

Arbitration in Intellectual Property Disputes

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Abstract

This study delves into the rising trend of employing alternative dispute resolution (ADR) mechanisms, including arbitration, to address intellectual property (IP) disputes. Given the traditional court system's limitations, ADR offers a more flexible and private avenue for conflict resolution. Arbitration, in particular, stands out due to its benefits, such as specialized expertise, confidentiality, and promptness. However, challenges persist, including concerns about consistent decision-making and the balance between transparency and secrecy. This discussion provides a comprehensive look into the merits and complexities of using arbitration as a primary method for amicably and efficiently settling intricate IP disputes.

Keywords: Alternative, comprehensive look, confidentiality, dispute, intellectual property

INTRODUCTION

In the realm of resolving disputes, we have witnessed a significant shift towards peaceful alternatives known as alternative dispute resolution (ADR). These include arbitration, reconciliation, mediation, and conciliation, which have gained prominence as effective supplementing mechanisms for handling intricate intellectual property (IP) disputes. The purpose of this study is to explore the advantages, challenges, and arbitrability of IP disputes, shedding light on the increasing preference for arbitration as the preferred method of resolving such conflicts.

The strict procedure and nature of the traditional court system, which is advisory, have given way to ADR, providing more flexible and private ways to settle disputes. Arbitration has become a favored choice for resolving complex IP disputes due to its numerous benefits. The expertise of specialized arbitrators in IP law and relevant industries ensures well-informed decisions on intricate technical and legal matters, giving parties confidence in the resolution process.

A significant advantage of arbitration is confidentiality, which allows parties to protect critical trade secrets and intellectual information while still reaching an agreement. Furthermore, in the fast-paced world of technology and innovation, where prompt resolution is critical to minimizing delays in corporate operations, the efficiency and speed of arbitration become important.

However, arbitration in IP issues is fraught with difficulties. In the absence of legal precedents, different decisions in comparable circumstances might occur, raising questions about consistency.

Furthermore, restricted discovery in arbitration may make acquiring essential technical evidence difficult, which is critical in IP disputes. To preserve the credibility of the arbitration process, the correct mix of secrecy and transparency must be struck. Allowing some public inspection while retaining anonymity is one way to build the trust of all parties concerned.

The revival of alternative conflict resolution, particularly arbitration, has transformed the settlement of intellectual property issues. This

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article will go deeper into the benefits and drawbacks of arbitration, providing insights into why it is increasingly seen as the preferable way for resolving complicated intellectual property disputes amicably and effectively.

LITERATURE REVIEW

This overview of the literature dives into the multifaceted environment of IP arbitration, pulling ideas from a variety of scholarly books and legal resources. The Arbitrability of International Intellectual Property Disputes” by William Grantham presents a worldwide perspective on the challenges and factors in arbitrating IP issues [1]. Intellectual property is usually seen as a potentially inarbitrable domain, despite the fact that it is frequently brought into the purview of arbitral agreements through private decisions. Grantham examines the different public policy issues that frequently arise during IP arbitration. He offers insights into the nuanced challenges associated with arbitrating international intellectual property conflicts. “The Law and Practice of Arbitration and Conciliation” by O.P. Malhotra and Indu Malhotra is the foundational reference for comprehending the legal framework and jurisdictional issues of arbitration [2]. It helps in navigating jurisdictional considerations in the context of IP disputes and proposing solutions for harmonization in applying arbitration to IP disputes. The seminal case of *“Booz-Allen & Hamilton Inc. v. SBI Home Finance Ltd.”* (2011) 5 SCC 532, separates arbitrable from inarbitrable IP disputes, influencing the discourse on IP arbitration under Indian law. Therese Jansson’s “Arbitrability Regarding Patent Law—An International Study” delves into international views, offering a comparative analysis of various approaches to patent arbitration. The World Intellectual Property Organization (WIPO) emerges as a key participant in IP dispute settlement, providing specialized ADR services for effective conflict resolution. This literature review provides a comprehensive exploration of IP arbitration, featuring global insights from William Grantham and foundational legal perspectives by O.P. Malhotra and Indu Malhotra. The landmark case *“Booz-Allen & Hamilton Inc. v. SBI Home Finance Ltd.”* [3] shapes discussions on IP arbitration in India. Collectively, these sources contribute to a nuanced understanding of the challenges and trends in intellectual property arbitration.

