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Mediation and Negotiation in Resolving Intellectual Property Disputes

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"An ounce of mediation is worth a pound of arbitration and a ton of litigation!"
-Joseph Grynbaum

ABSTRACT: *The vast usage of internet has virtually made the world borderless and has put ideas on places that can't be controlled. Internet or the world wide web has the potential to be of great help in terms of communication, flow of information and e-trade. This flow of information raises newer concerns related to disputes. International transactions have facilitated not only the sale of goods and services but has also brought about a growth in the disputes related to intellectual property rights. Through the recently popularized methods of Alternative Dispute Resolution, the parties now do not have to wait for their dates in courts. This proves that it is cost and time saving This paper deals with solving IPR problems through ADR's method and various international organizations such as WIPO promoting ADR methods*

Keywords: *IPR, Mediation, Negotiation, WIPO.*

1. INTRODUCTION: The nature that Intellectual property (IP) has is that of being global. The core of any IP is information, whose transmission cannot be controlled. Because of the nature of IP, it can simultaneously be enjoyed by not only one but many people. This is its best advantage as well as the worst disadvantage. The owner of the intellectual property gets the advantage of using this anywhere in the world and the disadvantage is that it can also be used and abused by people other than the owner. IP has the ability to create a rich ground for worldwide questions.

In today's day and age, intellectual property is coming out as one of the most valued asset in the world. The greater economies of the world are now directly or indirectly dependent on technology which bring IP laws into a much higher position today than they ever were. These greater economies of the world have now entered into terms and contracts that help in facilitation of protection of intellectual property. In these terms and contracts, specifically two ways or methods namely i) arbitration and ii) mediation have come to special focus. This comes as a sign that maybe the traditional way of litigation is no longer the best suited option for settling of international disputes.

The process or the ways that assists parties in resolving their conflict without having to take the matter to the court or to a trial are called alternative dispute resolution. ADR in India, not only has an important historic place but also has a varied liking by the international business sectors. They soon realized that in India, fighting court cases would not only waste time but also the life and blood of the business that is money. The field of law is the most ever changing field and has taken to ADR in a very good spirit. The lengthy, time and cost consuming litigation is one of the major reasons why ADR has started becoming popular with the corporate sector of the country.

Alternative Dispute Resolution is today being increasingly acknowledged in the field of law as well as in the commercial sector. Through ADR the results are fast and do not cost as much as years of litigation does. Growth in the field of technology has made its mark throughout the world and has also facilitated the increase in competition worldwide.

ADR has the ability to not only resolve conflicts in a cost-effective manner but also resolve conflicts in a manner that does not worsen relationships. It eases the life of the parties as their disputes can be settled without the involvement of courts. ADR deals with finding newer means which could be a possible alternative to litigation. In the todays world, ADR is becoming a highly recommended way to provide cost effective legal resolution and would also reduce the burden on the courts. Proceedings through ADR are not as formal as in courts and are to a greater extent even less complicated. The system of ADR lays emphasis on:

- Middle way out rather than the winner of the case taking all away.
- Outreach and greater accessibility to justice for.
- Reduction in number of court cases thus leading to improves efficiency.

Out of the various types of ADR, Mediation and Negotiation are the most used and most recognized. This paper deals with finding solutions to IPR issues through the route of mediation and negotiation. Usually a mediator or a neutral person is the one who is appointed and helps both the parties reach a mutually agreeable solution. The process of mediation is not binding on the parties but is voluntary, there making it absolutely safe. The process of two or more parties which are intended to reach a mutually beneficial outcome for at least one of the issues is call added negotiation. Both these processes are usually confidential, and not as formal as traditional court proceedings. Parties using the process of ADR for resolving their issues have a lot to benefit from. This includes time and cost effectiveness which results in greater relations and better solutions.

2. HISTORY

India is country in which there has always been history in which there have been evidences of dispute resolution without courts. This practice can be dated back to the old and ancient times. From the Vedic times, there have been municipal courts referred to as the Panchayats where all the disputes related to any form of commercial transactions were solved. These panchayats dealt in disputes related to contracts, matrimony and also criminal in nature. In the normal course of action, all the parties would accept the settlement given by the panchayat and that would be as binding as any legal action.

With the entering of the East India Company, ADR took its beginning for us. The British Government, started formulating a proper regulation in the three presidency towns of Calcutta, Bombay and Madras. The Bengal Resolution Act 1772 and Bengal Regulation Act 1781 were put into place. Under these, the parties have to submit the dispute to the arbitrator who would be appointed only after the mutual agreement of both the parties and the verdict given by them will be binding on both the parties. This act was then replaced by the Civil Procedure Code 1859 and was put into effect in the presidency towns in 1862.

