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APPLICABILITY AND EFFECTIVENESS OF ALTERNATIVE DISPUTE RESOLUTION FOR RESOLUTION OF INTELLECTUAL PROPERTY DISPUTES

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Former Chief Justice of the U.S. Supreme Court, Chief Justice Burger once said, "That the notion that ordinary people want black-robed Judges and well-dressed lawyers and fine Courtrooms as settings to resolve their disputes is not correct. People with problems, like people with pains, want relief, and they want it as quickly and inexpensively as possible."

ABSTRACT

Intellectual property rights are with the right owner for a specified period of time and he needs to effectively enforce his rights within it, the problem arrives when there arises a legal proceeding related to the Intellectual property. This is so because it's eradication takes excessive time in the Indian judicial system, therefore other solutions for dispute resolutions must be instituted so as to share the burden of the judiciary. With respect to these existing issues, an alternative dispute resolution system is gaining popularity for the enforcement of Intellectual property rights, exploration of which is required for the protection of intellectual property rights in India.

Between 2005-2015 there were around 143 patent infringement suits in front of the Indian judiciary, out of which to only five were decided by the courts till 2018. It is high time for the argumentative Indian to step down and adhere to the concept of time is money by adapting to the new age remedies and alternatives of dispute resolution. Alternative dispute resolution (ADR) could be the system which can eradicate the issue of long drawn litigations as it provides for a neutral mechanism, settling disputes outside of the court in the presence of a qualified intermediary.

WHAT IS MEANT BY ALTERNATIVE DISPUTE RESOLUTION AND FORMS OF ADR MECHANISMS?

ADR describes a range of techniques used to resolve disputes outside courts. [1]is a procedure of settling disputes without litigation, it primarily consists of two basic forms – arbitration and mediation. In general, parties in disputes either use arbitration, mediation or a hybrid of the two to conclude their matter by way of private adjudication. ADR affords parties the opportunity to exercise greater procedural control over the way their dispute is resolved than in court litigation.[2]

World intellectual property organization follows three mechanisms for ADR, namely arbitration, mediation and conciliation out of which arbitration and mediation are commonly used. United States uses sixteen hybrid forms of ADR's arbitration, mediation, conciliation, hybrid of mediation and arbitration, mini-trial, summary jury trial, early neutral evaluation, negotiation are a few [3].

The three most commonly used forms of ADR in India are-

i. ARBITRATION-

This is the most popular form of ADR, it is binding as well as a final method for private adjudication. In this it is upon the will of the parties that either they can select one private arbitrator or 3 private arbitrators, possessing expertise in the area of dispute. The rules and regulations for arbitration are to be tailored according to the individual position of each party. In arbitration, provided what form of structure parties pursue, the arbitrators can ask for the discovery of evidence, examination and cross-examination of witnesses and can use briefs and oral arguments to render their decisions.

ii. MEDIATION-

[1] Julis A Martin, *Arbitrating in the Alps Rather than litigating in Los Angeles,* 49 Stanford LR 4, 3(1997).
[2] Marc Jonas Block, *Benefits of ADR for International Commercial and IP Disputes,* 44 Rutgers LR, 7 (2016-17).
[3] Madhu sweta, *Alternative Dispute Resolution and the Law of Intellectual Property,* Singhania & partners LLP solicitors and advocates. Accessed on 7th april,2019.

iii. Mediation facilitates a shift of responsibility and ownership of disputes from the institutions of the legal system to the parties themselves.[4] It allows parties to design their own resolution through which they might arrive towards a solution, mutually agreed by both.

In a mediation, the facilitating role is that of a mediator who guides the party towards a conclusion and reaching upon a certain agreement, mediator acts as a neutral body, does an unbiased analysis of an issue and provides his understanding to the parties, making it easier for them to find a way out. Usually, whenever there is a collision between two parties the issue is stuck between right and wrong, winning and losing and both the parties forget about the mutual gains and interests originating from their relationship. It is the mediator who helps them in realising the same. The main objective of mediation is to lead the parties towards a settlement wherein both the owner as well as infringer satisfy their interest up to quite an extent.

