



## Intellectual Property Disputes and Resolutions

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Disputes relating to intellectual property [IP] protection are gradually increasing. Resolution by State courts resulting in expensive and time-consuming mechanism. The way-out from the downside is alternative dispute resolution of IP disputes. But, the issues like 'public policy' and 'arbitrability' of IP dispute are road-blocking. To resolve IP disputes amicably and speedy is vital for the parties and their business. WIPO, which has currently 193 member states, has established Arbitration and Mediation centre to settle IP disputes with subject 'arbitrability' left on State to interpret. The article discusses arbitration in IP disputes, the relationships among WIPO, TRIPS and WTO in IP disputes; and IP disputes and IP Law in India with few judicial pronouncements.

**Keywords:** Intellectual Property, Arbitration, Dispute Resolution, Indian Law and Practice, International Intellectual Property Laws, WIPO, TRIPS, WTO

Arbitration has been developed by courts and legislators to support and assist the legal processes.<sup>1</sup> It speed up case disposal and facilitate access to justice by minimizing procedural obstacles.<sup>2</sup> The bilateral and multilateral treaties (with arbitration clause) are centres for cross border disputes.<sup>3</sup> And hence, arbitration remains the best alternate method to resolve the commercial disputes today. Essentially, this is because of party autonomy, forum neutrality and finality<sup>4</sup> for international enforcement.<sup>5</sup> But, arbitration in IP dispute is different. The difficulty is whether all IP dispute is arbitrable in all jurisdictions?

### Arbitration in Intellectual Property [IP] Disputes

IP includes broad range of property rights that enable the protection, sharing and transfer of intangible and valuable objects including creative expressions, industrial inventions, and commercial names etcetera.<sup>6</sup> The intellectual property disputes having been resolved by arbitration way back from 19<sup>th</sup> Century.<sup>7</sup> For example, in Sweden, an 1834 Royal Ordinance mandated arbitration for oppositions to patent registrations<sup>8</sup> and legal practitioners in the United Kingdom recommended arbitration for patent disputes in as early as 1855.<sup>9</sup>

However, despite these early examples, arbitration was not widely used for intellectual property disputes even up to the late 20<sup>th</sup> century.<sup>1</sup> So, it can be said that historically, IP disputes were regarded as non-

arbitrable.<sup>10</sup> Disputes relating to intellectual property rights are traditionally predominantly dealt with before national courts.<sup>11</sup> In the past, many legal systems did not allow the arbitration of IP disputes simply because the rights had been granted by a sovereign power.<sup>12</sup> And the argument was that the nature of the rights was such that questions as to validity should only be decided by the authority which issued the right.<sup>12</sup> In principle, an arbitral tribunal can adjudicate upon every dispute that can be adjudicated upon by a court, except a few that are not considered to be 'arbitrable'.<sup>13</sup> Public policy of a jurisdiction reserves certain matters for the court alone.<sup>13</sup> IP practitioners occasionally appear to believe that arbitration of IP disputes would generally give rise to objective arbitrability issues.<sup>14</sup> Non-arbitrability is a ground for non-enforcement of arbitral awards under the New York Convention and a basis for setting aside an award under many national laws.<sup>15</sup> This argument has been caused by the lack of distinction between domestic and international arbitration and the absence of express provisions dealing with IP arbitration in most jurisdictions.<sup>15</sup> The arbitrability of any subject-matter including IP issue is dictated by a country's public policy to arbitrate and the IP dispute to arbitrate or not varies in different jurisdiction. The country legislation that enable the protection of IP rights do not apply extraterritorially, such as patent which require registration.<sup>15</sup> However, international arbitration provides, in theory, an attractive alternative to litigation for resolving cross-border IP disputes.<sup>16</sup> The IP disputes like; disputes

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regarding the scope of an IP license, IP infringement disputes, disputes regarding the validity of the IP rights can become subject to arbitration where they arise out of or in connection with an agreement which also contains an arbitration clause submitting such disputes to arbitration.<sup>16</sup> However, the issue of territoriality exists because of the nature of IP disputes. This principle of territoriality is foundational for IP disputes. According to the principle of territoriality, intellectual property rights are restricted to the territory of the country where they have been granted.<sup>17</sup> Number of these investment agreements empowers Corporations to challenge regulatory measures (implemented by host countries to achieve specific societal goals) before international arbitration tribunals *via* the Investor-State Dispute Settlement (ISDS) system.<sup>18</sup> And is still scope for the preservation of the principle of territoriality within the framework of the ISDS system.<sup>19</sup> There are a number of ways in which the assetization of intellectual property and the ISDS system can negatively impact the principle of territoriality in International Intellectual Property Law (IIPL).<sup>19</sup> In determining whether there is still scope for the preservation of the principle of territoriality in IIPL within the ISDS system, the two issues identified can be used as a metric to critically assess the decisions of the tribunals in *Philip Morris v Uruguay*.<sup>19</sup> Recently, on 14 June 2017, Hong Kong enacted amendments to its Arbitration Ordinance that clarified the arbitrability of IP disputes in Hong Kong.<sup>19</sup> The amendments expressly provide that all disputes over the enforceability, infringement, subsistence, validity, ownership, scope, duration or any other aspect of an IP right would be arbitrable.<sup>19</sup> And thus, Honk Kong joins jurisdictions such as Switzerland and the United States in expressly permitting issues relating to the validity of IP rights to be arbitrable.<sup>19</sup>

