ARBITRATION OR NO ARBITRATION: EXPLORING THE LEGALITY OF ARBITRATION IN INTELLECTUAL PROPERTY DISPUTES

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INTRODUCTION

'When will mankind be convinced and agree to settle their difficulties by arbitration?'[1]

- Benjamin Franklin

If Benjamin Franklin had been alive, he would have got the answer in one single word - 'NOW'. With increasing commercialisation and privatisation, arbitration as a mode of settling disputes is becoming popular all over the world. Arbitration has become the preferred way of settling disputes due to its party-oriented approach and economic and speedy disposal of cases. However, not all disputes fall within the realm of arbitration. Some disputes have been specifically reserved to be decided by the Courts alone,[2] for which the concept of arbitrability has been evolved. The arbitrability of a matter has been recognized in New York convention in the form of *'subject matter of the difference capable of settlement by arbitration'*.[3] However, which matters are incapable of being decided by arbitration have remained uncertain. This has led some to remark that the attempt to draw up a list containing the common factors which determine inarbitrability was bound to fail, and has failed.[4]

Arbitrability of Intellectual Property (hereinafter IP) disputes has never been equivocally accepted throughout the world. IP rights are territorial in nature, and are granted by the State. The protection these rights enjoy is subject to local laws of the country granting those rights. Thus, the extent to which arbitration can penetrate in IP disputes varies significantly from country to country.

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[1] Benjamin Franklin, *The Private Correspondence of Benjamin Franklin* (3rd edn, Russell 1818) 132

[2] David Sutton, *Russell on Arbitration* (22nd edn, Sweet & Maxwell 2003) 2.

[3] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959) 330 UNTS 38 (New York Convention).

[4] Mustill and Boyd, *Commercial Arbitration* (2nd edn, LexisNexis 2001) 71.

The resistance to the use of arbitration in resolving IP disputes is based on several grounds; the oldest being the perceived intrusion in '*exclusive sovereign authority*'. Since Intellectual Property Rights (hereinafter IPR) are granted by the State, it is argued that only the State has the power to decide on the validity, enforceability and infringement of these rights. An arbitrator, being appointed by private parties, could not rule on the validity of these rights granted by the State. Another argument against arbitration of IP disputes is that it affects the rights of third parties. The IPR holder not only has the right to exploit IPR by herself, but she can allow the enjoyment of these rights to others through license, joint ventures etc. Since, any ruling of an arbitrator may impinge upon the rights of a large number of stakeholders that may not be party to the dispute; arbitration of IP disputes may deny the contractual nature of arbitration. Lastly, the ground of public policy, as has been recognized in New York convention,[5] is used in some countries against the arbitration of IP disputes.

Some factors that determine the odds of arbitration in IP disputes are also located within the IPR regime. The use of arbitration in IP rights that require registration, such as patents and trademarks, is less likely than use of arbitration in Copyright, which does not require registration for its enforcement. This paper intends to examine all the above-mentioned arguments against arbitration of IP disputes, with a general overview of the position in this regard in different jurisdictions, before examining the position in India.

ARBITRATION IN IP DISPUTES: PREFERRED WAY OF DISPUTE RESOLUTION?

In this era, IPR have made their mark across the globe. The time has gone when their cousins from the corporeal family enjoyed superiority over them. With the increasing use of new technologies, need for continuous innovation, and advantages of exclusivity, IPR not only feature in this commercial world but are considered as valuable assets of the business. Not surprisingly, the growing use and importance of IPR have increased IP disputes as a by-product.

With some IP disputes oriented advantages of arbitration, arbitration not only has an edge over conventional litigation but also has left it behind in some countries in terms of resolving IP disputes. IPR are not only granted to be exploited in national boundaries, but they have a global reach as they often involve multinational parties and trans-border transactions. The infringement of IPR can take place simultaneously in multiple countries. When such cross-border claims occur, it is not feasible to institute multiple

[5] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959) 330 UNTS 38 (New York Convention) art V(2)(b).

suits in different jurisdictions because of economic and legal issues. In such matters, arbitration provides more legible and economic option of resolving the disputes by ruling out the problem of differences in local laws and curbing the cost of multiple litigations.

