out that these bodies were formed to share the load and to render an expert testimony towards the determination of validity of intellectual property. The infringement of intellectual property rights, since it pertains to an inter parties dispute, can be very well adjudicated by using alternative dispute resolution measures. Although resolving intellectual property disputes can be technically complex, time-consuming, resource draining, and adversarial, ADR offers solutions that can reduce the complexity, time, cost, and controversy. Whether private ADR neutrals or an ADR service provider are used, neutral

selection is important, especially in complex, technical disputes. When preparing intellectual property licensing agreements, consider including ADR clauses for some or all possible issues that may arise.

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