### **International Organisation (WIPO), Conventions (TRIPS), World Trade Organisation (WTO) and Dispute Resolution of IP Disputes**

Relationship between TRIPS, WTO and WIPO has to understand first. Intellectual Property Rights (IPRs) at a multilateral level have their genesis in the Paris Convention for the Protection of Industrial Property in 1883 which protected industrial property i.e. Patents and trademarks and the Berne Convention for the Protection of Literary and Artistic Works in 1886 for copyrights and related rights.<sup>20</sup> World Intellectual Property Organization (WIPO) which began its work in 1967 taking over from the Bureau for the

Protection of Intellectual Property that had been working since 1893, is the international agency under the United Nations that administers the work of these conventions.<sup>20</sup> The WIPO administers many other international conventions on IPRs also.<sup>20</sup> The WTO's Intellectual Property Agreement contains rules for trade in ideas and creativity. The rules state how copyrights, patents, trademarks, geographical names used to identify products, industrial designs and undisclosed information such as trade secrets, "intellectual property", should be protected when trade is involved.<sup>21</sup> The WTO provides that "intellectual property" should be protected when trade is involved. Thus, through the TRIPS, the WTO makes it mandatory for all its member countries to follow basic minimum standards of IPR provided for under TRIPS and bring about a degree of harmonization of domestic laws in this field.<sup>21</sup> The WTO's procedure for resolving trade conflicts under the dispute settlement understanding is vital for enforcing the rules and therefore for ensuring that trade flows smoothly.<sup>21</sup> Confidence in the system is borne out by the number of cases brought to the WTO – more than 500 cases since the WTO was established compared with the 300 disputes dealt with during the entire life of the GATT (1947-94).<sup>21</sup> Since 1995, the 'Marrakesh Agreement' establishing the WTO and its annexes (including the updated GATT) which has become the WTO's umbrella agreement. It has annexes dealing with specific sectors relating to goods, agriculture, product standards, subsidies and actions taken against dumping. A recent significant addition was the Trade Facilitation Agreement, which entered into force in 2017.<sup>21</sup>

In 2015 alone, 5.98 million trademark applications were filed worldwide.<sup>22</sup> The number of disputes submitted to alternative dispute resolution administered by the World Intellectual Property Organization (WIPO), including arbitration, more than doubled between 2015 and 2016.<sup>23</sup> And, Press coverage of recent high-value arbitrations involving U.S. companies highlights their increased choice of international arbitration to resolve IP disputes.<sup>24</sup> The movement in the international arbitration system to accommodate IP disputes was assisted by the founding of WIPO in 1967<sup>25</sup> to administer major multilateral IPR conventions and to promote the development and use of the international IP system.<sup>26</sup> The first multilateral treaties that addressed the issues of IP and obliged the states to create basic IPRs in

their legal systems were the Paris Convention<sup>27</sup> and the Berne Convention.<sup>28</sup> The two treaties are deemed to be the cornerstone treaties can generally be called international IP law.<sup>29</sup> Specially, the Paris convention expressly contained the most favoured nation principle.<sup>30</sup> The treaty mainly addressed procedural and formal aspects of industrial property law but does not substantive rights.<sup>31</sup> There were no provisions ordering the establishment or setting of patentability requirements.<sup>28</sup> These matters were left to the states to implement on their own accord.<sup>31</sup> Over the years both treaties were amended in order to adapt to contemporary times and practices.<sup>32</sup> In 1994, following the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement), WIPO established an Arbitration and Mediation Center with offices in Switzerland and Singapore to assist in resolution of international commercial disputes between private parties (the WIPO Center). WIPO was early to meet the demand of rights-holders of flexible, private and efficient procedure to resolve cross border disputes.<sup>33</sup> WIPO provides specialized arbitrators and enhanced procedural protections for IP disputes today.<sup>26</sup>

