REVOLUTIONIZING ALTERNATIVE DISPUTE RESOLUTION IN INTELLECTUAL PROPERTY

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ABSTRACT

Intellectual Property Rights (IPR) have become crucial for research collaborations, transforming them into valuable business assets. Cross-border transactions often lead to disputes due to different laws and backgrounds. Entities familiar with Alternative Dispute Resolution (ADR) efficiently resolve such conflicts, avoiding high legal costs. ADR, particularly arbitration and mediation, provides a unified forum for entities from diverse nationalities, ensuring a final and enforceable award across jurisdictions. Increasingly, IP owners turn to ADR to resolve disputes. This research paper explores debatable issues, including the viability of ADR as a real alternative to IP disputes litigation and the extent to which IP right disputes can be brought under ADR procedures

Keywords: ADR, Arbitration, Mediation, IP disputes, Copyright, Trademark, Patents

INTRODUCTION

In the dynamic landscape of the contemporary global market, intellectual property has emerged as a cornerstone of economic value. The pervasive reliance on technology in the global economy has magnified the importance of safeguarding intellectual property through robust Intellectual Property Laws. Recognizing this critical need, nations worldwide have actively engaged in multilateral treaties, strategically implementing mechanisms to elevate the standards of intellectual property protection. IP is the cornerstone of the economy built on knowledge. It is present in every economic area and is becoming more crucial to maintaining the competitiveness of businesses.[1]

The evolving nature of technology and its influence on the global economy has rendered traditional litigation less effective in resolving international intellectual property disputes. Acknowledging this shift, recent multilateral agreements have paved the way for alternative dispute resolution mechanisms, such as arbitration and mediation. These mechanisms are positioned as more pragmatic and efficient approaches to navigate the intricate terrain of international intellectual property conflicts. The full potential of arbitration and mediation was underutilized as intellectual property (IP) owners and legal professionals leaned more towards traditional court proceedings. However, a shift has occurred in recent years, with parties increasingly favouring this novel approach to resolving disputes. The efficacy of Alternative Dispute Resolution (ADR) received a significant boost from the success of domain name dispute resolution mechanisms like the Uniform Domain Name Dispute Resolution Policy (UDRP). This has empowered trademark owners to safeguard their marks effectively on the internet.

OVERVIEW OF ALTERNATIVE DISPUTE RESOLUTION MECHANISMS

Alternative Dispute Resolution (ADR) refers to the process of resolving legal conflicts or disputes through methods that are more informal, expedient, and less adversarial than traditional litigation. The acceptance of ADR has grown significantly in both developed and developing countries due to its perceived advantages, including informality, cost-effectiveness, and timeliness. ADR methods are preferred by parties seeking a quicker and less expensive resolution to their disputes.

The key ADR methods include:

[1] Dr. Vikas Vashishth, Law and practice of intellectual practice in India, First Edition (2002).

1. Arbitration: In arbitration, a neutral third party, called an arbitrator, is chosen by the disputing parties to make a binding decision on the matter. This process is more formal than other ADR methods but is still generally faster and less formal than a court trial.
2. Mediation: In mediation, a neutral mediator assists the parties in reaching a mutually acceptable resolution. Unlike arbitration, the mediator does not impose a decision but facilitates communication and negotiation between the parties.

The overarching goal of ADR methods is problem-solving rather than determining winners and losers, making it a 'win-win strategy.'[2] Alternative Dispute Resolution (ADR) is becoming more and more popular. Some of the reasons for this include the increasing backlog in traditional courts, the perception that ADR is less expensive than litigation, a preference for privacy, and the desire of some parties to have more control over the selection of the person or people who will resolve their dispute.[3]

APPLICABILITY OF ADR METHODS TO INTELLECTUAL PROPERTY DISPUTES

Alternative dispute resolution (ADR) methods are well-suited for resolving commercial disputes related to intellectual property. A survey of patent attorneys conducted in 1981 and repeated in 1991 revealed a growing openness among them to engage in arbitration, with an accompanying rise in the number of attorneys possessing mediation expertise.[4] Multiple factors align to render these types of cases even more conducive to alternative dispute resolution (ADR) than the typical dispute.