With respect to the global necessities, the emergence of alternate dispute resolution has become a very important step in conflict resolution. Such specially devised machinery can also be described as "Appropriate Dispute Resolution" or "Amicable Dispute Resolution" so as to stress upon its non-adversarial objectives. In disputes arising across national frontiers covering the field of private international law ADR is of special significance to combat the problems of applicability of laws and enforcement.[1]

The Lok Adalat or the People's Court is a concept that has been embedded into the history and legal culture of India. It thus acts as a very important and integral part of our legal system and structure. ADR has a very deep reach and hold not only in our documented history but also in our history otherwise. Time and again it has proved that it is not only cost effective, but also time effective and this quality puts it into the better position than litigation. The people's court till date plays a very important role in settling disputes among people.[2]

ADR is a system which has not only modernized the legal system but is also a voluntary system in which both the parties get into a negotiation which has a definite structure. They may also put their dispute in front of a third party for the evaluation or judgment. The judicial system is having an over flood of cases and disputes that are not only of heavy importance but sometimes also of national interest. This not only delays matter's which are not important enough but also the atmosphere of the court and the tiresome process makes lawyers jittery. This has made ADR widely acceptable and is the sought of alternative that lawyers and parties are willing to take over litigation. These alternate methods include negotiation, conciliation, mediation and arbitration. This makes the process of ADR very different from that of the Lok Adalat.[3]

3. FUNDAMENTAL PROBLEMS OF INTERNATIONAL IP DISPUTES

The basic problem with international IPR laws is that there is a conceptual difference in the understanding of these laws by each nation. The recent notification of GATT[4] has changed the entire domestic patent law in the United States[5]. The domestic law in the United States stated that the patent applications must be submitted and kept as a secret and should in no way be disclosed until the patent is granted. This law is not in-line with the international laws that stated that the disclosures were to be made at the time of filling. The international agreements provide for better and robust means for protecting the intellectual properties in lesser developed nations. After keeping in mind these, highly developed nation can then enter into those countries.With all the parties being in multilateral agreements, the difficult choice of jurisdiction or laws would no longer be an issue. Mediation is used for solving problems in the international intellectual property disputes. Mediation lays special focus on solving the problem rather than the parties involved in it, and this proves its effectiveness. Different countries depending on their status of development have different views and takes on intellectual property rights. This makes reaching a compromise easier and in the favor of both the parties.

4. USE OF MEDIATION IN IPR DISPUTE

Worldwide there is an increased potential for cross-border intellectual property disputes. With the world becoming a much more connected place, the challenges such

as change in climate, increased emphasis on digital environment, greater access to health care and the preservation of bio-diversity has created ways for newer type of Intellectual Property Disputes. In this difficult economic and financial environment, all partners of law and clients are looking at methods and means through which they can in some way skip through the court proceedings. As stated by Abraham Lincoln- ***"Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses and waste of time."***[6]

It is advised that lawyers should discourage their clients from going to court. Attorneys should at this point advise their clients to rather choose alternative dispute resolution than the traditional litigation. In the recent years the use of ADR as a means for dispute resolution has gone up quite a bit because of its main feature, i.e. time and cost saving. Not all forms of ADR are considered the best. Intervention is considered as one of the best appropriate options for businesses. The other type called mediation has gained popularity when it comes to conflicts related to intellectual properties. The recent trend of mediation offers many different advantages, a few of which are detailed below: Attorneys should prevent their clients from going to court. At the point when looked with a question, business administrators ought to rather be urged to think about elective debate determination ("ADR") alternatives .The use of ADR has expanded in recent years as parties are seeking ways to circumvent overcrowded court dockets while keeping their disputes confidential and avoiding soaring litigation expenses. All things considered, not all ADR forms are made equivalent. Out of all the accessible alternatives, intervention is thought to be the most business inviting ADR process. Mediation has especially gained popularity among parties in conflicts involving technical topics like intellectual property ("IP"). This recent trend is based on the fact that mediation offers many distinctive advantages, some of which are detailed below.

1)It is up to the parties, whether they want to choose litigation or types of ADR at any point of time. An ADR arrangement in any dispute may expect them to attempt mediation or any other type ADR before getting back to assertion or suit. However, without such an arrangement, the choice stays accessible. To be sure, gatherings can simply consent to present their question to mediation on a willful premise, paying little heed to regardless of whether prosecution has initiated.

