



MEDIATION AND NEGOTIATION: DISPOSING INTELLECTUAL PROPERTY RIGHTS DISPUTES

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ABSTRACT: *The authors postulate the need of the hour is to have ADR mechanism to settle disputes related to intellectual property right in India. The article will highlight the necessity to have mediation as well as negotiation process in order to lighten the burden of Indian courts comprised of intellectual property matters. Further, the authors will reflect the significant role played by them than litigation process in intellectual property disputes, which will result in global acceptance of Indian goods and innovation.*

Keywords - *Alternative Dispute Resolution (ADR), Intellectual Property (IP), Mediation, Negotiation, Litigation*

1. Introduction

In society today we see that there has been a rapid increase in trade and commerce activities. With globalization and liberalization, we have not only opened the door for international trade but have encouraged the practice of creation and innovation. Now the concern arises what can be done to protect the interest of the person who has been behind this effort. At present, we have intellectual property laws in India which are meant to protect the transfer as well as dissemination of technology. The prime objective behind this is to believe in the practice of growth and development which can be achieved only if there is harmony in the society and lead to social, economic and cultural development.[1]When dispute arise the matter is referred to ADR instead of going for litigation now days in order to get quick relief without causing unnecessary delay.

ADR makes the parties to choose the forum in order to settle down their dispute and make the parties follow a procedure in order to maintain confidentiality of that matter. There has been a rise in a number of cases related to intellectual property rights such as especially in a number of cross-border disputes so mediation and negotiation are considered helpful for resolving disputes related to it.[2] The paper will reflect on the problems and challenges which ADR come cross while addressing IP disputes along with their merits of having this resolution to solve the disputes.

2. Role of Mediation and Negotiation In Intellectual Property Rights Disputes

It is considered that mediation and negotiation being a similar procedure helps the parties to come to a solution for their dispute. Factors such neutrality, party autonomy draws the attention toward preferring ADR as a mechanism to consider IP disputes. It is observed that patent litigation is expensive so ADR seems to be more effective in its nature. According to Kingston intellectual property disputes is less effective due to its higher cost. This shows the role played by the courts in order to determine the technical issues.[3] He further added that there is possibility to have costs which one

have to pay indirectly which can be in form of distraction or even it can result in not giving proper direction for encouraging creativity which advocacy process has in innovation matters which are dealt by some of the firms.[4] Where he suggested in having compulsory arbitration in relation to patent matters with the support of services such as legal aid who have not appeal further to the court's rulings.

During the 19th century, it was observed that there has been a public figure known as Kilb who has emphasized on arbitration to be a quick, effective method to solve the patent disputes and it helps in avoiding long litigation process and helps in reaching to a potential decision.[5] Due to time-consuming process and a high cost of patent litigation as it comprises of technical issues which require technical as well as financial experts' leads to the higher cost than ADR.[6] Although, in arbitration, the arbitrator will be considered who is aware and have experience in patent law and has been updating itself in relation to the changing scenario that has taken place in the business community.

Arbitration is a process less expensive and quick as compared to litigation.[7] Additionally, it encourages in maintaining international standards by encouraging the practice of confidentiality and helps in maintaining trade secrets. It is argued that it more certain and another form of mediation is less adversarial and encourages the practice of maintaining good trade relation with another party.[8]

2.1 Advantages Of Mediation And Arbitration In IP Disputes In India

It is well stated that the parties can agree to resolve in a single procedure which is considered by many countries in order to solve disputes related to intellectual property. This helps in having less expensive and avoiding multi-jurisdiction litigation process.[9] Due to increase in the number of cross-border issues as well as the rise in exploitation of matters related to intellectual property at international level in such scenario ADR appears to be more helpful than litigation.[10] On another hand, litigation of intellectual property dispute covers multiple- jurisdiction which covers complex conflict of laws. The parties in such circumstances are required to go have separate proceedings as the case may be under the same jurisdictions.

Although, ADR is helpful in considering matters related to multi-court actions which are litigated in the same jurisdiction.[11] Further, ADR encourages the practice of covering issues of different matters and rights concerning different jurisdiction in the single procedure related to IP disputes. With the help of mediation or arbitration, we are able to come to a solution which is quicker as compared to litigation. This result in binding award or settlement in the end which is felt the need to settle the disputes without causing unnecessary delay.[12] ADR provides a forum which is neutral in its nature in order to solve the matter. The disputes can be preferred for ADR by the parties which are not based in the same jurisdiction and results in it governing by neutral law and locations.[13] ADR rules are also set up by WIPO center and they also maintain standards such as neutrality and without any discrimination related to the parties.[14] Due to neutral nature in jurisdictional aspect, ADR method is more preferable than litigation for matters related to cross-border disputes related to IP sector.