The TRIPS is one of the main agreements that forms a part of what is known as WTO law.<sup>34</sup> TRIPS deals with comprehensive agreement that in great detail with a multitude of IPR aspects.<sup>34</sup> TRIPS, negotiated in the 1986–94 Uruguay Round, introduced intellectual property rules into the multilateral trading system for the first time.<sup>35</sup> TRIPS obliges the states to introduce protection for IPRs and determines the minimum standards which IPRs need to be subject to.<sup>35</sup> The state is notably allowed to implement higher standards but that is left to the state's discretion.<sup>36</sup> Furthermore, the TRIPS creates a set of substantive rights that the states are required to implement.<sup>36</sup> The TRIPS, even though providing a substantial amount of obligations for WTO member states, leaves some regulatory leeway for the implementation of the rules.<sup>34</sup> The TRIPS similarly recognizes the non-absolute nature of IPRs by providing rules for certain limitations of rights.<sup>34</sup> Settling disputes is the responsibility of the Dispute Settlement Body (the General Council in another guise), which consists of all WTO members.<sup>37</sup> It monitors the implementation of the rulings and recommendations, and has the power to authorize retaliation when a country does not comply with a ruling.<sup>37</sup> The disputes are settled by the panel

members with the principles of equitable, fast, effective, mutually acceptable mechanism.<sup>37</sup> For instance, in brief, the first stage is consultation and is up to 60 days. Second stage is the panel. It takes up to 45 days for a panel to be appointed in addition 6 months for the panel to conclude. Then, before the first hearing, each side in the dispute presents its case in writing to the panel. Formally, the panel is helping the Dispute Settlement Body make rulings or recommendations. But because the panel's report can only be rejected by consensus in the Dispute Settlement Body, its conclusions are difficult to overturn. The panel's findings have to be based on the agreements cited.<sup>37</sup> The report becomes the Dispute Settlement Body's ruling or recommendation within 60 days unless a consensus rejects it. Both sides can appeal the report (and in some cases both sides do).<sup>37</sup> With the TRIPS being part of the WTO *acquis*, the enforcement of IPRs is not only secured in national legal orders but from an international law perspective as well.<sup>38</sup> This means that the states' compliance with their international law obligations is secured through the WTO dispute settlement mechanism.<sup>38</sup>

### IP Laws and Policy in India

To meet international obligations under the TRIPS, various existing domestic IPR laws have been amended from time to time in India. On 12 May 2016, the Indian Government approved its National Intellectual Property Rights (IPR) Policy.<sup>39</sup> The main focus of this policy is related to the slogan 'Creative India, Innovative India', which subsequently is aligned to different government initiatives and mission in recent times that include 'Make in India', 'Atal-Innovation Mission', 'Start-Up India', and 'Stand-Up India' promoting creativity, innovation and entrepreneurship in the country.<sup>39</sup> The stated Vision of this Policy is: *'An India where creativity and innovation are stimulated by Intellectual Property for the benefit of all; an India where intellectual property pro motes advancement in science and technology, arts and culture, traditional knowledge and biodiversity resources; an India where knowledge is the main driver of development, and knowledge owned is transformed into knowledge shared'*.<sup>39</sup>

Intellectual property rights are granted and regulated under various statutes and rules framed there under. The statutes like; the Patents Act 1970 and the Patents Rules 2003, the Copyright Act 1957 and the Copyright Rules 2013, the Trade Marks Act 1999 and the Trade Marks Rules 2002, amended in 2017, which came into

effect on 6 March 2017, the Designs Act 2000 and the Design Rules 2001, amended in 2014, the Geographical Indications of Goods (Registration and Protection) Act 1999 and the Geographical Indications of Goods (Registration and Protection) Rules 2002, the Semiconductor Integrated Circuits Layout-Design Act 2000 and the Semiconductor Integrated Circuits Layout-Design Rules 2001, the Protection of Plant Varieties and Farmers' Rights Act 2001 and the Protection of Plant Varieties and Farmers' Rights Rules 2003, amended in 2009, the Biological Diversity Act 2002 and the Biological Diversity Rules 2004; and the Intellectual Property Rights (Imported Goods) Enforcement Rules 2007.<sup>40</sup>