Resolving IP disputes often require subject-specific technical expertise, which judges of conventional courts may lack. Arbitration of IP disputes permits the appointment of arbitrators who may be well equipped to deal with these matters with ease. Moreover, IP disputes may contain case sensitive information; as in the case of trade secrets, which may require a very high amount of confidentiality, which can hardly be ensured by conventional courts but can certainly be accommodated through arbitration.

Further, in this global arena of IPR world, various multinational players are contesting or defending IP matters and related suits. There is always an apprehension of Courts being biased in favour of local parties as can be seen in several patent litigations.[6] Arbitration provides a dispute resolution mechanism free from these biases. Lastly, since infringement in case of IP matters is generally of a continuous nature, arbitration can provide a speedy remedy and thus, can prevent the prospective losses. These above mentioned intrinsic features of arbitration give a stimulus to the IPR community for preferring arbitration to litigation.

POINTS OF CONTENTION: CHALLENGING THE ARBITRABILITY OF IP DISPUTES

The roadmap towards universal acceptance of arbitration as the mode of settling IP disputes is not without barriers. Although arbitration has been accepted as a mode of settling IP disputes in some countries, the arbitrability of these disputes has been challenged every now and then, in one country or another. The main arguments that are used to resist arbitration of IP disputes can be summarised as follows:

STATE'S EXCLUSIVE AUTHORITY

The argument of State's exclusive authority to deal with the enforcement, recognition, and validation of IPR never went out of the picture. This argument is based on the territorial nature of IPR, i.e., it is the State in a particular territory that grants a person these rights for certain period. However, the distinction between registered and non-registered IPR may be noted in this context. With the exception of very few countries, matters concerning the infringement of Copyright, which do not require registration,

[6] Daniel Klerman, 'Rethinking Personal Jurisdiction' (2014) 6 Oxford Journal of Legal Analysis 245.

are arbitrable. However, with extra caution, this distinction should not be equated with arbitrable and inarbitrable IPR, as doing this would mean dividing the entire IPR regime into arbitrable and inarbitrable rights, which is too broad a demarcation to make. Instead, the test should be of arbitral awards' impact, i.e., whether it is *inter partes* or *erga omnes*.

Nonetheless, arbitrability of IP disputes is most problematic with respect to rights that confer a *monopoly* and require the intervention of the State to grant it, such as trademarks and patents.[7] It has been argued that since the bargain for grant of these rights is between the State and right-holder, an arbitrator appointed by the consent of the parties cannot not rule on the validity of these rights. It is said that since the State grants these rights, only the State has the authority to rule on the validity of these rights. The middle path put forward by Courts and legislations of some of the countries is that the arbitrator can rule on the issues of infringement of these rights, but cannot not decide the validity of these rights, as it would fall within the exclusive domain of the State. However, following this path is not as simple as it may seem. The validity or ownership of a patent or trademark often arises, as a preliminary question or as a defence, in the context of disputes on infringement.[8] Then, deciding on the validity of patent or trademark may become *sine qua non* to decide upon the issue of infringement. In such cases, "*there is no legal obstacle that bars an arbitration tribunal to rule on the validity of a patent, as a preliminary matter*".[9] However, the conclusion of the award will operate solely *inter partes*, since only a national Court with proper jurisdiction can invalidate a monopoly granted in the form of patent or trademark.[10]

This argument of State's exclusive authority to deal with issues of IPR no longer enjoys as much popularity as it once did. There is a gradual shift in States' attitude towards respecting party autonomy over State's exclusivity. Consequently, resistance to arbitration of IP disputes on this ground has somehow fainted.

