



NAVIGATING INTELLECTUAL PROPERTY DISPUTES: EXPLORING THE BENEFITS AND DRAWBACKS OF ARBITRATION

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Abstract: This study delves into the intricate relationship between arbitration and intellectual property (IP) disputes within commercial transactions, focusing on the arbitrability of such disputes in the context of Indian law. Despite ongoing uncertainties regarding the arbitrability of IP conflicts, there is a discernible shift towards arbitration as a preferred method of resolution, particularly in contractual IP disputes. Arbitration offers several distinct advantages over traditional litigation, especially in the realm of international commerce, owing to its unique features. Arbitration's appeal lies in its ability to provide a neutral and efficient forum for dispute resolution. Unlike litigation, which may entail biases or unfamiliar legal landscapes in foreign courts, arbitration offers a level playing field for parties from different backgrounds. This neutrality is bolstered by the selection of arbitrators who are often subject matter experts and chosen based on their impartiality. Moreover, arbitration provides flexibility and confidentiality, allowing parties to tailor the process to their specific needs and maintain the privacy of sensitive information. In the context of IP disputes, where proprietary information and trade secrets are often at stake, this confidentiality is paramount. Additionally, arbitration streamlines the resolution process by consolidating multi-jurisdictional claims into a single procedure, minimizing costs and procedural complexities.

Despite these advantages, challenges remain, particularly concerning the enforceability of arbitral awards and the complexities inherent in navigating different legal regimes governing IP rights across jurisdictions. Nevertheless, the growing popularity of arbitration in resolving international IP disputes underscores its efficacy in meeting the evolving needs of the global marketplace.

Keywords - Arbitration, Intellectual Property Disputes, Commercial Transactions, Arbitrability, Indian Law, Neutrality, Efficiency, Flexibility, Confidentiality, Multi-Jurisdictional Claims, Enforceability.

I. INTRODUCTION

The correlation between arbitration and intellectual property disputes in commercial transactions have been thoroughly examined, with a specific emphasis on the arbitrability of intellectual property disputes in India. The current finding suggests that the debate on whether Intellectual Property conflicts can be resolved through arbitration remains inconclusive, yet there is a noticeable shift towards embracing arbitration as a viable approach to dispute resolution, particularly in contractual disputes concerning IP.

Throughout the preceding chapters, the core essence and correlation between arbitration and intellectual property disputes in commercial transactions have been thoroughly examined, with a specific emphasis on the arbitrability of intellectual property disputes in India. The current finding suggests that the debate on whether Intellectual Property conflicts can be resolved through arbitration remains inconclusive, yet there is a noticeable shift towards embracing arbitration as a viable approach to dispute resolution, particularly in contractual disputes concerning IP.

THE INCLUSION OF AN "INTERNATIONAL" DIMENSION AND IMPARTIALITY

The transnational nature of the commercial transactions itself is one of the key reasons why arbitration may be excellent for resolving disputes arising out of such international agreements. It is a known fact that arbitration being a neutral forum appears to be attractive to parties who hail from multiple jurisdictions, as neither of them would want their claims to be adjudicated by a national court of the other, as such situations would lead to prejudice or preference.

Furthermore, the party initiating proceedings in their national courts might have a deep understanding of the laws, language, and legal customs of their own country, which could lead to unfavorable results in dispute resolution. This is why arbitration has been widely embraced as a way to resolve conflicts, particularly in the sphere of international commercial disputes. Many jurisdictions have made efforts to promote international trade at the domestic level by incorporating principles of international commercial arbitration into their municipal laws. The US Supreme Court rightly pointed out that the parochial mindset of settling all disputes under domestic laws and in local courts would hardly encourage the growth of commerce and industry in a country.¹