METHODOLOGY

This study’s methodology, which focuses on the function of arbitration in settling intricate IP issues, takes a qualitative approach to investigating the arbitrability of IP disputes. A thorough assessment of pertinent literature, including academic journals and legal resources, as well as an examination of relevant case law and legal frameworks, are all included in the research strategy. The core parts of the literature review are notable publications like “The Arbitrability of International Intellectual Property Disputes” and “The Law and Practice of Arbitration and Conciliation.” Furthermore, significant decisions such as *“Booz-Allen & Hamilton Inc. v. SBI Home Finance Ltd.”* are examined closely to identify the subtleties of the Indian legal system in identifying IP conflicts that are arbitrable and non-arbitrable. The study uses an analysis framework that takes into account public policy issues, the nature of the dispute, precedents, legal principles, and international norms. Comparative research examines different international strategies, with an emphasis on countries such as the US, Switzerland, Belgium, Brazil, Japan, and China. An analysis of the services provided by the WIPO Centre is part of the exploration of the role played by the World Intellectual WIPO in promoting alternative dispute resolution for IP problems. The methodology also includes a thorough analysis of case law, examining pertinent cases like *“Eros International Media Ltd. v. Telemex Links India Pvt. Ltd.”* and *“Swatantra Properties (P) Ltd. v. Airplaza Retail Holdings Pvt.”* to identify trends, obstacles, and results in the field of IP arbitration.

CAN IP DISPUTES BE RESOLVED THROUGH ARBITRATION? UNDERSTANDING THE NATURE AND RELIEF INVOLVED

When it comes to the arbitrability of intellectual property (IP) issues under Indian law, the case of *Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd.* [4] is crucial. The court distinguished arbitrable from inarbitrable disputes based on two criteria: the nature of the dispute and the relief sought.

In terms of the basis of the argument, traditional thought was that intellectual property rights were “rights in rem” and so arbitrable. Booz Allen questioned this concept by acknowledging the existence of “subordinate in personam rights” derived from primary in rem rights via contractual ties. Contractual IP issues stemming from technology sharing or licensing agreements, for example, involve specific parties and have no bearing on others. As a result, these disputes can be resolved through arbitration.

Moreover, the Bombay High Court in the case of *Eros Media* [5] emphasized that claims of IP infringement should be treated as “rights in personam” rather than “rights in rem”. This means that while the IP right itself may be in rem, the infringement claim pertains to specific parties and does not affect the world at large. Consequently, such disputes are amenable to arbitration. The Court established a four-prong test for assessing situations that are not arbitrable in *Vidya Droila v. Durga Trading* [6].

However, when it comes to questions of validity and the existence of IP rights, the scenario changes. These questions are considered judgments in rem, meaning they impact the rights of the public at large. As a result, Booz Allen held that such matters are not suitable for arbitration, and only the state courts have the jurisdiction to decide on the validity of IP rights.

Moving on to the remedy sought, Booz Allen developed the “reliefs test” to establish arbitrability depending on whether the relief requested may be awarded solely by state courts or specialized tribunals. Arbitration can be used to address contractual IP issues that seek remedies such as damages, injunctions, or specific performance because arbitral tribunals have the authority to grant such remedies.

However, there are exceptions. Certain IP disputes, such as those involving copyright assignment, compulsory licensing, or issues listed under Section 6 of the Copyright Act, must be adjudicated by the Copyright Board and not by arbitrators. The arbitrability of infringement claims seeking remedies like damages or injunctions remains debated in Indian jurisprudence. While some view these remedies as mandatory and exclusive to state courts, others consider them arbitrable, as they involve rights in personam and do not affect the world at large.

In conclusion, the arbitrability of IP disputes in India depends on the nature of the dispute and the relief sought. Contractual IP disputes involving specific parties and certain remedies can be resolved through arbitration. However, disputes concerning questions of validity, certain remedies, and certain IP rights require adjudication by state courts or specialized tribunals.

The Theoretical Debate: Challenges to Arbitrating IP Disputes

Various theoretical arguments challenge the arbitrability of IP disputes:

1. *Sovereign authority*: The grant of IP rights lies solely with the sovereign, and private arbitral tribunals lack the authority to modify or expand such rights.
2. *Protection of public interest*: Public interest demands that IP owners have exclusive rights to exploit their creations, preventing arbitral tribunals from invalidating these rights.
3. *Consent and third-party impact*: Arbitral awards cannot bind third parties, making it difficult to enforce IP rights against them.
4. *Social and economic goals*: IP rights are granted to promote social and economic objectives, and allowing private tribunals to negate these rights might undermine these goals.

