ROLE OF ARBITRATION IN IPR

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INTRODUCTION TO THE CONCEPT OF ARBITRATION

There has been a surge in litigation matters and thus, there was the need for an alternate dispute redressal mechanism. India adopted the UNCITRAL Model for arbitration. Due to the rise in commercial matters and their long pendency, arbitration was chosen for a speedy and alternate source of dispute resolution. Various developed countries had been already following the arbitration laws and accordingly, had an established track of execution. Uniform Arbitration Act[1] , 1955 has been adopted by various countries which promotes arbitration procedures for commercial and corporate matters. This has been adopted and gradually come into a universal standard all over the world.

Arbitration has been executed with aim of making it consensual, binding, neutral, and private[2]. It is acknowledged as a hybrid version of dispute resolution, somewhere between mediation and pure litigation route. This Act's primary objective is to provide speedy and effective dispute resolution for both International & Domestic commercial arbitration, Conciliation, and Enforcement of Foreign Awards in India. The Arbitration Act of 1996 defines 'international commercial arbitration' to mean and include any dispute of commercial nature arising between the Indian party and the International party. India has lately brought in Arbitration Act, 1996 into its legal system and has been amending it till date as per the needs and demands of the growing and fast-changing economy.

ROLE OF IPR IN THE ECONOMY

Intellectual property rights are the rights that are protected towards any intellectual product. This could be any artistic work, literature work, writings, or any such creations. The creations of human minds are protected under the laws of Intellectual property rights, often called as IPR laws. This has a broad spectrum of trademarks, copyrights, designs, patents, and geographical indications. It is important to understand that the primary aim of IPR laws is to protect the

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[1] https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=cf35cea8-4434-0d6b-408d-756f961489af

[2] https://www.international-arbitration-attorney.com/what-is-international-arbitration/

human minds' creation but also to give a boost and motivate the minds to create and develop more.

The protection of any such creation ultimately becomes a brand, when it becomes recognisable in the market as unique. The unique marks and creations come out to be identified as unique along with a symbol of certain standards and quality. This helps the producers in better marketing of the product and services attached. And thereby, the IPR becomes a catalyst in marketing, branding, and enhancing the business. This has immense importance in the economy. Nowadays, the requirement of certain IPR registration has become a mandate before introducing a product or service in the Indian Market. For example, any product that requires registration under the Legal metrology act, 2009 is required mandatorily to have a trademark registration. This is to ensure the unique name and identity of the product. Similarly, any name of a business organisation that may be registered under the Companies act, 2013 cannot supersede any name which is registered under the trademark laws of India. Thus, it is quite evident that slowly and gradually not only the importance of IPR laws but also its essence has been realised in different sectors of the Indian market.

THE REALISTIC SCENARIO

As it has been noticed, the role of IPR has slowly sneaked into the commercial and economic aspects of the Indian market. IPR has now a strong footing in each commercial agreement, business development, and legal requirement. Every commercial agreement has an IPR clause. The confidentiality and Non- disclosure agreements have deeply dealt with the IPR and its transfer. The recent growth in IPR[3] has also led to complex situations which haven't been dealt with before. The resolution to any such complex situations where a dispute could arise from the breach of confidentiality, breach of franchisee agreements, breach of assignment agreements, infringements and passing off, misrepresentation in IPR, theft, and various issues are required to be dealt with.

We are well aware that as per the Arbitration Act, 1996, any agreement or clause that parties mutually agree on and binds both parties towards choosing arbitration as the dispute resolution mechanism, is referred to as an arbitration agreement. This is a pre-requisite for any party to proceed towards the arbitration mechanism. This must be mutually agreed upon and must bind

[3] https://economictimes.indiatimes.com/news/economy/policy/ipr-plays-important-role-in-strengthening-growth-focus-on-development-fm/articleshow/89849765.cms

both parties together to fulfill the sole objective of arbitration law. The second important aspect is that the agreement must be either commercial or corporate. Any matrimonial disputes, non-commercial, testamentary matters, or others cannot be considered for arbitration proceedings. For such other disputes, civil litigation, contractual disputes, and criminal law have a very well-defined legal route. This is the conventional way of resolving disputes.

LEGAL ROUTE TO DISPUTES IN IPR

Disputes arise due to conflicts in 'Right in rem' or 'Right in personam'. It is important to know that Arbitration law deals with disputes that are right in personam and not right in rem only. This has been established by various precedents. The apex court has emphasised this concept in Vidya Drolia v. Durga Trading Corporation[4].

Section 2(3) of the Arbitration and Conciliation Act, 1996 provides exceptions to disputes that are not arbitrable in nature. Additionally, Section 34(2)(b)(i) provides that courts may set aside arbitral awards where the subject matter of the dispute was not capable of settlement by arbitration. This section emphasises on the power of the court. These provisions depict that there exist disputes which are not covered under the arbitration law. We may refer to the definition of the term 'commercial dispute' in the Commercial Courts Act, 2015 to understand what commercial disputes are and what kind of commercial disputes arbitration law can deal with. It is important to know that this definition specifically includes disputes pertaining to Intellectual property.