Although both arbitration and mediation have the same goal in mind, a fair resolution of the issues in hand yet there lies major differences which are important for the parties to understand and these are-

S.NO.	ARBITRATION	MEDIATION
1.	Arbitrator hears the evidence and makes a decision.	No such hearing of evidences required
2.	It is like a court proceeding which is less formal in nature. This is so as it involves parties to provide testimonies	Mediation is quite an informal method which involves parties to choose a neutral third party so that certain negotiations and

[4] Nadja Alexandar, *Four Mediation Stories Across the Globe*, 74 The Rabel Journal of Comparative and International Private Law 732, 749 (2010).

	and evidences similar to a trail.	assistance could be maintained between them.
3.	The decision of an arbitrator is binding upon the parties.	Decision of a mediator is not binding upon the parties.
4.	In arbitration either wins or loses	In mediation there's no such thing as winning or losing. A mutual settlement is the only objective.

iv. LOK ADALATS-

It is one of the alternative dispute resolution mechanisms in India, being a forum wherein cases pending before the court are settled. The decree passed by a lok Adalat is similar to that of a civil court, it is final and binding upon the parties, whereas if the parties are not satisfied with the award of lok adalat they can initiate litigation in a court of appropriate jurisdiction.

1. NEED FOR ALTERNATIVE MODE OF DISPUTE RESOLUTION IN INTELLECTUAL PROPERTY DISPUTES.

Intellectual property rights follow the principles of Lockean labour theory and bars any person who tries to enjoy the fruit of someone else's hard work. Every person who is the creator of something original must have the right over the benefits arising out of his intellectual output[5].

[5] Id. At 1

Whenever there exist certain rights, there's a high probability of the infringement of the same. Along with this, exists a recourse to certain remedies to prevent the infringement of a person's rights because the purpose behind the creation of rights gets defeated if there is no remedy to enforce the same. To exercise the same the right holders takes the recourse of the courts whenever any instance of infringement takes place[6].

Indian courts have contributed so far quite a lot in the development of Intellectual Property rights, but the available resources such as alternative dispute resolution could be used in a better way by the courts to resolve disputes relating to IPRs, the majority of which are civil in nature. Matters relating to patent law and copyrights law require the adjudicating officer to have knowledge regarding the subject matter of the dispute so that they can comprehend the case at hand with ease, therefore new mechanisms are needed to suffice the rights of owners and to provide them with swift justice. In the case of ***Shree Vardhman Rice & Gen Mills v. Amar Singh Chawalwala*** the Hon'ble Supreme court observed that cases relating to trademarks and patents mainly revolve around whether or not to grant an injunction. Also, the matter is not expeditiously tried by the trial court, whole of the litigation is mainly fought by the parties about temporary injunction which lingers on for years and years, which in the eyes of the court is not a proper methodology being applied. The proviso to Order XVII Rule 1(2) C.P.C. should be strictly complied by the courts and hearings of the suits relating to trademarks, patents and copyrights should also proceed on a daily basis and the final judgment should be given normally within 4 months from the date of filing of the suit[7].

The delays in the disposal of the cases and costs of litigation results in a roadblock for the effective promotion of Intellectual Property rights, due to which the aggrieved parties are now opting for alternate dispute resolution mechanisms for the advancements of Intellectual property rights in India and the commercial nature of intellectual property rights somewhere provides an edge for this approach.

[6] Id. At 1
[7] Id. At 1

2. ADVANTAGES OF ADR IN INTELLECTUAL PROPERTY CASES-

i. PARTY AUTONOMY-

Intellectual property disputes are distinctive in character, involve technical matters, complex laws and sensitive information. These are the reasons due to which the parties in dispute need these processes of dispute resolution which can resolve a dispute whilst addressing all its distinctive characteristics[8]. ADR gives parties the freedom to customize their dispute resolution process in a single forum[9]. Parties can choose that process of which suits them the best. Parties can agree to meet at a neutral location, choose a neutral expert and abide by the rules to meet their needs. Certain processes like mediation even allow the parties to craft outcomes that take into consideration their specific interests

ii. SINGLE PROCESS JURISDICTIONAL NEUTRALITY-

Intellectual Property Rights are territorial in nature, multiple jurisdictions can have separate parts of these properties. Due to international treaties and agreements, cross-border trade and exploitation of Intellectual property and their disputes put an impact on multiple jurisdictions, this compels parties to take out separate proceedings in each of them. These proceedings might lead to complex conflict building. A remedy to this can be the use of ADR which allows multiple issues arising in different jurisdictions settled through a single process like arbitration and mediation. It is also useful when the country is the same but the actions taken by the court are multiple[10].