Cross-border intellectual property (IP) disputes involve parties from different jurisdictions and are governed by multiple substantive laws. These disputes arise due to the territorial nature of IP, where each country has its own laws and regulations regarding IP protection, validity, infringement, and other related matters. Consequently, reaching a consensus on which country's laws should be applied for conflict resolution or which country's local courts should be approached becomes a challenging task. Thus, the presence of a neutral, independent dispute resolution mechanism which offers recognition to party autonomy as a matter of procedural as well as statutory requirement comes to great relief to parties in an international commercial dispute. Moreover, where the international character of the disputes comes from the fact that the subject matter is covered by intellectual property titles issuing from several jurisdictions, ADR offers the advantage of a single procedure, as against multi-jurisdictional litigation, for the resolution of the dispute.²

The impartiality of international arbitration is undeniably one of its most praised attributes. Many of the top arbitral institutions worldwide follow a practice of selecting an arbitrator who is not affiliated with either party's nationality. This quality is especially valuable in cases involving intellectual property and related disputes, where the parties often include companies that hold national importance or play a key role in job creation. Occasionally, these politically significant entities may receive preferential treatment in national courts or administrative agencies.

Also, the fact that arbitral proceedings are presided over by panelists who are subject-matter experts contributes to the quality of the decisions rendered. A well-versed arbitration panel can develop a better understanding of the dispute more quickly. In the case of domestic court-based litigation, while some judges may possess such specialized knowledge, this is not always the case. Appointing subject-matter experts also adds a layer of quality control (and predictability) to the evaluation of the parties' disagreements.³

In numerous countries, patent and trade secret disputes are handled by general courts that also handle a wide range of other commercial and non-technical disputes. However, as technology becomes more advanced and scientific, parties involved in these disputes may find it advantageous to have them resolved by individuals who are well-versed in the specific industries and technologies involved. Technology disputes are intricate and distinctive, and not all courts possess the specialized technical knowledge required to fully comprehend their complexities. Therefore, it would be more beneficial to have panelists who specialize in this field of study to handle such issues. International Arbitration offers parties the opportunity to select an arbitrator from a group of globally renowned expert panelists, providing them with the option to have their dispute resolved by someone with the necessary expertise.⁴ Arbitrators possessing expertise in the relevant markets, languages, regulations, and technology can effectively mitigate the unpredictability and uncertainty that may arise from the involvement of non-professional judges. By leveraging their knowledge, these specialists can expedite the resolution process, reduce costs, and enhance the overall quality of decisions. This is particularly crucial in instances where intricate and evolving legal domains intersect with complex technological advancements, as is frequently observed in the realm of international intellectual property.

¹ Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972).trfd

² https://www.wipo.int/wipo_magazine/en/2016/si/article_0010.html

³ <https://www.natlawreview.com/article/growing-importance-international-arbitration-intellectual-propertydisputes>

⁴ Supra Note @7

UNIFIED PROCESS

Invoking international arbitration often results in the consolidation of many concurrent multi-jurisdictional claims and actions arising from a single business transaction. This is particularly true when it comes to intellectual property disputes, as either party may choose to challenge the validity of the relevant intellectual property or infringement of intellectual property rights in its jurisdiction, or potentially bring related claims in multiple forums. Disputes in international trade often require complications due to the involvement of multiple subjects as well as multi-jurisdictional issues. Conducting multiple lawsuits simultaneously in multiple countries is difficult and expensive. Differences in procedural and substantive law in different countries also mean that the duration of such multiple processes will vary significantly between countries, increasing the complexity of coordination between the parties. Moreover, the presence of numerous litigations highlights the significant risk of conflicting judgments, which in turn complicates the process of appealing and enforcing decisions made in each case. The complexities arising from this situation can be effectively addressed through the utilization of arbitration, which offers a more efficient method for resolving disputes. This is particularly beneficial in intellectual property disputes, where a unified arbitral process helps to avoid complications arising from the fact that the IP rights in question may be protected under different legal frameworks in multiple jurisdictions. Furthermore, arbitration proceedings can be customized to accommodate the preferences of the parties involved, demonstrating a high degree of flexibility. By consolidating multi-jurisdictional disputes in a single, neutral forum like arbitration, significant cost and time savings can be achieved, along with simplified enforcement of arbitral awards.