AFFECTING RIGHTS OF THIRD PARTY

Arbitration is *contractual* and *consensual* in nature and determines the rights and liabilities of parties to the contract. Thus, by its very nature, it is being done in respect of a right *in personem*. Arbitration cannot bind the third party since it is not a party to the arbitration. Therefore, more or less, it is universally accepted that it cannot be done in respect of a

[7] Loukas A Mistelis and Stavros LBrekoulakis, *Arbitrability: International & Comparative Perspective* (Kluwer Law International 2009) 52.

[8] ibid.

[9] Interim Award in Case No 6097 (1989) ICC Bulletin, October 1993, 79.

[10] ibid.

right *in rem*. However, disputes relating to subordinate rights *in personem* arising from rights *in rem* have always been considered to be arbitrable.

IPR are in nature of right *in rem* i.e. they can be enforced against the world. Resistance to use arbitration as a mode of settling IP disputes comes in the form of the argument that it will bind the third party that has not consented to arbitration. However, disputes concerning the performance or termination of contracts relating to IPR involving third parties are clearly arbitrable, provided that the existence or validity of the rights themselves are not at issue.[11] To allow the arbitration of questions of grant or validity of IPR challenge the contractual nature of arbitration, since a private arbitrator is not authorised to dictate legal effects *erga omnes*.[12]

A solution to this issue can be in the form of restricting the effect of the arbitral award between the parties i.e. giving it *inter partes* effect only. Courts and legislations of some countries have adopted this view by specifically providing that the award in IP disputes bind only parties to the disputes. This approach guards against the intrusion by arbitration into the rights of the third party and thus, sanctifying the contractual nature of arbitration.

AGAINST PUBLIC POLICY

Public policy becomes a hindrance in some countries when it comes to use arbitration in IP disputes. However, what constitutes public policy for that matter has always remained uncertain and has been the subject matter of evolving jurisprudence. New York Convention recognizes public policy as a ground against enforcement and recognition of the arbitral award.[13] The ambit of public policy may vary from country to country, depending upon the socio-legal conditions of that country. By and large, the above mentioned two grounds of State's exclusive authority and affecting the rights of third party, may themselves be considered as part of resistance to arbitration in IP disputes on the ground of public policy. However, this ground also has different dimensions in terms of IP disputes.

Arbitral awards are not published and persons who are not a party to the dispute seldom come to know about the proceedings or the outcome of the arbitration. This may jeopardize the interest of the public at large, who may have an interest in the outcome

[11] P Fouchard, E Gaillard and B Goldman, *International Commercial Arbitration* (Kluwer Law International 1999) 352.

[12] Christopher John Aeschlimann, 'The Arbitrability of Patent Controversies' (1962) 44 Journal of Patent and Trademark Office Society 662.

[13] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959) 330 UNTS 38 (New York Convention) art V (2)(b).

of these disputes. In cases where the validity of an IPR, like patent, is challenged and a particular patent is held to be invalid, then, due to the unavailability of information regarding the award, public may still be under the impression of its validity and this may have serious repercussions on public interest by hampering research in that area. Further, there may be instances of false claims motivated by business interests, which may require going into the motive of the parties, which can be assessed properly by the Courts alone having proficiency in dealing with these matters.

Confidentiality, being a lucrative feature of arbitration, has to be balanced against public interest, and the capacity of the arbitrator appointed by private parties, to balance these two may be doubted. However, some states, like USA, have made it compulsory to register the arbitral award with the tribunal,[14] which may, to some extent, provide an answer to this problem.

ARBITRATION OF IP DISPUTES: A GLOBAL SCENARIO

Globally, with the exception of some countries, IPR issues such as infringement, violation, or transfer of patents and copyright are more likely to be arbitrable.[15] On the basis of the report of the International Chambers of Commerce (hereinafter ICC),[16] countries, in this respect, can be broadly categorized into four types: countries wholly denying arbitrability to intellectual property disputes (conservative approach); countries granting full arbitrability (liberal approach); countries qualifying arbitrability on public policy grounds, and restricting the effect of arbitral award (mixed approach); and countries where the question remains uncertain and has not been addressed either in legislation or by judicial authority (unclear approach). The first three approaches are briefly discussed below, as they provide practical examples of how countries have dealt with this thorny issue.

