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Patent Dispute settlement through Arbitration and the public policy concerns

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Abstract: India is a developing nation, which had shown both progress and decline in economy over the years. Intellectual property rights are considered as an important asset of a nation. National legislations are made in par with the international conventions and treaties, more concentration on the industry and investments are needed for the development of the nation. Patent legislations changed on basis of the national and international needs. The monopoly right granted for an invention is on the basis of their intellectual skill. Patent dispute settlement mechanisms are mainly patent office through controller of patent, District Court & High Court and the patent tribunals. Patent is granted for 20years in India. The patent holder can utilize the same within this short span of time. Hence all the patent holders and the public challenging the validity of the patent, expect a speedy justice in patent disputes. This research paper addresses the question as to whether subject matters that can be referred for arbitration can be limited on grounds of public policy. Further the paper will address the issues as to whether arbitration can be effective mechanism for settling patent disputes in India.

Keywords: Patent. Arbitration. Public policy.

Introduction

Intellectual property rights protect the creativity and helps in development of the nation. Evolution of intellectual property law can be seen as old as human evolution. The protection of ideas was inevitable at a point of time, when the concept of globalisation and consumerism increased. Pharmaceutical and biotechnology

companies rely most on the patent mechanisms. The protection granted by patent is domestic in nature. Intellectual property rights are territorial in nature. And they can exist in different nations at the same time. Multiple jurisdictions will come up with different dispute settlement mechanisms for settling disputes. The jurisdiction of national Court' are fixed.

The patent granted is for 20 years and the patent holder has the right to use, sell, offer to sell the patented invention. There are industries which invest large amount of money for the patented invention. All the inventions by these industries have an impact on the public by providing quality life. The monopoly right granted is limited and the high cost of the research is compelling to have a quick, effective and speedy settlement of disputes. Patents are assets to industries. Patent protection is essential for these companies to ensure they remain competitive in the market and license their inventions to others.[1]

Patent

Introduction to patent

Patents are granted for inventions which are new, involve an inventive step and are capable for industrial application. For promoting scientific research and for development of society, patent law has been enacted in India as the Patent Act, 1970.

TRIP's agreement mentions about granting patent to all inventions which are new, involve an inventive step and capable of industrial application. World Intellectual Property Organisation [WIPO] by Patent Cooperation Treaty [PCT] allows for filing of patent application procedure to be centralized in single procedure.

Patents are granted for inventions whether product or process and are new and involve an inventive step. The objective behind enacting Indian Patent Law, 1970 is the progress of scientific research and technology for public good. The patent registered with the patent office will be examined and the granted patent will be registered with the office. The patent holder has the exclusive right to make, use, sell the product. Patent holder can prevent third parties from using the patent. Once the patent is granted it is still open for a third party to oppose it. The dispute settlement mechanism for patent disputes are as follows:

1] the Indian Patent Office for examining the patent application and for accepting the post and pre- grant opposition applications.
2] the District Court for deciding infringement applications.

[1] David A. Allgeyer, In Search of Lower Cost Resolution: Using Arbitration to Resolve Patent Disputes, 12 CONFLICT MGMT. NEWSL. OF THE SEC. OF LITIG.'S COMMITTEE ON ALTERNATIVE DISP. RESOL. 1, 9 (2007).

3] High court for both counterclaim and infringement matters. High Court has original and appellate jurisdiction.
4] Supreme Court for appellate jurisdiction.
5] Patent tribunals.

The owner of the invention has a monopoly right to exclude others from using, selling or buying the patent. The grant of patent alone will not guarantee the validity of the patent. The procedure for challenging the patent varies from nation to nation on basis of National Patent legislation. A nation with strong and supporting economy can be obtained only by protecting the intellectual skills.

License and assigning of rights are allowed in case of patent, which in turn will lead to disputes later. License is a permission reflected in an agreement on which certain rights are assigned to a third party. The patent holder has the right to enter into a license agreement with the third party. Granting License can lead to disputes later as infringement or violation of terms and conditions in the license agreement.

Number of patents granted[2]

The number of patent applications filed have increased. On basis of the applications received the number of patents granted also increased. More the number of patents granted, more will be the number of disputes on basis of validity of patent and infringement matters.