### Issue of Arbitrability in IP disputes

The issue of *arbitrability* of IP disputes is worldwide. In India too, with the persistent strain between rights in *rem* and rights in *personam* results to believe that it is difficult to decide. Judicial trend is also seems acute to judge.<sup>13</sup> Kinds of disputes arising from IP disputes are like, Infringements of trademark, cross-licences infringements in patents, broad-casting copyrights issues, information and communication technology outsourcing issues etc. The arbitral tribunal can adjudicate upon every dispute that can be adjudicated upon by a court, except a few that are not considered to be 'arbitrable'.<sup>41</sup> IP rights of the owner, by their very nature, stand against the world at large, i.e. right in *rem*. However, the IP landscape in the present commercial world is writ large with a web of rights of other parties intertwined with the rights of the originator.<sup>41</sup> And these subordinate rights acknowledge the owner's right and it operates between two private parties without involvement of State.<sup>41</sup> And hence, it is challenging for courts/arbitral tribunals to identify the thin line between rights in *rem* and subordinate rights arising out of rights in *rem* in order to ascertain arbitrability of an IP dispute.<sup>41</sup> In India, arbitrability is not defined under arbitration statute. The landmark case of Supreme Court, *Booz-Allen Hamilton v SBI Home Finance* in India, has summarised the conceptual jurisprudence regarding arbitrability.<sup>41</sup> In this case, Supreme Court culled out three facets of arbitrability as under: '(i) whether the disputes, having regard to their nature, could be resolved by a private forum chosen by the parties or fall within the exclusive domain of public fora; (ii) whether the disputes are enumerated as matters to be decided through arbitration; and (iii) whether the parties have submitted disputes to arbitration that fall within the scope of the arbitration

agreement.'<sup>42</sup> The Court also cited well-examples of non-arbitrable disputes like those relating to rights and liabilities arising out of criminal offences, matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody, guardianship, etc. but, it did not contain a reference to IP disputes, specifically.<sup>42</sup> In Mustill and Boyd's Commercial Arbitration, commentary stated that, 'for example, rights under a patent licence may be arbitrated, but the validity of the underlying patent may not. An arbitrator whose powers are derived from a private agreement between A and B plainly has no jurisdiction to bind anyone else by a decision on whether a patent is valid, for no-one else has mandated him to make such a decision, and a decision which attempted to do so would be useless.'<sup>43</sup> In another case, Madras High Court in 2017 in *Lifestyle Equities C V v Q D Seatoman Designs (P) Ltd* has more clearly dealt with the traditional *in rem* versus *in personam* debate. Herein, it was held that patent disputes can be arbitrable if the dispute is about the licensing of a patent or infringement of a patent, but a dispute challenging the validity of the patent will not be arbitrable.<sup>44</sup> In the case of *Eros International Media Limited v Telex India Pvt. Ltd. and Ors.*<sup>45</sup> The Court held that 'IP Dispute arising out of a commercial contract, like between two claimants to a copyright or a trademark in either an infringement or passing off action, that action and that remedy can only ever be an action in *personem* and hence such IP disputes are arbitrable in nature. It was observed that the Section 62(1) of The Copyright Act should not be read down to mean the ousting of the jurisdiction of an arbitral panel.'<sup>12</sup> In *Steel Authority of India Ltd*<sup>46</sup> (SAIL) in 2014, the Bombay High Court considered an issue of infringement of trademarks and held that the disputes were not arbitrable, despite existence of arbitration clause in the contract.<sup>46</sup>

National Intellectual Property Rights Policy of India, 2016 is a roadmap for the future of IP rights. Objective 3 of the policy is said to balance between interest of right holder and larger public interest.<sup>47</sup> It has mentioned to review the existing IP laws, where necessary, to update and improve them or to remove anomalies and inconsistencies, if any, in consultation with stakeholders.<sup>47</sup> In fact, an Indian IPR policy may be deemed inclusive if and only if it succeeds in providing sustainable solutions to the problems the most critical being.<sup>48</sup> It suggests review and update IP related rules, guidelines, procedures and practices for clarity, simplification, streamlining, transparency and time

bound processes in administration and enforcement of IP rights.<sup>47</sup> It recommends examining the issues of technology transfer, know-how and licensing relating to SEPs on fair and reasonable terms and provides a suitable legal framework to address these issues, as may be required.<sup>47</sup> The objective 4 of the Policy, suggests the administration of the Copyright Act, 1957 under the Department of Higher Education, and the Semiconductor Integrated Circuits Layout Design Act, 2000, under the Department of Electronics and Information Technology is being brought under the aegis of the Department of Industrial Policy and Promotion leading to synergetic linkage between various IP offices under one umbrella, streamlining processes, and ensuring better services to the users.<sup>47</sup>

### Conclusion

There is no rule of international law that prevents investment tribunals from adopting a broad interpretive approach when construing investment treaties.<sup>47</sup> A broad interpretive approach will permit investment tribunals to incorporate relevant principles from other areas of international law such as international intellectual property law and international human rights law when deciding disputes between states and corporate actors.<sup>48</sup> And this approach with public interest may lead to benefit in larger interest for long period of time.

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