CONSERVATIVE APPROACH

This category has a dearth of countries within it and fortunately, it is the smallest category. Examples of this approach can be *South Africa*, and *Israel,* prior to 1993.[17]

[14] 35 US Code, s 294.

[15] Harsh Sethi and Arpan Kr Gupta, *International Commercial Arbitration & Its Indian Perspective* (Universal Publications 2011) 188.

[16] Final Report on IP Disputes and Arbitration (Document No 420/364), Bulletin of the ICC International Court of Arbitration, Vol 9 NO- 1 Pp 37 et seq.

[17] Sophie Lamb and Alejandro Garcia, 'Arbitration of Intellectual Property Disputes' (*Two Birds,* 18 December 2007) <http://www.twobirds.com/en/news/articles/2007/arbitration-ip-disputes> accessed 13 October 2016

South Africa explicitly bars the arbitration of patent-related disputes[18] and it is commonly understood there that IP disputes are not arbitrable. Prior to a 1993 judgement,[19] Israel followed the same approach of denying arbitration of IP disputes.

LIBERAL APPROACH

On the other end of the spectrum, we have USA and Switzerland that allow the arbitration of all IP disputes. In the U.S., explicit legislation permits the arbitration of disputes '*relating to patent validity or infringement.*'[20] However, the award '*shall be binding between the parties to the arbitration, but shall have no force or effect on any other person.*'[21] The Supreme Court of USA also held that any issue concerning the arbitrability of a dispute should be resolved in favour of arbitration.[22] US Courts have also allowed the arbitration in '*complex copyright disputes*' including issues of validity, infringement, and ownership.[23]Altogether, the Swiss law displays the most liberal position. Rights that are subject to registration are also arbitrable. All aspects of patent rights can be arbitrated, even their validity and their removal from the registry.[24]

MIXED APPROACH

The ground of public policy is more or less followed by several countries, though in varying degrees and form. Public Policy considerations in the realm of arbitration have their roots in the New York Convention,[25] though the exact content of public policy has always remained a point of contention. *France*[26] and *Italy*[27] have the *ordre public* bar that means restricting the power of arbitrator on the ground of public policy. France also embraces the concept of an international *ordre public* and has different international arbitration rules. International arbitral awards will be recognized and enforced inFrance unless such recognitionand enforcement is '*manifestly contrary to international public*

[18] Patents Act 1978 (South Africa) art 18(1).

[19] *Golan Work of Art Ltd v Bercho Gold Jewellery Ltd* Tel Aviv District Court Civil Case 1524/93.

[20] 35 US Codes 294.

[21] 35 US Codes 294 (c).

[22] *Moses H Cone Memorial Hospital v Mercury Constructions Corp* 460 US 1 (1983) 24.

[23] *McMahan Sec Cov Forum Capital Markets* 35 F 3d 82.

[24] M Blessing, 'Arbitrability of Intellectual Property Disputes' (1996) 12(2) Arbitration International 200.

[25] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959) 330 UNTS 38 (New York Convention) art V (2)(b).

[26] French Civil Code 2004, art 2060.

[27] *Scheck Enterprises AG v Soc Del Grandes Marques* Cass 15 September 1977 No 3989.

policy'.[28] Italy, on the other hand, has given special powers to public prosecutor to intervene in trademark or patent validity cases by both Trademark Law and the Law on Patents.[29] Enforcement of arbitration award in *India* can be denied on the ground of public policy.[30] The Supreme Court in India has defined public policy as a fundamental policy of Indian law, the interest of the country and justice and morality.[31] The same Court has ruled that an award would be contrary to public policy if it is 'patently illegal'.[32] However, even after these judgements, the exact scope of public policy in India is unclear, and jurisprudence on this point is still evolving.