Number of New Patent Rights Issued under Intellectual Property Rights in India	
(2016-2017 to 2021-2022-upto 15.03.2022)	
Year	**No. of Patents Granted**
2016-2017	9847
2017-2018	13045
2018-2019	15283
2019-2020	24936
2020-2021	28391
2021-2022-upto 15.03.2022	28091

[2] https://www.indiastat.com/table/patents/number-new-patent-rights-issued-under-intellectual/1425121, assessed on 02/08/2022 at 14: 24 PM.

Patent dispute settlement mechanism

Patent validity and infringement disputes are settled through Court and patent office. The Court proceedings are lengthy and the decision makers may not be experts in the filed always. Multiple appeals are allowed in a patent dispute. Difficult to maintain confidentiality in the entire proceedings. Patents are granted by the national authorities; the jurisdiction of the Court is limited on basis of the territorial nature of the patent granted.

Pre-grant opposition application

The opposition application can be filed within 3 months from the date of application or before grant of patent. The patent examiners will submit the first examination report within a period of 1 to 3 months from the date of reference. The applicant after receiving the first examination report, has to comply with the requirements in the report and can file an objection within a period of six months from the date of report.

After receiving the objection, the controller will fix a hearing date and decide on the claimed invention. The grant of patent will be published. The term of patent granted is for 20 years, from the date of filing complete specification. As per Sec.63 of Patent Act,[3] patentee has the right to surrender the patent.

As per Sec.25[4] any interested person will file objection for grant of patent, within 1 year of grant of patent.

[3] Section 63 in The Patents Act, 1970

63 Surrender of patents.

(1) A patentee may, at any time by giving notice in the prescribed manner to the Controller, offer to surrender his patent.

(2) Where such an offer is made, the Controller shall [publish] the offer in the prescribed manner, and also notify every person other than the patentee whose name appears in the register as having an interest in the patent.

(3) Any person interested may, within the prescribed period after [such publication], give notice to the Controller of opposition to the surrender, and where any such notice is given the Controller shall notify the patentee.

(4) If the Controller is satisfied after hearing the patentee and any opponent, if desirous of being heard, that the patent may properly be surrendered, he may accept the offer and by order, revoke the patent.

[4] 25 Opposition to the patent. -

(1) Where an application for a patent has been published but a patent has not been granted, any person may, in writing, represent by way of opposition to the Controller against the grant of patent on the ground-

(a) that the applicant for the patent or the person under or through whom he claims, wrongfully obtained the invention or any part thereof from him or from a person under or through whom he claims;

(b) that the invention so far as claimed in any claim of the complete specification has been published before the priority date of the claim-

(i) in any specification filed in pursuance of an application for a patent made in India on or after the 1st day of January, 1912; or

(ii) in India or elsewhere, in any other document: Provided that the ground specified in sub-clause (ii) shall not be available where such publication does not constitute an anticipation of the invention by virtue of sub-section (2) or sub-section (3) of section 29;

(c) that the invention so far as claimed in any claim of the complete specification is claimed in a claim of a complete specification published on or after priority date of the applicant's claim and filed in pursuance of an application for a patent in India, being a claim of which the priority date is earlier than that of the applicant's claim;

(d) that the invention so far as claimed in any claim of the complete specification was publicly known or publicly used in India before the priority date of that claim. Explanation. -For the purposes of this clause, an invention relating to a process for which a patent is claimed shall be deemed to have been publicly known or publicly used in India before the priority date of the claim if a product made by that process had already been imported into India before that date except where such importation has been for the purpose of reasonable trial or experiment only;

(e) that the invention so far as claimed in any claim of the complete specification is obvious and clearly does not involve any inventive step, having regard to the matter published as mentioned in clause (b) or having regard to what was used in India before the priority date of the applicant's claim;

(f) that the subject of any claim of the complete specification is not an invention within the meaning of this Act, or is not patentable under this Act;

(g) that the complete specification does not sufficiently and clearly describe the invention or the method by which it is to be performed;