Intellectual property cases frequently present a challenge to the legal system due to their intricate and technical nature. Oftentimes, the legal issues necessitate an arbitrator to grasp the underlying technology. Parties may find greater reassurance in being able to select at least one arbitrator whose background and expertise enable a comprehensive understanding of the involved technology. Various sectors within intellectual property offer distinct advantages and focal points when

[2] www.amicus.iupindia.org
[3] Kanika Sawhney, Alternate Dispute Resolution to online Dispute Resolution, 2 Amity Law Review 57(2001)
[4] Francis Flaherty, ADR. Low Cost for High Tech., CPR'S ALTERNATIVES TO THE HIGH COST OF LITIGATION, Jan. 1993, reprinted in TECHNOLOGY DISPUTES (highlighting the increased preference for arbitration and mediation).

determining the appropriateness of utilizing alternative dispute resolution (ADR).[5]

ADR In Commercial Copyright and Software Disputes

In a copyright dispute, the central concern revolves around determining whether the accused party has violated a copyright[6]. The primary focus often centres on whether the alleged infringer has illicitly replicated or derived their work from a copyrighted piece. Resolving these disputes generally involves examining evidence concerning the accused party's access to the original work and determining the extent of substantial similarity between the specific expressions found in the original work and those present in the alleged infringing creation.[7]

Typically, these cases arise in nuanced scenarios, such as when a book author alleges that a movie infringes on their copyright or when the creator of an older song accuses a newer song's writer of copying their work. In such instances, the names of the infringing work, characters, setting, plot, and words are usually not identical to their alleged counterparts in the earlier work. If they were, the dispute would likely be resolved swiftly. Consequently, the arbitrator must ascertain whether the accused party replicated the expression established in the earlier work. This involves evaluating (1) the accused author's access to the earlier work and (2) the extent of similarity between their work and the earlier creation. A strong determination on the first factor may reduce the necessity for a compelling showing on the second.[8]

Copyright cases are typically straightforward and not overly technical, with a scope and complexity that are often limited. These cases seldom necessitate extensive discovery or documentation. Given that the evaluation of similarity relies on the viewpoint of an "ordinary observer," specific expertise is typically unnecessary and inappropriate for resolving these types of cases.[9]

Hence, these cases are frequently suitable for resolution through alternative dispute resolution

[5] Foreword to ADR IN TRADEMARK AND UNFAIR COMPETITION DISPUTES, (noting the role of ADR in trademark and unfair trade disputes
[6] Atari Games Corp. v. Nintendo of Am., Inc., 975 F.2d 832, 837 (Fed. Cir. 1992); see also Jessica Litman, Copyright as Myth, 53 U. Pitt. L. Rev. 235 (1991).
[7] Atari Games, 975 F.2d at 844.
[8] Shaw v. Lindheim, 919 F.2d 1353, 1361 (9th Cir. 1990)
[9] Hupp v. Siroflex of Am., Inc., 122 F.3d 1456, 1464 (Fed. Cir. 1997)

(ADR), with a level of suitability comparable to many straightforward commercial disputes. Despite their involvement with more intricate subject matter, conflicts related to the replication or derivation of computer software and other highly technical matters can also be well-suited for ADR.[10]

As parties acknowledge the advantages of employing an arbitrator with specific technical expertise and a capacity to comprehend the relevant subject matter, the appeal of alternative dispute resolution (ADR) as a method of resolution increases. ADR also affords the parties a greater opportunity to safeguard trade secrets and other proprietary or sensitive information throughout the proceedings. In contrast to a trial, ADR permits the parties to independently decide the extent to which such information will or will not be disclosed to the public.[11] This aspect is particularly advantageous in disputes concerning computer software, where maintaining confidentiality is often a primary concern.