In UK[33] and Germany[34], it is generally understood that IP disputes are arbitrable but the award will only bind the parties to the arbitration i.e. it will have *inter parties* effect only. *Canada* follows the same approach. Copyright disputes in Canada are arbitrable after the judgement of the Supreme Court,[35] as long as they are not intended to bind third parties. Similarly, Ontario's Superior Court of Justice held patent disputes to be arbitrable.[36] Some countries like Italy, Spain, France and Japan follow the middle path of allowing the arbitration of infringement of patent disputes but do not allow the arbitration of issues involving the validity of a patent.[37]

POSITION IN INDIA AFTER THE EROS JUDGEMENT: SETTLING DUST IN MUDDY WATERS?

In its quest of becoming a business giant in this world of globalization and considering the rising popularity of arbitration as a mode of settling disputes, India has to develop itself as a global arbitration hub. The condition of dispute resolution in India was not very pleasant. The Indian Supreme Court observed that arbitration in India has made

[28] William Grantham, 'The Arbitrability of International Intellectual Property Disputes' (1996) 14 Berkeley Journal of International Law 173.

[29] ibid.

[30] The *Arbitration and Conciliation Act 1996,* s 34(2)(b)(ii).

[31] *Renusagar Power Co Ltd v General Electronic Co* AIR 1994 SC 860.

[32] *Oil & Natural Gas Corporation Ltd v Saw Pipes Ltd* (2003) 5 SCC 705.

[33] Mustill and Boyd, *Commercial Arbitration* (2nd edn, LexisNexis 2001) 73.

[34] PSclossan, *Das Recht Der Internationalen Privatenschiedsgerichsbarkeit* (2nd edn, Mohr Siebeck 1989) 232

[35] *Desputeaux v Éditions Chouette (1987) Inc* (2003) SCC 17.

[36] *University of Toronto et al v John N Harbinson Limited* (2006) 46 CPR (4th) 175 (Ontario Superior Court of Justice).

[37] Sophie Lamb and Alejandro Garcia, 'Arbitration of Intellectual Property Disputes' (*Two Birds*, 18 December 2007) <www.twobirds.com/en/news/articles/2007/arbitration-ip-disputes> accessed 13 October 2016.

'*lawyers laugh and legal philosophers weep*'.[38] With the advent of a new arbitration act in 1996,[39] India tried to become more arbitration-friendly by creating this Act on the lines of the Model Law on Arbitration of the UNICITRAL[40]. Further, after giving effect to Section 89 of CPC[41] in the year 2002,[42] India has promoted the arbitration, as a mode of settling disputes outside the Courts. However, these efforts are not sufficient to make India an arbitration-friendly country on the map of the world. In most developed countries, arbitration of commercial disputes is the rule while litigation is the exception. In India, the situation is just the reverse.[43] Nonetheless, with the encouragement of arbitration in recent times, one can look towards the future of arbitration in India with optimism.

The arbitral award can be set aside in India if the subject matter of the dispute is not capable of settlement by arbitration.[44] However, what subject matters are inarbitrable is a point of contention. The Supreme Court laid down that every civil or commercial dispute, which can be decided by a court, is in principle capable of being adjudicated and resolved by arbitration unless the jurisdiction of arbitral tribunals is excluded either expressly or by necessary implication.[45] The arbitration of a dispute in India can be denied on the ground of deciding the rights of the third party and being against the public policy.

Nothing has been laid down by the laws of India with respect to arbitrability of IP disputes. Thus, this has been subjected to differing interpretations of national courts in cases where the arbitrability of IP disputes have been challenged. However, Courts in India are more often in favour of resolving IP disputes expeditiously. Supreme Court of India has observed that matters relating to trademarks, copyrights and patents should be finally decided expeditiously by the Court.[46] In another case[47], Supreme Court expressed grave concern over the pending suits relating to the matters of patents, trademarks and copyrights for many years and called it a very unsatisfactory state of

[38] *Guru Nanak Foundation v Ratan Singh and Sons* AIR 1981 SC 2075 (2076).