(h) that the applicant has failed to disclose to the Controller the information required by section 8 or has furnished the information which in any material particular was false to his knowledge;

(i) that in the case of a convention application, the application was not made within twelve months from the date of the first application for protection for the invention made in a convention country by the applicant or a person from whom he derives title;

(j) that the complete specification does not disclose or wrongly mentions the source or geographical origin of biological material used for the invention;

(k) that the invention so far as claimed in any claim of the complete specification is anticipated having regard to the knowledge, oral or otherwise, available within any local or indigenous community in India or elsewhere, but on no other ground, and the Controller shall, if requested by such person for being heard, hear him and dispose of such representation in such manner and within such period as may be prescribed.

(2) At any time after the grant of patent but before the expiry of a period of one year from the date of publication of grant of a patent, any person interested may give notice of opposition to the Controller in the prescribed manner on any of the following grounds, namely:-

(a) that the patentee or the person under or through whom he claims, wrongfully obtained the invention or any part thereof from him or from a person under or through whom he claims;

(b) that the invention so far as claimed in any claim of the complete specification has been published before the priority date of the claim-

(i) in any specification filed in pursuance of an application for a patent made in India on or after the 1st day of January, 1912; or

(ii) in India or elsewhere, in any other document:

Provided that the ground specified in sub-clause (ii) shall not be available where such publication does not constitute an anticipation of the invention by virtue of sub-section (2) or sub-section (3) of section 29;

(c) that the invention so far as claimed in any claim of the complete specification is claimed in a claim of a complete specification published on or after the priority date of the claim of the patentee and filed in pursuance of an application for a patent in India, being a claim of which the priority date is earlier than that of the claim of the patentee;

(d) that the invention so far as claimed in any claim of the complete specification was publicly known or publicly used in India before the priority date of that claim. Explanation. -For the purposes of this clause, an invention relating to a process for which a patent is claimed shall be deemed to have been publicly known or publicly used in India before the priority date of the claim if a product made by that process had already been imported into India before that date except where such importation has been for the purpose of reasonable trial or experiment only;

(e) that the invention so far as claimed in any claim of the complete specification is obvious and clearly does not involve any inventive step, having regard to the matter published as mentioned in clause (b) or having regard to what was used in India before the priority date of the applicant's claim;

Revocation of patent

Can be done by controller of patent, patent tribunal as the intellectual property appellate board is quashed on basis of the ordinance 2021 or by the High court. The original jurisdiction of the patent infringement suits lies with the district Court.

Infringement of patent

The patentee has the right to sue for infringement of process or product patent. In case of a product patent if someone make, use, offer for sale or sell or import the patented product without the permission of the patentee, it can be considered as an infringement.

District Court's as per Chapter 18 [sections 104 to 115] has jurisdiction to entertain the matter. If the revocation of the patent is addressed in the counter claim by the defendant the matter will be referred to the High Court.

Significance of dispute settlement mechanisms in patent

Dispute resolution mechanisms existing in a nation are for providing proper remedy to the parties to a dispute. Two types of dispute resolution mechanism are

(f) that the subject of any claim of the complete specification is not an invention within the meaning of this Act, or is not patentable under this Act;

(g) that the complete specification does not sufficiently and clearly describe the invention or the method by which it is to be performed;

(h) that the patentee has failed to disclose to the Controller the information required by section 8 or has furnished the information which in any material particular was false to his knowledge;

(i) that in the case of a patent granted on a convention application, the application for patent was not made within twelve months from the date of the first application for protection for the invention made in a convention country or in India by the patentee or a person from whom he derives title;

(j) that the complete specification does not disclose or wrongly mentions the source and geographical origin of biological material used for the invention;

(k) that the invention so far as claimed in any claim of the complete specification was anticipated having regard to the knowledge, oral or otherwise, available within any local or indigenous community in India or elsewhere, but on no other ground.

(3) (a) Where any such notice of opposition is duly given under sub-section (2), the Controller shall notify the patentee.

(b) On receipt of such notice of opposition, the Controller shall, by order in writing, constitute a Board to be known as the Opposition Board consisting of such officers as he may determine and refer such notice of opposition along with the documents to that Board for examination and submission of its recommendations to the Controller.