The Case for Arbitrating IP Disputes

1. *Fluidity of public policy*: The dynamic nature of public policy complicates the blanket ban on the arbitrability of IP disputes, potentially allowing some IP matters to be arbitrable.
2. *Limited impact*: Arbitration decisions only affect consenting parties and do not extend to the world at large, thus preserving the sovereign’s grant of IP rights.

3. *Incidental questions*: If the validity of IP is an incidental aspect of the central question before the tribunal, it can decide whether to address it or not.

The Booz Allen Case: Weighing Limitations of Arbitration

The Indian Judiciary laid the groundwork for comprehending the scope of arbitrability in the famous *Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd.* case. The court emphasized that not all issues may be arbitrated, particularly those involving “real rights” enforceable against the entire globe. It emphasized numerous limitations of arbitration vs. regular litigation:

- *Public policy concerns*: Arbitrators are appointed by the parties and lack the state’s authority. To protect the public interest, certain disputes cannot be bound by an arbitral award without the consent of all parties. Additionally, distinguishing between private and public fora, it acknowledged that certain commercial matters are suitable for arbitration to safeguard business interests.
- *Real and subordinate rights*: IP disputes often involve both “real rights” (enforceable against the world) and “subordinate rights” (enforceable only between parties). While “real rights” are generally non-arbitrable, “subordinate rights” may be subject to arbitration.
- *Court’s role*: The court’s powers under Section 8 and Section 11 of the Arbitration and Conciliation Act of 1996 differ. Under Section 11, the court merely appoints an arbitrator based on the existence of an arbitration agreement. However, under Section 8, the court may determine if a matter should be referred to arbitration despite a valid arbitration clause.

DIVERSE APPROACHES TO THE ARBITRABILITY OF IP DISPUTES IN DIFFERENT COUNTRIES

The approach to the arbitrability of IP issues varies by country. Some nations, like the United States of America (U.S.A.), Switzerland, and Belgium, enable arbitration of all forms of IP issues, including those involving the validity of patents, trademarks, and copyrights. Other nations, such as Brazil, Japan, and China, have exclusions and concerns when it comes to allowing such arbitrations. Domestic arbitral judgments, particularly those dealing with the validity of intellectual property, may be enforced differently, and some nations subject arbitral rulings to judicial scrutiny or enable parties to appeal.

Through ADR methods, the WIPO plays an important role in easing the settlement of IP, technical, and economic conflicts. The WIPO Centre, which was founded in 1994 and has offices in Geneva and Singapore, provides processes that are particularly suited to IP and technology disputes owing to unique rules addressing secrecy, trade secrets, technical evidence, and site inspections. The WIPO Center’s major service is the settlement of internet domain name disputes without the need for judicial action. This service, known as the Uniform Domain Name Dispute Resolution Policy, has effectively resolved various issues involving abusive domain name registration and usage.

The WIPO Center’s ADR services go beyond intellectual property issues. Commercial cases including those that do not directly involve IP issues, are also included, such as distribution, franchising, marketing, construction, energy, and insurance conflicts. Multinational firms, small and medium-sized businesses, R&D centers, universities, and inventors from all over the globe seek the WIPO Center’s ADR services. While WIPO handles the majority of international issues, it also handles a considerable number of local cases. The WIPO Center’s caseload has continuously increased in recent years, with a remarkable 45% rise in its yearly caseload in 2021. The WIPO’s ADR procedures aim to create opportunities for party settlement, with a settlement rate of 75% in WIPO mediations and 33% of cases settling before the issuance of a final award in WIPO arbitrations.

Overall, the approach to the arbitrability of IP disputes and the role of the WIPO in resolving such disputes vary across countries, with the WIPO’s ADR services proving to be a valuable resource for parties seeking to resolve IP-related conflicts effectively and efficiently.

Arbitrability Concerning Patent Law

The value of IP in the current global economy cannot be overstated. Frequently, a company's intangible assets, such as its IP, outweigh the value of its tangible assets. The growing importance of IP coincides with an increase in IP-related conflicts and disputes. In 2007, the International Chamber of Commerce (ICC) reported that IP played a significant role in 15% of its yearly disputes. A significant number of these conflicts arise as a result of various agreements such as patent licenses, joint ventures, and employment contracts, among other things. In the realm of patent license agreements, it is common practice to include an arbitration provision as a means to safeguard the advantages of a discreet and secret method of resolving disputes.

In essence, a patent provides innovators with legal protection for their discoveries for a certain period of time. It grants special rights, such as the ability to sell or use the innovation. For these rights to be enforced, the innovation must frequently be legally registered within the respective country. The registration procedure is governed by national law and carried out by state agencies, giving the patent geographical protection.