[39] The *Arbitration and Conciliation Act 1996.*

[40] UNCITRAL Model Law on International Commercial Arbitration 1985.

[41] Code of Civil Procedure1908, s 44.

[42] Code of Civil Procedure (Amendment) Act 1999, s 7.

[43] Justice RS Bachawat, *Law of Arbitration & Conciliation* (Anirudh Wadhwa and Anirudh Krishnan eds, LexisNexis 2010) xxiii.

[44]The *Arbitration and Conciliation Act1996,* s 34(2)(b)(i).

[45] *Booz-Allen & Hamilton Inc v SBI Home Finance Ltd* (2011) 5 SCC 532.

[46] *Shree Vardhman Rice & Gen Mills v Amar Singh Chawalwala* (2009) 10 SCC 257.

[47] *Bajaj Auto Ltd v TVS Motor Company Ltd* (2009) 9 SCC 797.

affairs. In one case,[48] Delhi High Court in a matter relating to IP dispute, adopted a process known as early neutral evaluation on the lines of alternate dispute resolution and advocated the inclusion of such procedures. This attitude of the Courts shows the pitiful condition of litigation relating to IP disputes in India and the eagerness of the Indian Courts to get rid of it.

IPR, by their nature, have their genesis in bargaining with the State and are universally considered rights *in rem*; India is not an exception. Generally, all disputes relating to rights *in personem* are considered amenable to arbitration; and all disputes relating to rights *in rem* are considered to be inarbitrable.[49] The basic premise of resistance against using arbitration in IP disputes rests on this *erga omnes* effect of arbitral award in matters related to IPR.

The ICC working group on IPR has listed India in the group of countries who do not allow arbitration for the settlement of IP disputes.[50] However, this does not represent the true picture of arbitration of IP disputes in the country. Now, the Courts in India may take a pro-arbitration stance in view of the growing popularity of arbitration.

The recent judgement of Bombay High Court in *Eros International Media Limited v Telemax Links India Pvt Ltd*[51] *has tried to settle down the controversy relating to arbitration of IP disputes. Dealing with the matter related to copyright infringement, the Court allowed the application of the defendant to refer the dispute to arbitration in accordance with the terms of the contract. The Court followed the 'rights test' laid down by Supreme Court in Booz Allen case*[52] *and differentiated between rights in rem and subordinate rights in personam arising from rights in rem.*[53] *The Court upheld the reasoning that disputes relating to subordinate rights in personam arising from rights in rem have always been considered to be arbitrable.*[54] *The Court observed that it would be a broad proposition to say that no action under the Trade Marks Act or the Copyright Act can ever be referred to arbitration.*[55] *In this case, the Court not only followed 'rights test' but also evolved a 'remedies test' i.e. what remedies arbitrator is capable of awarding.*

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[48] *Bawa Masala Co v Bawa Masala Co Pvt Ltd* AIR 2007 Delhi 284.

[49] *Booz-Allen & Hamilton Inc v SBI Home Finance Ltd* (2011) 5 SCC 532.

[50] WIPO, '*Worldwide Forum on the Arbitration of Intellectual Property Disputes*' (American Arbitration Association 1994) 104; Harsh Sethi and Arpan Kr Gupta, *International Commercial Arbitration & Its Indian Perspective* (Universal Publication 2011) 188.

[51] Notice of Motion No 886 of 2013 in Suit No 331 of 2013 (Bombay High Court).

[52] *Booz-Allen & Hamilton Inc v SBI Home Finance Ltd* (2011) 5 SCC 532.

[53] ibid.

[54] ibid.

[55] *Eros International Media Limited v Telemax Links India Pvt Ltd* Suit No 331 of 2013 (Bombay High Court).

Since, the remedies sought in this case were permanent injunctions and damages, the Court ruled that the arbitrator is well capable of awarding these remedies.