The process of ADR provides for jurisdictional neutrality in disputes relating to the cross-border issue where the parties do not intend to have a trial in each other's country.

[8] Veronique Bardach, 'A Proposal for the Entertainment Industry: The Use of Mediation as an Alternative to More Common Forms of Dispute Resolution' (1993) 13 Loy LA Ent LJ 477, 479.
[9] Ignacio de Castro and Panagiotis Chalkias, 'Mediation and Arbitration of Intellectual Property and Technology Disputes: The Operation of the World Intellectual Property Organization Arbitration and Mediation Center' (2012) 24 SAcLJ 1059, 1073.
[10] David Allan Bernstein, The Case for Mediating Trademark Disputes in the Age of Expanding Brands (2005) 7 Cardozo J Conflict Resol 139, 154–155.

iii. INDEPENDENT SPECIALISED EXPERTISE-

A country like India lacks specialized Intellectual Property Courts or judges who can effectively resolve Intellectual property disputes which involve complex legal issues and technical-scientific matters. If we start in expertizing the technical assistance of judges, it will take a considerable amount of time and resources[11]. The process of ADR allows the parties in dispute to choose a neutral expert, specialized in the subject matter to act as a facilitator. An expert can be anyone having knowledge of the law, technology and specific industries. This appointment of qualified experts is done through the process of ADR which benefits the parties, this benefit is normally unavailable by the process of litigation.

iv. SIMPLICITY & FLEXIBILITY-

The process of ADR, in comparison to litigation is simpler and flexible. In this process, the selection of a procedure and the conduct of proceedings are decided by the parties. It is a much more straight forward mechanism.

For example, the process of mediation does not make decisions relying on the strict legal positions of the parties but in their mutual interest, it diverts the party to focus upon the shared interest instead of calculating what is right or wrong, leading to a satisfying settlement[12].

v. COST SAVINGS-

Litigation involving Intellectual property rights is an expensive affair, especially when it is a cross border deal, small businesses suffer the most due to this. ADR in comparison to litigation provides a more affordable avenue for the parties to resolve their dispute. It uses neutral experts who dive straight into complex Intellectual property issues leading to rectifying the complications easily, making the process time saving as well as cost-saving.

[11] Scott H Blackman and Rebecca McNeill, 'Alternative Dispute Resolution in Commercial Intellectual Property Disputes' (1998) 47 Am U L Rev 1709, 1713.
[12] Jennifer Mills 'Alternative Dispute Resolution in International Intellectual Property Disputes' (1996) 11 Ohio St J on Disp Resol 227, 231. 39 Susan Corbett, 'Mediation

vi. CONFIDENTIALITY-

Information like trade secrets, proprietary information can get disclosed during a court proceeding. These secrets that the parties keep evolve from a very high degree of research and development, disclosure of which can damage the parties and their business prospects. ADR is highly advantageous in scenarios of such kinds as the parties have effective control over their information. Even the entire process of ADR and its outcome can be kept confidential for preserving the business reputation and relationship of the parties.

vii. DIVERSE SOLUTION-

Litigation involves limited legal remedies like injunctions, damages, specific performances etc. and the trend is inclined more towards the 'win or lose' scenario. ADR and specific relief mediation on the other hand provide creative solutions to the parties leading to a win-win situation.

3. IN DEPTH STUDY AS TO HOW ADR CAN BE IMBIBED INTO RESOLVING IP-RELATED DISPUTES-

i. COMMERCIAL COPYRIGHT AND SOFTWARE DISPUTES-

A copyright infringement involves the unlawful copying of a protected original work and the degree of similarity between the expressions of original work and the infringing work. Copyright cases are usually not very technical and are less complex in nature. An extensive amount of documentation and discovery is also not required sometimes, for example, consider a situation where author of a book sues the producer of a movie stating that the movie infringed his copyright in a book or the writer of an old song sues the writer of a new song stating that he copied his song, in such cases extensive examination of the issue is not needed, merely examining certain facts like the degree of similarity between two works and the access of the accused to the work is to be

determined, these form of cases do not require any expertise and are perfect for a recourse of ADR[13].