The debate over the arbitrability of patent law is multidimensional. Certain legal theories contend that the exclusive jurisdiction of certain laws or state agencies over specific patent issues limits the possibility of settling such conflicts through arbitration [7]. In essence, there is a school of thought that holds that the only authority to grant a patent also grants the sole ability to cancel the related rights. However, an opposing opinion contends that because patent holders can license or even renounce their rights, having an arbitrator make these choices is not an unrealistic concept. Moreover, it is essential to note that the core tenet of arbitration is the ability of parties to tailor their processes, hence warranting the exploration of the inclusion of patent matters within the realm of arbitration.

The scope of an arbitrator's authority is an important consideration in this continuing debate. Historically, arbitrators have only had jurisdiction over disputes and organizations have voluntarily chosen to submit to the arbitration procedure [8]. In the event of patent nullification, the resulting judgment might have far-reaching repercussions, affecting entities other than those directly engaged in the case. There is some speculation that this issue can be effectively resolved by defining the scope of the arbitrator's judgment or by carefully considering its larger implications in subsequent legal proceedings.

Framework for Arbitration in Patent Disputes

The issue of arbitrability in patent disputes exhibits substantial variation among different jurisdictions, resulting in intricacies and heightened costs within the arbitral proceedings [9–15]. The existence of such inequalities might be attributed to the divergent opinions that different countries have regarding the appropriateness of certain matters for arbitration.

1. The inarbitrability of all patent issues is a viewpoint that asserts that no part of patent disputes, including infringement and validity, is appropriate for resolution by arbitration. In jurisdictions that embrace this perspective, the enforceability of arbitration rulings pertaining to patents may be compromised, and there is a possibility that courts may decline to respect arbitration clauses, notwithstanding their inclusion in agreements between parties. South Africa stands out as a prominent country that adopts this particular method.
2. The differentiation between private and public law rights in patent disputes is observed in some jurisdictions. From this standpoint, it might be argued that claims related to infringement, which are characterized by their contractual and private nature, are subject to arbitration. However, questions of validity that pertain to matters of public law are not considered appropriate for arbitration. The problem becomes intricate when a singular disagreement encompasses both topics. For example, if one party alleges patent infringement, the opposing party may respond by raising a challenge to the validity of the patent. In some situations, it may be necessary for a court or relevant body to resolve the matter of validity, which might result in

procedural inefficiencies and bifurcations. Italy has implemented several modifications in this domain, wherein arbitrators are now permitted to initially examine matters of validity, provided that they are subordinate to a fundamental contractual concern.

3. *The Nature of the Arbitral Award: Inter Partes vs. Erga Omnes.* Certain nations allow for the arbitration of both infringement and validity matters; however, the outcome of the resultant decision may differ. An award that possesses an ‘inter partes’ effect is only enforceable upon the parties directly engaged in the dispute, akin to a conventional judgment. Hence, notwithstanding the determination of a patent’s validity by an arbitral tribunal, the patent may remain in force as it has not been formally invalidated by the governing authority. This technique effectively upholds the patent monopoly given by the state, irrespective of the outcome of the arbitration process. Conversely, an ‘erga omnes’ award possesses the capacity to impose obligations on not only the parties involved in the dispute but also on third parties. Generally, this type of widespread impact is often limited to domestic courts and governmental bodies. When a government endorses this approach, it confers on the arbitral award complete judicial effect, thus causing a convergence of the boundaries between the public and private legal spheres.

Analysis

The practice of ADR, with arbitration at its core, has become a recognized means of settling disputes. Yet, when it comes to IP disputes, the question of arbitrability arises sharply. The domain of patent arbitration is particularly intricate, with varied methodologies presenting both merits and concerns.