(c) Every Opposition Board constituted under clause (b) shall conduct the examination in accordance with such procedure as may be prescribed.

(4) On receipt of the recommendation of the Opposition Board and after giving the patentee and the opponent an opportunity of being heard, the Controller shall order either to maintain or to amend or to revoke the patent.

(5) While passing an order under sub-section (4) in respect of the ground mentioned in clause (d) or clause (e) of sub-section (2), the Controller shall not take into account any personal document or secret trial or secret use.

(6) In case the Controller issues an order under sub-section (4) that the patent shall be maintained subject to amendment of the specification or any other document, the patent shall stand amended accordingly.]

in existence for providing justice, judicial dispute resolution and alternative dispute resolution. Diverse dispute resolution mechanisms are in existence for protecting the intellectual property rights. Remedies for solving disputes are available in different legislations. If the existing diverse dispute settlement mechanisms are not efficient enough to address the disputes or enforce the rights, then there is no use in having a detailed dispute resolution mechanism. All the existing dispute resolution mechanisms are taking time to decide the matter by giving less preference to the party's convenience or not understanding the significance of patent.

Dispute settlement through Arbitration

Arbitration is an alternative mode of dispute settlement mechanism. The parties through arbitration clause in an agreement agrees for referring matter for arbitration. The arbitrators will be the experts in the field. The arbitration clause in the contract specifies about how the arbitrator will be appointed, the place of arbitration, the substantive and procedural law applicable. The way in which the arbitral award will be enforced. New York Convention and Geneva Convention on arbitration gives you clarity regarding the enforcement and setting aside procedure for arbitration. The procedure for enforcing arbitral award varies for domestic and international arbitration. The arbitral awards are having validity depending upon the jurisdictions chosen and the multi- jurisdictional treaties.

Arbitration is a dispute settlement mechanism where the issues are submitted before a private tribunal and the decision is taken by the tribunal on basis of the evidence. The decision taken by the tribunal is final and binding on the parties. The advantages of arbitration proceeding are as follows:

1. Party autonomy and neutral proceedings

   Party autonomy in an arbitration can be seen in drafting the clauses in an arbitration agreement, the appointment of arbitrator, choosing the seat and venue of arbitration, the language to be used for the arbitration, the office of arbitration, the length of arbitration proceedings, the finality of the award.

   The entire arbitration proceedings are conducted on basis of the arbitration agreement. Where parties have complete autonomy to decide the arbitrators depending upon the experience and expertise of the arbitrators.

   The parties can decide the qualification required for the arbitrator, experience and the expertise required. The arbitrator appointed for any proceeding has to be independent and impartial. Where the neutral code of ethics will be decided either by the parties and the arbitrator or by

the institution they approach. The independence and impartiality of an arbitrator can be decided on various grounds.

2. Arbitration proceedings and party autonomy
   The framework of the arbitration proceeding can be decided by the parties. No fixed code or convention mentions about the entire procedure to be followed in an arbitration. Arbitral proceedings are less complex in nature. Few legislations had given a brief outline of the documents to be submitted in arbitration, how the proceedings have to be and the finality of the decision taken. The institutions dealing with the arbitration has their own arbitration rules.
   The tribunal can provide suggestion to the parties on basis of the administrative assistance needed, the language to be chosen and the time frame within which the arbitration proceedings can be concluded.
   The procedural aspects that can be decided by the parties include the entire structure of the arbitration, the timeline within which the IA can be decided, confidentiality clause regarding disclosure of information's, rules related to the evidence taking and fast track proceedings. Choice for the parties to decide any kind of dispute settlement mechanism during the arbitration proceedings.
3. Confidentiality in an arbitration
   Parties can fix the confidentiality clause depending upon their subject matter in dispute. Confidentiality can be fixed on the documents submitted including the evidence and the witness to be summoned, the proceeding to be followed in an arbitration, on the final arbitral award.
4. Autonomy to choose the third neutral person for taking decision
   The parties have the liberty to choose the decision makers depending upon the subject matter, the qualification required, and the experience of the neutral third party. Thus, experts in the filed can take decision. The number of arbitrators can be decided by the parties depending upon the complexity of the dispute. The arbitrators can do the fact- finding and come to a suitable settlement. Thus, depending upon the party's choice, it is possible that the arbitrator's themselves would be able to undertake fact- finding and decision – making process required to resolve the dispute.[5]
   In highly technical matters judges and neutral parties may not be qualified to understand and address the issue correctly.