One example of an international arbitral institution successfully resolving multi-jurisdictional trade disputes involving intellectual property through streamlined arbitration is the World Intellectual Property Organization's ("WIPO") Arbitration and Mediation Centre, which has over seventy member countries that consent to its jurisdiction for conducting arbitral proceedings⁵. The following chapter contains a more in-depth examination of the WIPO Centre's operations and rules.

ECONOMIC AND TEMPORAL EFFICIENCY

Arbitration is in fact known to be a cost-effective and efficient way to resolve disputes. This aspect of arbitration is particularly attractive to parties involved in international disputes related to intellectual property, especially when they are often large corporations in need of a swift and effective resolution mechanism. By opting for arbitration, these parties can maximize the investments and resources they have dedicated to their businesses. This is crucial because businesses must concentrate on various aspects like product development and innovation, and cannot afford to be tied up in lengthy litigation when faced with commercial disputes. It is widely accepted that companies in rapidly evolving technology sectors cannot risk being hindered by prolonged and expensive legal procedures.⁶ Litigation is time utilizing, expensive and wearying. It may also garner negative press attention, since there is lesser degree of confidentiality guaranteed, thereby wreaking havoc on a business's reputation⁷. In the event where disputes are not resolved intelligently, such enterprises may end up spending a significant proportion of their valuable time, effort and money on dispute resolution, impeding operations for couple of years.⁸

Expense and time efficiency are crucial in resolving disputes, especially when it involves Intellectual Property. Claims related to IP licensing violations, validity, or infringement must be addressed promptly to prevent any loss in the value of the IP or associated services. The availability of timely legal remedies is essential to uphold exclusivity in the use of IP and agreed-upon terms. Failure to enforce legal remedies in a timely manner can disrupt the value of IP and its privileges.

SECRECY AND THE LIBERTY OF FLEXIBILITY

Arbitration makes sure that the confidentiality is maintained by granting the concerned parties the provisions to effectively manage their disclosures of information as well as access to sensitive material. Contractual

⁵ Member States, WIPO Arbitration & Mediation Centre, WIPO WORLD INTELLECTUAL PROPERTY ORGANIZATION, <http://www.wipo.int/members/en/>

⁶ Ana Alba Bettencourt, Cross-border patent disputes: Unified patent court or international commercial arbitration?, 32 UTRECHT JOURNAL OF INTERNATIONAL AND EUROPEAN LAW 44–58 (2016) <https://doi.org/10.5334/ujiel.262>.

⁷ Christopher R. Drahozal, Confidentiality in consumer and employment arbitration, ARBITRATION LAW REVIEW 28- 48 (2015), <https://ssrn.com/abstract=2716412>.

⁸ Sandra J. Franklin, Arbitrating Technology Cases—Why Arbitration May Be More Effective than Litigation When Dealing with Technology Issues, MICH. BAR J. 31, 32 (2001).

agreements that pertain to Intellectual Property may include various proprietary information that needs to be safeguarded in order to maintain the property's value. The confidentiality of such information must be upheld even during dispute resolution through arbitration, as arbitrators have the power to issue protective orders that prevent parties from accessing sensitive data. Moreover, the entire arbitration process and its outcomes can be kept strictly confidential, which is advantageous for parties seeking to preserve their professional reputations and relationships. This characteristic of arbitration sharply contrasts with court-based litigation, where closed courtroom proceedings are only conducted upon request. In most arbitral rules, the default position is to maintain the. The procedural Rules formulated by arbitral institutions across the globe, including the WIPO Centre, promote the principle of confidentiality by incorporating the same into its texts. Similar to the confidentiality principle in arbitration, is the concept of flexibility in arbitral proceedings, both of them being distinctive advantageous features of the process. The arbitration terms can be tailored by the parties to meet their individual needs. Contractual issues such as choice of law, jurisdiction, venue, and the nature of the award are crucial in international agreements. However, parties can also address other matters like language, time to decision, appealability, discovery, evidentiary rules, severability, and any other anticipated issues. When a disagreement is brought to court, the judge applies the private international law principles of their country to determine the applicable law. In arbitration procedures, the parties can specify the rules that the arbitrator will follow. They may instruct the arbitrator to base their decision on equity and good conscience or apply general legal principles used by international courts. Selecting the appropriate law in intellectual property cases offers specific advantages. For instance, traditional regulations necessitate consulting the laws of each jurisdiction involved in the dispute to determine patent validity. Furthermore, deciding on the applicable law ahead of time saves time and money in the long run. Arbitration by *lex mercatoria* or amicable composition is recommended for parties seeking flexibility in arbitration, albeit the exact level of flexibility depends on the jurisdiction concerned.