Moreover, it is observed that ADR process is helpful in resolving matters concerning the technical scientific matters and legal issues of complex nature. Sadly, every

country doesn't have a developed court system. Therefore, intellectual property courts are not active in some countries. Due to lackness in expertise the judges are not able to address the complex factual, technical as well as legal issues properly. There is need to have considerable time and resources in order to relate it to the present prevailing technologies and laws concerning them. The decision maker in ADR process is neutral as the parties are asked to choose a facilitator with specialized expertise. The person should be expert in law, technology or specific industry. A panel can be appointed by the parties which comprises of experts, which have knowledge and expertise in many areas. With the guidance of the expert under ADR process, we are able to craft a better solution for the problem. It is more beneficial for the party which is not possible in litigation.[15]

It is essential to follow mediation as well as negotiation method as the case may be as it is simple and flexible in its nature. It gives the parties the liberty to agree on the method the proceedings should be conducted. It allows them to choose appropriate procedural rules. It acts as a straightforward mechanism to consider intellectual property disputes. This encourages the parties to focus on their interest which later results in settlement.[16] With the help of the mediator, the parties can be satisfied by having appropriate assistance and support.

It is to be noted that intellectual property disputes comprise of different characteristics. It consists of complex nature of law, technical matters and sensitive information. It becomes essential to address these distinctive characteristics. On the contrary, litigation is inflexible in nature and it rarely adapts the process to their dispute.[17] Whereas, ADR process gives an opportunity to the parties to settle their dispute through a single forum. Subsequently, they can consider the process which is suitable for them which can be either mediation or arbitration or even expert determination as the case may be.[18] Under such circumstances, parties agree to come to a neutral location and can come up with a solution with the help of neutral experts of their choice and follow the rules as well as procedure in order to fulfill their needs.[19] Mediation is helpful in coming up with a solution to comfort the parties with the fulfillment of the specific interest of the parties.[20] In addition, ADR is based on party autonomy and this principle is beneficial in nature.[21]

Subsequently, mediation and negotiation process is a cost saving as compared to intellectual property litigation. It becomes difficult for small-scale business or individual to ask for relief or to enforce their rights, or to defend themselves under such circumstances as compared to large entities. It is being affordable and accessible in nature helps the parties to resolve their disputes. On another hand, litigation is expensive at home and abroad with the help of neutral experts. It is considered helpful to consider complex intellectual property disputes and follows simpler procedure. It is time-saving process results in cost saving as well.[22]

Litigation is a complex process and it indulges in many steps whereas mediation and negotiation encourage the practice of confidentiality. Under this, the parties are allowed to control the disclosure and they can even have access to information which is sensitive in nature.[23] Through an agreement between the parties, the proprietary information is not told to anyone.[24] The arbitrator can even have preventive orders in order maintain the confidentiality.[25] Further, the outcome can be kept secretive in

order to preserve business standards and relationship.[26] Therefore, it is difficult to find such opportunity under litigation while considering intellectual property disputes in India.

Mediation encourages the practice of win-win in order to find a solution that could satisfy the parties wants instead of going for the win or lose situation, which mostly happens in litigation. It helps in providing a creative solution to the problem that has arisen.[27]The arbitral tribunal considers the content and substance of the arbitral award. One could seek for interim relief through injunction or even security for cost.[28]Moreover, the New York Convention provides focus on recognition as well as enforcement of arbitral awards. It encourages practices such as enforceability of awards.[29]

3. Intellectual Property Arbitration: An Indian Perspective

Recently, the arbitration law has been amended which has focused on certain aspects such as Section 29 A of the Arbitration and Conciliation (Amendment) Act, 2015. The Act has made clear and focused on the award which should be made within a time period of twelve months which has been now made necessary during this tenure. In addition, this process will begin from the date when the arbitral tribunal has entered upon the reference. Therefore, the process of arbitration is speedy and has drawn the attention toward itself at present in India. Due to privacy, we are able to do the settlement by submitting a memorandum of settlement to the court. The terms remain in the private domain and confidentiality is maintained. It is observed that the Indian judiciary is encouraging such practice in order to encourage international trade as well as providing recognition to Indian intellectual property jurisprudence worldwide.[30]

In 2009 in a case at Delhi High Court where the plaintiff contended that arbitration clause was subject to the clause related to breach of the obligation related to confidentiality of the matter or it includes infringement of intellectual property cannot be considered arbitrable in nature.[31] Further, the parties were referred to arbitration when the arbitration clause was wide-ranging and the intellectual dispute was referred to arbitration in *Sukanya Holding* case.[32]