[5] P. Nutzi, "Intellectual Property Arbitration", European Intellectual Property Review 4 (1997); 4.

5. Procedural flexibility
   Parties have the discretion to decide the procedure of arbitration. In an arbitration proceeding, parties are free to decide on the procedure.[6] The adhoc arbitration proceedings can be decided by the parties themselves and in case of Institutional arbitration proceedings, the institutions decide the proceedings with fixed set of rules.[7]
   Through agreement parties are free to decide the arbitration procedure including appointment of arbitrators. Further modification can be made to the Rules after appointing the arbitrators. The procedure decided by the parties include the timeline for arbitration, the rounds of arguments, the written submission deadlines, and the deadlines for production of documents for evidence and the expert opinions in a particular field.
6. Hybrid ADR mechanisms can be utilized
   The ADR mechanism which is most suitable for a particular dispute can be utilized by the parties. Parties with the consent of the arbitrator can change arbitration proceedings to mediation and to mediation-arbitration proceedings and mediation proceedings.
7. Arbitral Awards are final in nature, they are not subjected to appeal or review. Thus, state interference in arbitral decisions is allowed only on limited grounds. National courts tried to interfere in the arbitration matters to certain extend earlier. This has been limited in majority of the jurisdiction's including India through amendments in existing legislations or through new legislations.[8] Judicial Review is possible in New Zealand, Switzerland, and United Kingdom.[9]
8. Speedy settlement of the dispute in an arbitration mechanism. The time period for concluding an arbitration can be fixed by the parties. It depends on the subject matter in dispute, the number of parties involved, the kind of qualification required from the neutral third person. The length of arbitral proceeding will change again on basis of domestic and international arbitration.
9. The cost of arbitration as compared to litigation is high, on basis of various factors as decision makers are paid by the party's, any ancillary charges are paid by the party, the administrative assistance required for arbitrator is given either by the party or by party to the institutions

[6] See. G. Born, 'International Commercial Arbitraion', 2nd edn (The Hague Kluwer Law International, 2001), 7-8.
[7] LCIA Rules with 32 articles, ICC Rules with 35 articles, AAA international rules with 37 rules.
[8] In India Arbitration Act 1940 mentions about converting arbitral award to a decree which was a lengthier procedure. Later when Arbitration Act 1940 was replaced by Arbitration and Conciliation Act 1996, the arbitral award is considered as final and has the same status of a decree. Hence court will not look into the merits of the case, but the court has discretion to setaside the award on various grounds.
[9] See W. Park, 'Irony in Intellectual Property Arbitration '. Arbitration International 19. No.4 (2003): 453.

providing arbitrators for settling a matter. The cost of arbitration proceedings varies on basis of the time spend on the dispute, the qualification and the experience of the arbitrators.

Disadvantages of arbitration

1. Arbitral tribunal lacks coercive power to compel the parties to do or refrain from doing something, but judicial assistance can be taken to enforce the orders given by the arbitral tribunal especially on basis of temporary and perpetual injunction and for taking evidence, summoning the parties and for production of documents. Certain Arbitration legislations and rules mentions specifically about the consequence of not comply with the tribunal orders.[10]
2. Decision of the arbitrator binding only on the parties to the arbitration agreement. Thus, the arbitrators didn't have the right to take decision against the third party. The joinder of parties and adding of issues are allowed in arbitration only if parties to an arbitration agrees for the same. But the tribunal didn't have the power to order for adding of a party who is not connected with the entire dispute to the arbitration proceedings.
3. No precedent setting for arbitration proceedings.
4. The excessive exercise of powers or failure to exercise the powers by the arbitrators can lead to failure in the arbitration process. Where the proceedings can itself be delayed and the parties will get less opportunity to clarify the points or their statements.
5. Tribunal lacks coercive powers to enforce any decision. In India judicial assistance can be sought even form the beginning to appoint arbitrators,[11] for referring matter for arbitration for taking evidence. In UK under English Arbitration Act, 1996 legislation mentions about dismissing the claims on failure to comply with the rules.[12]
6. The contractual nature of arbitration, is not allowing the arbitrator to take a decision against any third party. the tribunal didn't have the right to add more parties to the arbitration proceedings without the third parties' consent.
7. The arbitral award didn't have a precedent value. It has only inter party effect.