2)Out of all the methods or types of ADR, mediation provides the maximum flexibility. This gives both the parties a great degree of control over the entire process related to the dispute. The length of control can extent up to choosing the length of the process, the format and also the place where the mediation would be held. They are also the ones in charge of what information needs to be shared and considered and also the meditator for the entire process. The role of the mediator defers from that of an arbitrator. He does not need to give any judgment nor does he have to give a decision, he just has to be the medium for a productive and fair negotiation between the parties. This gives them the leverage to custom tailor the results of their debates to the needs and the requirements of their business and industry, this also gives them the similar negotiations to the ones they would get out of the courts and other ADR types. These orders or negotiations usually involve a lot of changes or amendments. They

are custom fitted to the needs of their businesses. So, this brings no limit to how creative parties and their mediator can become with respect to the making decisions.

3) The ability of selecting experienced neutrals is one of the biggest advantages that comes with IP disputes. It saves on a lot of time as both the parties do not have to waste time in making judges understand the laws of specific industry. In technical IP disputes it is fairly common to see a co-mediation setting and common enough to see only one mediator. The co-mediation format adds to the experience that is available. In the co-mediation setting, one of the judges may have a special involvement in the business debates and building accords with parties while the other may have specialized knowledge of the industry the case belongs to. Mediation has the ability to adapt itself to the complexity level and also the nature of the dispute, it hence becomes very specific and very direct. With the unveiling of the technicalities of the dispute, the mediators can then show both the parties the economic aspects of their relationships. This sometimes takes a positive tool on the parties and they end up elaborating for newer business strategies.

4) With the world becoming a smaller place and without boundaries, organizations of all natures and sizes are having a global reach. This is facilitating organizations to enter into foreign contracts and trade. This also increases the chances of cross border disputes related to intellectual properties. These international IP cases are the best suited for mediation. IP cases that are international in scope are particularly well suited for mediation. The processes of litigation are very stringent and cannot be made flexible. This is one such quality of mediation that makes it much more desirable. There are a lot of insecurities that both the parties can do away with, insecurities such as expensive court proceedings, not reliable court decisions and non-availability of preferred dates. By using this technique of mediation, both the parties can save on a lot of time and that could be the best outcome for them. The result of these mediations further come up with agreements which can be arranged for with laws pertaining to any country.

5) IP question are by and large long and expensive – particularly because of perpetual disclosure stages. While helping parties in surrounding their issues, a center individual is allowing them to confine the fringe of revelation to what is to a great degree related to their inquiry. Likewise, in light of the fact that a middle person encourages the trading of applicable data and positions between them, the gatherings remain effectively connected with amid the whole determination process. All the more overall, the pace intervention can compel on the individuals in like manner allows the assurance technique to be less dangerous to their own specific associations.

6) In most incidences wherein parties file a suit, they have either been working together or have had some official relations in the past. These disputes are usually between parties who are either working together, or were at some point of time partners, members of a joint venture etc. In maximum cases the partnerships or the relations that were made have had not only time invested into them but also a lot of financial resources. The process of litigation or arbitration only adds to the financial cost and also to the cost of time which would be required to get a new partner. Accordingly, regardless of the obvious intensity that can exist between them, parties associated with IP debate are typically more slope to take a shot at their issues. In this

regard, intervention can help restoring the lost trust, and saving progressing connections.

7) Each time a case in filed against someone, it comes under public record. The information shared in these sessions are very confidential and cannot be leaked at any cost. These disputes usually take place because there is this information that needs to be protected not only from the competitors but also the general public. The main aspect for both the parties is the information that is in these disputes, and if these mediations and negotiations are successful, then there would be no need for any filling of cases and hence no public record.

5. NEGOTIATION AS A MEANS TO RESOLVE IPR DISPUTE

While they are a regular part of business life, negotiations can become extremely sensitive when related to IP at the international level. Cultural clashes derived from different values, belief and norms can become very intense, while partners from differing IP regimes can have different understandings about some IP issues, which may protract the negotiations. The confidentiality of IP and its vital importance for firms can further complicate the negotiation process, which can also be affected by sensitive issues relating to other business activities, such as pricing, payment, time control, contractual implementation and so on.

Assessing individual negotiation styles is also an important step to understand combined team strengths. Salacue (1998) conducted a survey of cross- nation and cross-occupation negotiations, and concluded that ten factors impact of negotiation style, and can be used to access negotiation teams so that potential conflicts can be identified at an early stage. They are as follows:

- Aim orientation: goal-or relationship-orientation.
- Outcome orientation: win-lose or win –win relationship preference.
- Approach Orientation: formal and informal.
- Communication style: direct and indirect.
- Time attitude: high and low punctuality.
- Emotional aspect: high and low passion.
- Contract style: detailed and general
- Decision making: bottom up and top down.
- Team working: leader dominated and consensus.
- Risk taking: high and low.