Further, the Apex Court held that one cannot have an arbitration clause only on the basis of legal mindset but it should also consider aspects such as following common sense in order to give effect to the intention of the parties in order to arbitrate. The court needs to have a reasonable understanding as a businessperson, which acts responsible and has information about the business world properly in such circumstances. [33]

There is need to make Indian arbitration system developed despite having the new amendment we still need to see that whether it is able to able its goal or not. It is essential to make Indian jurisdiction to be arbitration friendly so that we could encourage foreign investment in India. In order to make India trade and commerce-friendly, it is essential to have such laws which will be helpful for maintaining international standards.

In *Suresh Dhanuka v. Sunita Mohapatra*[34], the Apex court didn't raise any objection in concern to request for arbitration which was under the deed of the assignment. From this, we can understand that dispute can be considered for

arbitration even if the dispute that has arisen under or as per the contract in such circumstances matter can be arbitrated.

Globally, it is reflected in the Queen Mary University of London, 2016 - International Dispute Resolution Survey that 51% of respondents in the survey considered that in the TMT sector the majority of disputes would be related to IP issues in coming future. On another hand, 43% indicated that arbitration will be their preferred dispute resolution mechanism. Therefore, due to uncertainty because of Brexit, the use of arbitration in resolving disputes concerning IPR will be rising only with time.[35]

Recently, Nokia has received the patent decision in her favor for patent licensing with Samsung. However, there is need to make efforts to improve the present circumstances that have been arising in India lately. There is need to understand that we lack in a uniform trend which should exist in the Indian legal system for considering matters related to intellectual property dispute under the ambit of arbitration mechanism. The authors want to highlight that under Section 89 of Civil Procedure Code it has been made clear that the settlement of the dispute can be done outside the court and refer it for arbitration, mediation, and conciliation. It is the duty of the court to provide best possible means for settling the dispute by following alternative dispute resolution methods.[36]

Further, *Booze Allen*[37] case depicts on the concept of arbitrability in Indian arbitration. Under this, it has observed that concept of arbitrability would vary as the context may be. For instance, whether the dispute comes under the public court or should it be solved under the private court. Also, there is need to see if the parties have considered the dispute for arbitration by themselves. It is to be noted that one can observe whether the dispute is under the ambit of the arbitration agreement or not etc.

4. Conclusion

India is actively engaged in activities such as multilateral negotiations as well as WTO TRIPS Council. Subsequently, India has played a vital role in matters related to open technology transfer, price controls, and use of compulsory licensing in a liberal manner. This will result in having a bright future for India which will affect positively in innovation, investment, and trade activities related to IP products and services. Recently, the Ministry of Health and Family Welfare has changed some laws such as now the companies do not require to disclose information related to their drug concerning their patent status or not when one fills for a manufacturing license.[38] In *Ayysamy v. A.Paramasivam & Others*[39], where the Apex court has emphasized on matters to be heard by special courts and tribunal when there is the exclusive jurisdiction and matters related to ordinary civil court are excluded from them.

Additionally, the Arbitration and Conciliation Act, 1996 should be interpreted in such a manner that it should be inconsistent with the common law countries. The jurisprudence should focus on strengthening the institutional arbitration in India. The National Intellectual Property Rights Policy of 2016 has emphasized in the practice of ADR methods for the strengthening of enforcement and adjudicatory system to combat intellectual property rights infringement. It highlights the need of the hour is to promote ADRs in the resolution of IP disputes by strengthening mediation and conciliation centers. Moreover, there is need to develop ADR capabilities as well as

skills in the IP sector.[40] The use of mediation and negotiation to resolve the intellectual property dispute offers many advantages, therefore, there is need to work in such a manner so that our actions can be helpful in future-oriented solution for their conflict. The article reflects that in India today we not only need a law for the welfare of the society but all to provide recognition to the country globally which can be possible only if we work in harmony with rest of the world. There is need to have laws and regulations which could not only provide a platform for trade activities but also encourage the practice of creativity and it gets its recognition around the world. Mediation and negotiation are one of the effective methods under ADR mechanism to provide relief and encourage the practice of settlement with a healthy environment. This trend will help us in achieving our respective goals and will lead to greater benefits in the business world. In India focus has been made on to involve mediation as well as negotiation in IP disputes in order to avoid delay and provide relief with a reasonable period of time which has been seen that it is not possible under Indian litigation system. The authors believe that more efforts should be made by the authorities in order to indulge in the practice of ADR methods in IP disputes.

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