In addition, Section 10 of the Commercial Courts Act provides jurisdiction for arbitration matters of commercial dispute. This provision does not specifically exempt any IPR disputes or provide any exception to it. Lastly, nothing in the Arbitration Act prevents the enforcement of awards concerning Intellectual Property Rights including the question of their validity or infringement. Whereas, it is important to understand that the Indian Patent Act, 1970 specifically allows for the arbitration of matters only involving government as its party. It can be understood that every trademark, patent, and copyright I given by the government body and any such infringement or illegality can, broader sense, be considered against the government. Though, this is specifically inclusion which implies that no matter of patent will be arbitrable where both the parties are private persons. This brings us to confusion as to whether IPR is arbitrable or not as per the interpretation of these statutes. Countries that have adopted

[4] Vijay Drolia v. Durga Trading Corporation, MANU/SC/0939/2020

UNCITRAL law like Australia, Germany, Japan, and Canada have all validated arbitration of patent infringement and some even of patent validity. The ICC Commission has stated arbitration to be the "most desirable method for settling disputes arising out of intellectual property transactions." [5]

In *A. Ayyasamy vs. A. Paramasivam and Ors*.[6] The courts have held that patents, trademarks, and copyrights are those disputes which may not be arbitrable. Adjudication of IPR issues is thus in question and still is not an issue that has a straight-jacket answer and the pendulum is still swinging in both directions.

CONJUNCTION OF IPR AND ARBITRATION LAWS

As discussed above the importance of Intellectual property rights in commercial agreements and the growth of the economy, the point here is that IPR laws are an integral part of the commercial aspect nowadays. And not only that, commercial transactions have IPR as their only basis. For instance, franchisee business models, licenses, and assignments are all kinds of business models that are based solely on the IPR. In such circumstances, IPR cannot be kept separate from the 'commercial'.

The second perspective to it also pertains to the contractual agreements and transfers that are usually prevalent in the industry which have the main substance as the IPR. It is difficult to fit such contracts into a specific definition of commercial contracts, IPRs, or contractual agreements. If a dispute is arising out of the terms of the contract between the parties, and the dispute falls within the ambit of the arbitration clause of the contract, even though such dispute pertains to copyright or trademark infringement, it still could be decided by arbitration as it is right in personam.

Section 89 of CPC lays strong decision making power on the courts to decide the jurisdiction of a dispute and to decide if the matter is arbitrable or not. When this provision is read with the provisions of the Arbitration act as well as the commercial courts' act, there is no bar on IPR matters to be arbitrable. The courts can take a broader perspective to understand the arbitrability of IPR issues. Supreme Court observed that *"Generally and traditionally all disputes relating*

[5] International Chamber of Commerce. Final Report on Intellectual Property Disputes and Arbitration. International Chamber of Commerce [online]. International Chamber of Commerce. 2016, p. 23 [quoted September 11, 2018].
[6] A. Ayyasamy vs. A. Paramasivam and Ors., MANU/SC/1179/2016

to rights in personam are considered to be amenable to arbitration; and all disputes relating to rights in rem are required to be adjudicated by courts and public tribunals, being unsuited for private arbitration.[7]*"* Similarly, In Hero Electric Vehicles Private Limited v. Lectro E-Mobility Private Limited, the Delhi High Court decided that a trademark dispute could be arbitrated because the plaintiffs were attempting to defend their trademark rights against a specific group rather than the entire world. In most common law jurisdictions, IP disputes are generally considered to be arbitrable, with certain limitations[8]. In civil law jurisdictions, IP disputes between private parties are, to a large extent, considered arbitrable. This is particularly the case in IP arbitrations involving contractual claims and obligations.

WIPO has specialised mediation and arbitration centre for the very specific purpose of dispute redressal. UNCITRAL MODEL also elaborates on the same. Most IP disputes at the WIPO arise as a result of contract clauses containing an arbitration agreement submitting the dispute to the WIPO[9].

CONCLUSION

There have been mixed views on this issue. Various national, as well as international judgements and provisions, have given views in favour as well as against arbitration with IPR disputes. There may be a challenge in front of the judges of India to decide whether a dispute is challenging Right in rem or Right in personam. This might ease the difficulty and courts could choose if the alternate redressal mechanism in an IPR dispute be suffice and efficient. With the growth in IPR laws and it becoming an integral part of every, this sector cannot be kept as a separate field, rather it is an integral part. There shall be a rise in IPR disputes gradually and not every dispute would be under the civil jurisdiction or the litigation procedure. It may merge with commercial aspects. In such cases, it will be difficult to keep arbitration away from the IPR laws.

There may be the requirement of a specific procedure or certain amendments for better incorporation of IPR laws, but complete ignorance of IPR laws from the arbitration as the source of dispute redressal cannot be ignored. And now, coming back to the purpose of arbitration as an alternate redressal mechanism that is binding, transparent, and speedy can still

[7] Booz Allen and Hamilton Inc. V SBI Home Finance Ltd. (2011), Civil Appeal No. 5440 of 2002
[8] https://www.acerislaw.com/international-arbitration-and-intellectual-property-ip-disputes/
[9] WIPO Caseload Summary WIPO Arbitration, Mediation, Expert Determination Cases and Good Offices Requests

be achieved. Arbitration has proven to reduce the burden on courts and has been efficient. Arbitration ensures confidentiality as well, which will add to the basic nature of IPR. It shall be a good step to have all IPR disputes covered completely under the ambit and jurisdiction of arbitration laws. It is logical and expected to have arbitration incorporated for IPR disputes. It is expected to have risen in IPR matters and thereby, disputes as well. To avoid long litigations and burdens on courts, arbitration centres would be a great way forward.