Also, issues which are slightly more complex such as duplication of computer software can be solved by the process of ADR quite effectively because the parties can appoint an arbitrator possessing the technical knowledge of the subject matter who can understand the dispute easily and can resolve it efficiently.

ADR also provides better degree of protection to trade secrets and other sensitive information as the parties here can determine as to what information is to be publicised and this will benefit the disputes relating to computer software to a very large extent where confidentiality of the software is the primary concern.

ii. ADR IN COMMERCIAL PATENT DISPUTES-

These disputes involve huge amount of technical issues and this makes it perfect for the recourse of ADR. Patent related infringements involve technical aspects such as validity of a patent etc. which can only be resolved with the help of a technical expert who can determine the claims and specifications from the perspective of a person skilled in the art. Most of the patent infringement issues revolve around biotechnology, pharmaceuticals etc., therefore appointing an arbitrator who can understand these technicalities will be more advantageous.

ADR provides in for a level playing field for both the parties where both the parties participate in controlling the amount of time, effort and expenses involved, dealing a patent infringement case with the help of ADR so as to be settled within 6 months. ADR provides for solutions which provide the parties with a middle ground i.e. no single party is victorious, for example, in certain cases of patent infringement in which no certain outcome is forceable the arbitrator suggests the way out of licensing out the patent which can benefit both the parties. Certain experts of the patent

[13] Aditya joseph, *Alternative Dispute Resolution Mechanisms In The Intellectual Property Regime*, http://www.*Manupatra.co.%20Articles%20ON%20ADR.htm*, accessed on 7th april,2019.

field also claimed that a patent infringement case when dealt by ADR saves 50% of the cost that would have been involved if a patent infringement suit would have been filed[14].

iii. ADR IN TRADEMARK AND TRADE DRESS DISPUTES-

A dispute of such a kind revolves around the likelihood of confusion when the plaintiff alleges that the defendant's mark is deceptively similar to that of his. A trade dress complaint involves issues when a defendant's packaging is the same as that of the plaintiff's product and which might create confusion in the minds of the consumers regarding the source of the product. This issue many times arises between the parties which are either in or were at some point of time in an ongoing business relationship. For example – the parties had a license or franchise relationship prior to the dispute. In such cases it is easy to find a solution which can meet the needs of both the parties and here the parties are not in a seek and destroy mode, as this could destroy any future possible collaboration between the two. In resolving these cases much of technical precision is not required but consumer surveys and market data and its thorough reading are important.

iv. ADR IN TRADE SECRET AND UNFAIR COMPETITION DISPUTES-

A trade secret is misappropriated when there's a breach of confidentiality of the information by improper means. To prove this, the party holding a trade secret must prove that the information misused is a trade secret. Often, a former employee of an organisation is observed to be involved in trade secrets infringement in order to benefit his new employer[15].

Unfair competition on the other hand includes unlawful unfair or fraudulent business activity which is unfair, false and misleading and can be covered under the ambit of trade secrets misappropriation, trademarks infringement or breach of contract[16].

In both these cases, the nature of the dispute is such that at least one of the parties is concerned about maintaining the secrecy of the confidential information, which makes ADR the perfect mode

[14] Id. At 10.
[15] Id. At 10.
[16] Id. At 10.

of recourse for them. These issues need a rapid resolution because of its limited life span and as ADR methods proceeds faster than a court of law making it a better option for a trail[17].

Trade secrets and unfair competition cases involve technical aspects which are necessary to resolve the case. Example- Where an issue for unfair competition arises in comparative advertising and the court needs to observe as to how it is misleading and false and that the product of the defendant might actually be more efficient and long lasting than that of plaintiff, to understand such a situation, an expert who can understand the situation in depth is required. This issue can only be resolved by appointing an arbitrator having knowledge regarding the issue in question and he can solve the issue saving the time, effort and money of the parties altogether.

v. ADR IN LICENCING DISPUTES-

The Intellectual Property right holders tend to obtain commercial profit out of their invention by way of licensing it. Such agreements usually include resorting to ADR for dissolution in case of disputes, these licensing disputes could be of such a nature where in case of a license of computer software it gets difficult to know the extent of license been given for open code or source code. This will be a key factor in determining the royalty rate, therefore a technical expert in the form of an arbitrator can solve an issue like this swiftly.