In an area as specialized as intellectual property, in which arbitrators possessing the technical skills and expertise to understand the complex issues which arise are needed, arguably the parties should allow the arbitral tribunal to utilize *lex mercatoria* and amiable composition to determine just and equitable solution to the dispute at issue.' This flexibility is provided under the WIPO Arbitration Rules, in which the arbitrators are permitted, failing a choice by the parties, to apply the law or rules that it determines to be appropriate, while simultaneously noting the terms of the relevant contract and accounting for its applicable trade-usages. Similarly, the WIPO, UNCITRAL or ICC rules permit the arbitral tribunal to act as amiable compositeur, but only with the express authorization of the parties to the tribunal. The use of alternative dispute resolution (ADR) methods for cyberspace IP issues is a natural extension of their already widespread use in traditional IP disputes. A flexible method of dispute resolution, such as arbitration, may be more appropriate than relying on a relatively static body of traditional law, given the rapid growth of technology (with more and improved ways to infringe-and protect-intellectual property rights) technical experience in arbitration presents a significant advantage over litigation in national courts as it gives parties the opportunity to ensure that at least the nominated co-arbitrator has the necessary technical expertise in the field, something that the national courts cannot always guarantee.

Several leading arbitral institutions (such as the WIPO) have recognised this need and have created panels of arbitrators with demonstrable experience and expertise in IP disputes. Flexibility in arbitral proceedings has also helped arbitrators to take external help to fill any gaps in her knowledge relatively efficiently. For instance, in the IBM v. Fujitsu arbitration, the arbitrators attended a four-day presentation by a computer science-professor from Carnegie Tech. IBM and Fujitsu also conducted several seminars to educate all the arbitrators about the said issues. The parties were able to successfully educate the arbitrators during the hearing because to the flexibility of arbitration, which allowed them to do so without having to worry about the formal rules of procedure.

CONCLUSION

To conclude this chapter, it is worth mentioning that arbitration, as a method to settle intellectual property disputes, is not without flaws. It can be argued that not all the advantages and features of international commercial arbitration are applicable to effectively resolve cross-border IP issues. For example, while arbitration is generally considered a cost and time-effective mechanism, this may not always hold true in practice. The duration and cost of arbitration heavily rely on the chosen procedural structure for the arbitral proceeding and the subject matter of the contractual terms under consideration. Similarly, challenges in enforcing awards are frequently encountered in real-world scenarios.

Regardless, arbitrating international disputes concerning IP does have its own beneficial outcome. The fact that international commercial arbitration has grown to become one of the most attractive dispute resolution mechanism for players in the field of international commerce seems to apply for players dealing with IP disputes as well. A more accurate question in this regard would be to analyse whether the existing legal regime of both arbitration as well as IP at the international level is well equipped to facilitate effective arbitral procedures to the benefit of concerning parties. It may not prove ideal to determine whether employing arbitration to resolve IP disputes is an appropriate decision. The answer to such a question cannot be made categorically with a yes or no. IP arbitral proceedings can be viewed as an attractive alternative option, when compared to state judicial proceedings, and such arbitration must ought to be determined by the circumstances prevailing the dispute, subject to be appropriately structured as well.

Therefore, in summary, it is evident that a well-functioning global marketplace in today's world necessitates dependable mechanisms for resolving IPR conflicts. International arbitration, especially in the realm of commercial disputes among private entities, is effectively meeting this requirement as it evolves and caters to the demands of the IP community. The rising preference for international arbitration can be linked to various factors beyond its inherent advantages, such as the surge in overall IP disputes, their progressively cross-border nature, and a broader and more nuanced recognition of the advantages of international arbitration.

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