ADR in Commercial Trade mark and Trade Dress Disputes

Trademark disputes can find resolution through alternative dispute resolution mechanisms beyond traditional court proceedings and arbitration, particularly through mediation and the Uniform Domain Name Dispute Resolution Policy (UDRP) for specific trademark-related Internet domain name conflicts. The UDRP has, in turn, set a precedent for other intellectual property-related domain name disputes. The push towards encouraging the use of ADR mechanisms to resolve certain trademark (and other intellectual property-related) disputes is actively underway. The widely acknowledged and growing importance of mediation services in handling trademark disputes indicates a promising future for both trademark mediation and intellectual property mediation.[12]

While the regulatory framework encourages the use of mediation for (international) trademark disputes, the provision of such services doesn't pose significant substantive legal challenges in the context of trademark transactions. Unlike legal issues surrounding the availability and suitability

[10] John R. Kahn, Negotiation, Mediation and Arbitration in the Computer Program Industry: Why play hardball with software, pt. III.B (1989).
[11] Jay E. Grenig, Alternative Dispute Resolution § 1.2 (2d ed. 1997 & Supp. 1998).
[12] Nick Gardner, Mediation and its Relevance to Intellectual Property Disputes, JOURNAL OF INTELLECTUAL PROPERTY LAW & PRACTICE 565 (2014)

of arbitration for trademark disputes, one important consideration for parties incorporating a multi-tier dispute resolution clause in their trademark agreement is the potential consequence if a party bypasses the obligation to undergo mediation before resorting to court or arbitration. Although not unique to trademark transactions, courts may deem such circumvention unacceptable, emphasizing the need for parties to engage in mediation before pursuing legal action. This aspect should be carefully addressed in the formulation of the dispute resolution clause in a trademark agreement, taking into account the parties' interests and the specific circumstances of the case.

The Uniform Domain Name Dispute Resolution Policy (UDRP), established by the Internet Corporation for Assigned Names and Numbers (ICANN) on August 26, 1999, stands out as a prominent and successful example of an alternative dispute resolution (ADR) system adept at resolving (international) trademark disputes.[13] While the viability of a complaint under the UDRP hinges on the complainant's demonstration of ownership or control over a trademark, as per the regulations of the relevant country or region where the trademark is registered or protected, the UDRP is typically characterized by its decentralized nature. This applies to both geographical and legal system aspects.[14] The key substantive criteria for a UDRP decision revolve around the good or bad faith registration and use of the pertinent domain name by its holder. As a result, the UDRP establishes a set of independent rules for trademark disputes in the realm of the internet, akin to electronic law.

ADR in Commercial Patent Disputes

ADR is often highly suitable for patent disputes, especially those entailing intricate technological matters. In such cases, an arbitrator chosen by the involved parties may possess better qualifications to navigate the technical intricacies of an invention. Resolving a patent dispute involves assessing both the patent's validity and potential infringement.[15] To address these aspects, the decision-maker must scrutinize the technical facets of the patent, including the claims and

[13] INTERNET CORP. FOR ASSIGNED NAMES AND NUMBERS, UNIFORM DOMAIN NAME DISPUTE RESOLUTION POLICY (24 October 1999)
[14] WORLD INTELLECTUAL PROP. ORG., WIPO INTERNET DOMAIN NAME PROCESS (1999)
[15] Engel Indus., Inc. v. Lockformer Co., 96 F.3d 1398, 1403-04 (Fed. Cir. 1996).

specifications, from the perspective of a person "skilled in the art" of the patent's subject matter.[16] Given that numerous patents in today's litigation landscape pertain to biotechnology, pharmaceuticals, and computer hardware and software (often referred as "high technology"), the ability to select a neutral arbitrator with adequate training to comprehend the subject matter becomes a significant advantage.