1. *Traditional legal procedures vs. patent arbitration:* Some claim that patent-related issues are not appropriate for arbitration, citing the sole authority of national courts, particularly in public-interest cases. They prefer established legal channels. Arbitration supporters, on the other hand, emphasize its business advantages, emphasizing characteristics like impartiality, speed, and cost-effectiveness. After careful consideration, the trend appears to favor patent arbitration due to its multiple advantages.
2. *Public law consideration:* Another viewpoint holds that because patents are state-granted rights, they should only be canceled or handled by the state. This viewpoint assumes that public law issues, such as patents, are not arbitrable. Others, on the other hand, emphasize the patent holder’s rights, distinguishing between the state’s role in issuing the patent and the inventor’s rights. This leads to disagreements over patent ownership and the surrender or exercise of these rights.
3. *Inter partes methodology:* This method restricts arbitrability to the parties directly involved in the dispute. Critics, on the other hand, point to the larger implications of such arbitration rulings, noting that a patent may be enforced against some but not against others, causing uncertainty. Supporters regard this strategy as justified because it does not infringe on the rights of third parties.
4. *Erga Omnes approach:* This strategy is contentious. Detractors point out the limitations of arbitral tribunals and believe that arbitration should stay within its traditional bounds, free of legislative interference. The public’s right to be aware of patents and their administration within the patent register is central to this dispute.
5. *National frameworks and arbitration suitability:* A country’s desirability as an arbitration center is determined by its attitude towards arbitrability. A consistent and stable legal structure fosters confidence among conflicting parties, which strengthens a country’s appeal for arbitration. Other issues include specialized courts’ exclusive jurisdiction, arbitrators’ ability to deal with technicalities, and the inherent confidentiality of arbitration. Transparency becomes critical, especially when public welfare is at risk.

The arbitrability of IP disputes is a complex issue that highlights the difficult balance between inventors’ private rights and broader public interests. This IP dispute resolution landscape is riddled with several techniques, each emanating from a distinct ideological foundation, whether it is anchored

in traditional legal channels, conceptions of public law, or the delineation of opposing parties. Certain truths stand out, especially in this intricate tapestry.

Firstly, as we stand on the brink of technological developments, the entire fabric of intellectual property rights is in flux, needing flexible and rapid resolution mechanisms. Arbitration arises as a potentially preferable tool in such a setting, enabling flexibility that traditional channels may fall short of. Second, while approaches such as ‘inter partes’ and ‘erga omnes’ are useful, they call for the development of a more complete framework [16–18]. This paradigm would strive for unshakable consistency and justice, considering even those who are not directly involved in a dispute. Individual governments’ rules surrounding IP arbitrability have important ramifications on a larger geopolitical scale [19–21]. The attitude of a country not only determines its allure as an arbitration center but also has an impact on the global IP arbitration ecosystem.

A country with a clear, firm, and equitable arbitration structure may unintentionally become a lodestar, guiding other countries in their pursuits. The tug of war between the sanctity of confidentiality inherent in arbitration and the overwhelming desire for openness is an extra dimension to this dialogue. While the former protects sensitive proprietary information, it may occasionally conflict with the overall public right to knowledge, a contradiction that is most evident in public interest cases. Drawing these strands together, the horizon of IP dispute resolution appears to beckon an arbitration model that not only respects inventor rights but also promotes overall justice and is sensitive to public interests. The conversation is not about sidelining traditional courts in favor of arbitration; it is about sculpting arbitration to be the most adept instrument for the nuanced challenges IP disputes present.

CONCLUSION

Scholars have expressed mixed feelings on the arbitrability of IP issues, with some praising their potential and others expressing doubts. In India, the National IPR Policy of 2016 addresses IP enforcement but only briefly acknowledges the possibility of using arbitration as a dispute settlement mechanism. This study investigates the arbitrability of IP disputes in India, considering the nature of the rights and activities involved, and provides a strategy to efficiently resolve the issue.

Because of their global importance, IP rights are often regarded as rights in rem. However, not every cause of action stemming from intellectual property conflicts has immediate effects. Booz Allen’s stance emphasizes that IP rights should not be categorically deemed unfit for arbitration. Distinguishing between the nature of rights and the nature of action is essential in determining arbitrability and ensuring a balanced approach.

Gary Born suggests that problems concerning the validity and existence of intellectual property rights be arbitrated with only the parties concerned bound. However, in the Indian context, various IP bodies have exclusive jurisdiction over particular subjects, making such arbitrability difficult. Attempts to avoid arbitration through ‘dressed up claims’ must be handled carefully, with the burden of showing inarbitrability being on the party trying to avoid the arbitration clause.

To solve the issue of IP dispute arbitrability, a proposed solution for India entails drafting legislation allowing for IP dispute arbitration. Parties should enter into express arbitration agreements freely, stating their desire to submit to arbitration. Any provision that waives the right to seek redress in civil courts should be prohibited. The arbitral tribunal should be empowered to decide on validity-related matters along with infringement disputes, and its award should be notified to relevant IP authorities. Third-party rights should remain unaffected, and the state may set qualifications for arbitrators. This model could be implemented as a pilot experiment and modified based on practical experience to eventually adopt a comprehensive and effective approach to arbitrating IP disputes in India.

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