If the parties keep an ADR clause at the early stage in an agreement, it might lead in establishing a fair rule of conduct in case a dispute arises[18] .

vi. ADR IN INTERNATIONAL DISPUTES-

The WIPO Arbitration and Mediation Center was established in 1994 on a not-for-profit basis to facilitate the time and cost-effective resolution of IP and related disputes through ADR. It is recognized as an international and neutral forum especially appropriate for cross-border and cross-cultural disputes.

The problems with international disputes are that different nations possess different views for Intellectual property rights like until the ratification of GATT under the US, Intellectual property

[17] Id. At 10.
[18] Id. At 10.

laws patent applications were maintained with secrecy and there was no requirement for disclosure for the granting of a patent, this situation varies from nation to nation. In certain countries, disclosure is a requirement to obtain a patent during filing, these fluctuating ideologies might create disputes and because a bilateral relation is involved in these scenarios, therefore, taking the recourse to ADR appears to be more fruitful as the settlement can be done through compromise[19].

4. CASE LAWS-

CASE – I.

- **In a WIPO Arbitration of a Biotech/Pharma Dispute:** A French biotech company, holder of several process patents for the extraction and purification of a compound with medical uses, entered into a license and development agreement with a large pharmaceutical company. The pharmaceutical company had considerable expertise in the medical application of the substance-related to the patents held by the biotech company. **The parties included in their contract a clause stating that all disputes arising out of their agreement would be resolved by a sole arbitrator under the WIPO Arbitration Rules**. Several years after the signing of the agreement, the biotech company terminated the contract, alleging that the pharmaceutical company had deliberately delayed the development of the biotech compound. The biotech company filed a request for arbitration claiming substantial damages.

- The Center proposed a number of candidates with considerable expertise of biotech/pharma disputes, one of whom was chosen by the parties. Having received the parties' written submissions, the arbitrator held a three-day hearing in Switzerland for the examination of witnesses. In the course of the hearing, the arbitrator began to think that the biotech company was not entitled to terminate the contract and that it would be in the interest of the parties to continue to cooperate towards the development of the biotech compound. On the last day of the hearing, the parties accepted the arbitrator's suggestion that they should

[19] Id. At 10.

hold a **private meeting**. As a result of that meeting, the parties agreed to settle their dispute and continued to cooperate towards the development and commercialization of the biotech compound.

CASE-II

- **A WIPO Software Trademark Arbitration:** A North-American software developer had registered a trademark for communication software in the United States and Canada. A manufacturer of computer hardware based elsewhere registered an almost identical mark for computer hardware in a number of Asian countries. Both parties had been engaged in legal proceedings in various jurisdictions concerning the registration and use of their marks. Each party had effectively prevented the other from registering or using its mark in the jurisdictions in which it held prior rights.

- In order to facilitate the use and registration of their respective marks worldwide, the parties entered into a coexistence agreement which contains a WIPO arbitration clause. When the North-American company tried to register its trademark in a particular Asian country, the application was refused because of a risk of confusion with the prior mark held by the other party. The North-American company requested that the other party undertake any efforts to enable it to register its mark in that Asian country and, when the other party refused, initiated arbitration proceedings.

- Following proposals made by the Center, the parties appointed a leading IP lawyer as the sole arbitrator. In an interim award, the sole arbitrator gave effect to the consensual solution suggested by the parties, which provided for the granting by the hardware manufacturer of a license on appropriate terms to the North-American company, including an obligation to provide periodic reports to the other party.

5. CONCLUSION-

It can certainly be concluded that ADR mechanisms can be good enforcement and protection mechanism benefiting the Intellectual property laws which can make the settlement more efficient, can narrow down the issues and improve the communication between the parties. The most beneficial prospect of ADR is that the parties in disputes together can tailor the process suitable for them to resolve the dispute

An epitome for a conclusion would be to resonate the words eloquently stated by Abraham Lincoln, "Part of the role of an attorney is to persuade your neighbours to compromise whenever you can. Point out to them how the nominal litigant winner is often a real loser-in fees, expenses and waste of time". Presently, many Intellectual property attorneys and their clients do not regularly consider ADR as a means for resolving their disputes. ADR processes are relatively new in India to the Intellectual property field and should be used more frequently.