In situations where there is a more balanced position between the parties in dispute, the inherent advantages of ADR over traditional litigation become even more pronounced. Both sides can value the capacity to significantly manage the duration, exertion, interference, and costs associated with legal proceedings. Lastly, patent litigation is widely recognized for its exorbitant costs, with attorney fees often skyrocketing. In patent-related disputes, ADR offers a more streamlined and cost-effective resolution method, preventing a substantial drain on financial resources.[17] According to an expert, a well-conducted arbitration process should incur expenses of less than half the cost of a patent infringement lawsuit.[18]

ADR IN INTERNATIONAL INTELLECTUAL PROPERTY DISPUTES

The inherent characteristics of international disputes make them susceptible to conflicts arising from varied legal systems and tribunal procedures. Additionally, international intellectual property disputes frequently involve nations with divergent perspectives on intellectual property and the extent of protection it should receive.[19] Therefore, the dispute mechanisms outlined by the General Agreement on Tariffs and Trade (GATT) and WIPO serve as the standard for the methodology and procedures to be adhered to when addressing international disputes.

FUNDAMENTAL PROBLEMS OF INTERNATIONAL IP DISPUTES

In the realm of international intellectual property law disputes, a significant challenge arises from

[16] Ethicon Endo-Surgery, Inc. v. United States Surgical Corp., 93 F.3d 1572, 1574-75 (Fed. Cir. 1996).
[17] Ronald B. Coolley, Overview and Statistical Study of the Law on Patent Damages, 75 J. Pat. & Trade mark Off. Soc'y 515 (1993)
[18] Tom Arnold & William G. Schaurman, Alternative Dispute Resolution in Intellectual Property Cases, 321 Patent Litig. 437, 450 (1992)
[19] Eileen Hill, Trade-Related Aspects of Intellectual Property Rights: General Agreement on Tariffs and Trade, Business America, September 10, 1990

the diverse conceptual variations in how different nations perceive intellectual property rights. For example, before the recent endorsement of the GATT[20], leading to substantial changes in U.S.[21] domestic patent law, the requirement was to maintain patent applications in secrecy until the patent was granted, differing from foreign patent registration procedures where disclosure occurred upon filing. International agreements, incorporating ADR provisions, could offer more effective means for safeguarding intellectual property in less developed nations, encouraging industrialized nations to enter these markets. Multilateral agreements outlining dispute settlement procedures can address intricate issues like choice of law or jurisdiction. In international intellectual property disputes utilizing mediation, the emphasis is on problem-solving rather than strict determination of rights. The efficacy of mediation lies in its focus on resolving the problem rather than solely safeguarding individual rights. A fundamental challenge in intellectual property disputes is the divergence in views between developed and underdeveloped countries regarding intellectual property rights. By concentrating on problem-solving and not exclusively on the rights of each party, resolution through compromise becomes attainable.

CONCLUSION

In brief, the changing nature of the modern global market emphasizes how important intellectual property is to economic value. Technology's omnipresent presence has made strong intellectual property laws necessary, leading countries to sign multinational treaties for improved protection. International intellectual property conflicts are difficult for traditional litigation to resolve, which has led to the emergence of Alternative Dispute Resolution (ADR) processes including arbitration and mediation. ADR is especially well-suited for the complex nature of intellectual property disputes because it provides effectiveness, adaptability, and customized solutions. Diverse conflict situations are addressed by various ADR techniques, including collaborative law, mediation, arbitration, and negotiation. ADR offers advantages, but it also has drawbacks, such as potential injustices and enforcement of agreements. However, alternative dispute resolution (ADR) techniques, which are advantageous in copyright, trademark, and patent disputes, encourage a

[20] General Agreement on Tariffs and Trade-Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, April 15, 1994.

[21] Intellectual Property; GATT Bill Brings Major Reforms to Domestic Intellectual Property Law, Daily Report for Executives, December 5, 1994, at 231.

resolution-focused culture that prioritizes compromise and problem-solving in the intricate realm of global intellectual property issues.