The other question that came up before the Court was of denying the exclusive jurisdiction of the District Court in case of copyright infringement. The Court ruled that Section 62 of Copyright Act[56] *and section 134 of Trademark Act*[57] *do not oust the jurisdiction of the arbitral panel. These sections do not themselves define arbitrability or non-arbitrability and for that, we must have regard to the nature of the claim that is made.*[58] *The Court also upheld the Sukanya Holdings Case*[59] *by denying the principle of severability of dispute.*[60]

Although the judgement of the Bombay High Court did not specifically rule on disputes related to IPR other than copyright, it can be inferred from the reasoning of the Court that arbitration of disputes relating to the infringement of patent or trademark may also be arbitrated. However, nothing can be said with certainty about the arbitration of validity of Patent and Trademark claims. Nonetheless, this judgement is a step forward in making India more arbitration-friendly and in particular, to resolve IP disputes in an expeditious manner through arbitration. This judgement can also be seen as a positive sign for upholding the parties' autonomy.

CONCLUSION & RECOMMENDATIONS

The arbitrability of IP disputes has been challenged and will continue to be challenged until all the countries adopt a strong pro-arbitration stance. The grounds of challenge to arbitrability of IP matters cannot be discarded altogether; however, banning arbitration of all IPR related matters would not do any good; certainly not in this globalized and commercialised world where even general business events like mergers & acquisitions, joint ventures etc. involve dealing in IPR and have an arbitration clause as the mode of settling disputes. Closing the doors for arbitration in these matters would mean taking a step backwards in the field of dispute resolution, by denying an efficacious out of Court remedy like arbitration. The dangers of an arbitration invasion cannot be ruled out, but the advantages of arbitration tilt the balance in favour of a pro-arbitration approach.

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[56] *Copyright Act* 1957, s 62.

[57] *Trademark Act 1999, s 134.*

[58] *Eros International Media Limited v Telemax Links India Pvt Ltd* Suit No 331 of 2013 (Bombay High Court).

[59] *Sukanya Holdings Pvt Ltd v Jayesh H Pandya* 2003 (5) SCC 531.

[60] *Eros International Media Limited v Telemax Links India Pvt Ltd* Suit No 331 of 2013 (Bombay High Court).

The unclear stance of India towards the arbitration of IP disputes reflects the unsatisfactory condition of arbitration in India and is a hindrance in the Indian aspiration of becoming a global arbitration hub. Considering the speed of disposal of cases due to overburdening of Courts, and pledge of India to uphold the sanctity of IPR, a strong and clearer pro-arbitration stance of India in cases of IP disputes may cater to the needs and aspirations of the country. The judgement in Eros case is a welcome step and has shown some rays of hopes in a rather gloomy atmosphere. The path towards becoming a global arbitration hub is a long one, but every long journey starts with one small step.

RECOMMENDATIONS

Certain recommendations could be as follows:

1. In countries where arbitration of patent or trademark validity is allowed, or may be allowed in future, provisions regarding the registration of arbitral award should be made in order to protect the interest of the public.
2. If arbitrator rules on the validity of the IPR in order to determine the issue of infringement, such award on the validity should be restricted for deciding that particular case, and should not impact the validity of IPR as such.
3. With regard to India in particular and other countries in general where the law on the point is not clear, amendments in requisite legislations should be made, in order to clear the doubts in the minds of persons who may agree to settle their disputes through arbitration.

With its more flexible and business-oriented approach, and its ability to resolve disputes in lesser time than Courts; by all logical means, the benefits of arbitration in IP disputes cannot be denied, not even by those who oppose it. What we need is to think through the limits of arbitrability, and to genuinely assess the efficacy of arbitration in IP matters. The increasing IP disputes, on both national and international level, pose a challenge to the existing legal framework to cope up with them, and with all its promising results so far, arbitration can possibly be our answer to these challenges posed to the IP regime.