Despite the comparative lack of guidance as to the IP context, there is no lack of research on the art of cross-boarder negotiation. All negotiation, as Sparks indicated, are a process of going through information exchange, inevitable frictions, uncertainty about the unpredictable outcome, and anxiety about resolving the uncertainty. IP negotiations share all these problems, but can even be more protracted processes, because of the complexity of clauses to be negotiated, such as royalties and penalty clauses and so on.

6. WORLD INTELLECTAL PROPERTY ORGANISATION

The acronym WIPO stands for World Intellectual Property Organization which was established in 1994. The main reason behind the establishment of such a body was to ensure time and cost-effective resolution of Intellectual Property disputes related to

Alternative Dispute Resolution. This body was constituted to act as a neutral, international and non-profit organization which would provide resolutions in a time and cost-effective way. The functions of mediation, arbitration and expert determination facilitate the private firms to settle their international IP and technology disputes through the way of out of court settlement. WIPO is the world leader in the area of domain name dispute resolutions through the wing called UDRP.

It is perceived as a universal and unbiased discussion particularly fitting for cross-outskirt and diverse debate and leads methodology under the WIPO Mediation, Expedited Arbitration, Arbitration and Expert Determination Rules (WIPO Rules).

The WIPO Rules contain particular arrangements that are especially appropriate for IP and related debate, for example, those concerning classification and specialized confirmation. Nonetheless, their degree isn't restricted to such question and they can be, and have been, effectively connected in different territories. The WIPO Center influences accessible, in various dialects, to show provisions and understanding that gatherings may use as a reason for presenting their debate to WIPO.

As experience has appeared, the viability of ADR depends to a great extent on the nature of the middle person, mediator or master. The WIPO Center keeps up a database of more than 1,500 qualified neutrals from 70 nations with additionally applicants added by case needs, and it aids the arrangement of neutrals for each situation.

The WIPO Center works additionally as an asset focus to bring issues to light of the significant part ADR can play in various segments. It gives ADR guidance to intrigued private and open elements and in addition preparing in IP-related ADR through workshops and gatherings. The WIPO Center as of late teamed up with the WIPOAcademy in presenting an online course on Arbitration and Mediation under the WIPO Rules.[7]

7. CONCLUSION

It can now be concluded that maximum of the cases related to intellectual property rights can in some way or the other be resolved through the various types of alternate dispute resolution. This can be through negotiation, mediation, arbitration or conciliation. The very basic and on one of the core benefits of ADR is that the parties get to choose and select the most suitable way for their needs. From the point of view of the lawyers, they can get the benefits by helping their clients in choosing the right type of ADR process. Through this they can advise the clients on how their cases can be customized and also the way that could be customized for them. This will not only help the lawyer but also the client as both of them would be able to thoroughly work on their case.

For India, not only the field of intellectual property but also the ADR processes are new. These days a lot of the attorneys related to intellectual property do not pay much attention to ADR and do not take it as a viable option for resolving the cases related to their clients. Intellectual Properties are the future for the world and these disputes are the ones that create hindrances in the successful usage of them. It has become a challenge for the lawyers to resolve the conflicts and disputes in a manner that is not only efficient, but also cost and time effective. This needs to be done without damaging the working relationships between corporates. Out of all the above-

mentioned characteristics, ADR is the only one which possess a number of those characteristics and can truly become an important choice for resolution of Intellectual Property disputes.

REFERENCE

[1] Dr. Singh Avtar, Law of Arbitration and Conciliation (including ADR Systems), Eastern Book Company, Lucknow, 7th Edition(2006), p. 393

[2] Deshmukh RaosahebDilip, J. "Efficacy Of Alternative Disputes Resolution Mechanisms In Reducing Arrears Of Cases", NYAYA DEEP- Vol. X, Issue: 2, April 2009, pp. 26-27

[3] *Ibid*

[4] http://www.manupatrafast.com/articles/PopOpenArticle.aspx?ID=78779378-b7d0-44bd-a04c-b637daee867f&txtsearch=Subject:%20Intellectual%20Property%20Rights%20-%20f45

[5] http://www.manupatrafast.com/articles/PopOpenArticle.aspx?ID=78779378-b7d0-44bd-a04c-b637daee867f&txtsearch=Subject:%20Intellectual%20Property%20Rights#f46

[6]http://www.abrahamlincolnonline.org/lincoln/speeches/lawlect.htm

[7] https://www.wipo.int/edocs/mdocs/sme/en/wipo_ip_bis_ge_03/wipo_ip_bis_ge_03_9-main1.pdf