

## Alternative Dispute Resolution and the Law of Intellectual Property

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### INTRODUCTION

Disputes relating to intellectual property protection are gradually escalating in the Indian legal setting. Intellectual property protection is available for a limited period for the intellectual property creator who has to enforce it in an effective manner. Because of the excessive delays in the judicial system, there is a need to look for other solutions and mechanisms for sharing the burden of the judiciary. This is particularly relevant because the aggrieved person enjoys limited rights and the only remedy available is that which is prescribed under substantive legislations. Alternative dispute resolution measures are gaining prominence for enforcing the protection of intellectual property. This article explores the use of alternative legal mechanisms for the protection of intellectual property rights in India.

### NEED FOR 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 labour. 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 *ShreeVardhman Rice & Gen Mills v. Amar Singh Chawalwala*<sup>1</sup> 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,

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<sup>1</sup> (2009)10 SCC 257

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*<sup>2</sup>, 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 above-mentioned case 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.

### **ALTERNATE DISPUTE RESOLUTION MACHINERY**

Alternate dispute resolution embodies within its garb different modes of resolving a dispute, other than that provided by the traditional model of litigation. Arbitration, mediation, settlement and conciliation are some of the models which are the alternatives to court based litigation. The Arbitration and Conciliation Act, 1996 has been the main statute in India dealing with the two cited alternate forms of dispute resolution. The Civil Procedure Code, 1908 also provides for the adoption of different models for the expeditious determination of disputes. The merits of the modes of alternate dispute resolution are not only limited to speedy remedy, but also, to the flexibility, cost effectiveness, confidentiality and business oriented results. The Indian judiciary has effectively tried to bring mediation and settlement for intellectual property disputes in the traditional model of litigation, through the reading of Section 89 of the Civil Procedure Code, 1908. Even where the alternative dispute resolution methods fails 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.

In this context, it is relevant to refer to the law laid down by the Supreme Court in the case of *Booz-Allen & Hamilton Inc v. SBI Home Finance Ltd. & Ors*<sup>3</sup>. After discussing the law extensively, the Court laid down the test to determine the arbitrability of disputes and held that all disputes relating to rights in personam are considered to be amenable to arbitration while rights in rem are required to be adjudicated by Courts and public tribunals. It was specified that right in rem operates where class of actions are inarbitrable, like in cases where the disputes arise out of special statute or have exclusive jurisdiction of specific courts, such as disputes arising out of criminal offences, matrimonial matters, guardianship, insolvency and winding up, testamentary matters, eviction or tenancy.

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<sup>2</sup> (2009) 9 SCC 797

<sup>3</sup> AIR 2011 SC 2507

Thereafter, in the case of *A. Ayyasamy v. A. Paramasivam & Ors*<sup>4</sup>, the Supreme Court expanded its view and further categorised disputes relating to patents, trademarks, copyright, anti-trust/competition laws, fraud, bribery, corruption matters as inarbitrable disputes. It is pertinent to note that in this case, the main issue before the Court was to decide the arbitrability in matters involving fraud. Thus, the categorization of Intellectual Property disputes as inarbitrable was only *obiter dictum*, as no such reasoning has been put forth to support such categorisation.

Hence, the aforesaid dicta can be considered as an inflexible stance which tends to impair the efficacy of commercial arbitration, as right in rem can be distinguished in Intellectual Property disputes through legislative clarifications. Thus this decision cannot be read as bar to arbitrability of IP disputes. The test of arbitrability of disputes as laid down in the case of *Booz Allens* holds good as it envisages that arbitrability of dispute is dependent upon the nature of the claim made in a dispute and enables disputes pertaining to rights of parties in personam involving IPR, to be referred to arbitration.

### **ALTERNATIVE DISPUTE RESOLUTION MEASURES FOR INTELLECTUAL PROPERTY: NEED OF THE HOUR**

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. v. Bawa Masala Co. Pvt. Ltd. and Anr.*<sup>5</sup>, where a number of legal disputes were already 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 endeavour 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

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<sup>4</sup> AIR 2016 SC 4675

<sup>5</sup> AIR 2007 Delhi 284

Indian Courts have started sharing, towards involvement of alternate dispute resolution measures in resolving 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*<sup>6</sup>, 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, may pose another roadblock for the use of alternative dispute resolution machinery in intellectual property related disputes. Notwithstanding the aforesaid problems, the infringement of intellectual property being actions in personam as it determines the rights between two parties, can certainly be adjudicated by the use of alternative dispute resolution machinery.

This view has been propounded in the case of *Eros International Media Limited v. Telemex Links India Pvt Limited*<sup>7</sup> where the Bombay High Court distinguished Intellectual Property Rights as having an element of right in rem in contrast to right in personam as espoused by *Booz Allen case*. The Court held that the element of right in personam in a private dispute between two parties arising out of commercial contracts, where an infringement claim is involved in Intellectual Property disputes could be decided through arbitration. Where there are matters of commercial disputes and parties have consciously decided to refer these disputes arising from that contract to a private forum, no question arises of those disputes being non-arbitrable. Such actions are always actions in personam, one party seeking a specific particularized relief against a particular defined party, not against the world at large.

## **PATENT LAW AND ALTERNATIVE DISPUTE RESOLUTION**

Law related to patent channelizes the field of technology with law. As the patent disputes involve an understanding of technical knowledge related to the dispute in question, the biggest hurdle, which the Indian Courts face, is with respect to streamlining the trial of the dispute in a cost effective and prompt manner. Every dispute in the domain of patent law in India has revolved around the nitty-gritty of interim injunctions and the appeals related to those injunctions. In fact many countries have endorsed the inclusion of arbitration as a model for the resolution of patent disputes. The Patent Act, 1970 particularly under section 103 of the Act makes use of arbitration as a procedure for resolution of disputes. Closer integration of alternate dispute resolution mechanisms in patent infringement suits could be the way forward for appropriate dispensation of justice.

## **TRADEMARKS AND ALTERNATIVE DISPUTE RESOLUTION**

In India, trademark litigation covers an overwhelming landscape in the intellectual property related litigation. The trademark litigation is an inter partes 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 cybersquatting, arbitration plays an eminent role in the streamlined procedure outlined under the Uniform Domain Name Dispute Resolution Policy,

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<sup>6</sup> AIR 2003 SC 2629

<sup>7</sup> 2016 (6) BomC R321

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.

## 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 partes dispute, can be very well adjudicated by using alternative dispute resolution measures.



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