[10] Sec. 41 (6) of English Arbitration Act.
Article. 56 (d) of WIPO Arbitration Rules.
IBA Rules on taking of rules in International Arbitration.
[11] Sec. 30.
[12] Sec.41 (6) & WIPO Arbitration Rules Art.56(d).

Public policy concerns in arbitration

Arbitration has been identified as an alternative method of dispute resolution. Where the final award is binding and the same can be enforced through Court. Public policy concerns in arbitration arises both in domestic and international arbitration. Public policy is a term which cannot be clearly defined. It varies form nation to nation and from generation to generation. Public policy concerns in arbitration comes into picture in three different stages, first at the time of referring a matter for arbitration and 2nd at the time of setting aside arbitral award and 3rd at the time of enforcing the arbitral award. The Indian legislation which specifically dealt with domestic arbitration was the Arbitration and Conciliation Act, 1940. The 1940 legislation failed to mention the term public policy. The 1996 Arbitration and Conciliation Act, include the term public policy in setting aside an arbitral award under sec.34 of Arbitration and Conciliation Act.

The Arbitration and Conciliation Act, 1996, while referring a matter for arbitration, failed to mention the significance of the term public policy under sec.8. Where in sec. 8 of Arbitration and Conciliation Act mentions about referring a matter for arbitration. While entertaining an application under sec.8, the Court will look into arbitration agreement and decide whether the subject matter of dispute is arbitrable or not. The honourable Court in various cases tried to give an explanation for the matters that are excluded from arbitration.

In Booz Allen and Hamilton Inc. vs. SBI Home Finance Ltd. and Ors,[13] the Court followed a right based approach to decide whether the matter is arbitrable or not. Non-arbitrable disputes identified in Booz Allen case are as follows:

(i) criminal offences, (ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody (iii) guardianship matters (iv) insolvency and winding up matters (v) testamentary matters (grant of probate, letters of administration and succession certificate) and (vi) eviction or tenancy matters governed by special statutes. Where Court clearly mentioned that right in rem cannot be referred for arbitration. While right in personam are allowed to be arbitrable.

Ayyasamy Vs. Respondent: A. Paramasivam and Ors. Civil Appeal Nos. 8245-8246 of 2016,[14] *the Court had pointed out that* Where fraud, even though is considered as a serious offence affecting the public, If the parties were able to prove that the decision will be affecting only the parties themselves, can be referred for arbitration. The Court here tried to give a distinction between fraud

[13] In Booz Allen and Hamilton Inc. vs. SBI Home Finance Ltd. and Ors (2011) 5 SCC 232.
[14] *A. Ayyasamy Vs. Respondent: A. Paramasivam and Ors. Civil Appeal Nos. 8245-8246 of 2016.*

simpliciter and serious fraud. Here Court allowed arbitrability of disputes including fraud even though it is a matter of public interest, but will affect only the parties.

In Himangni Enterprises Vs. Respondent: Kamaljeet Singh Ahluwalia,[15] Respondent filed suit for eviction of the appellant from the shop and for obtaining unpaid arrears of rent, and for permanent injunction. Appellant relied on the arbitration clause and tried to refer the matter for arbitration. The Court relied on various decisions along with Booz Allen & Hamilton Inc. case which has given well recognized examples of matters that are not arbitrable. Where it is stated that eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes.

Public policy varies on basis of national, social and economic and moral needs. In all these decisions the main aspect taken into consideration by the court is whether the matter falls in public fore or not? As the matters of public policy issues are considered as coming within the sovereign authority of the Court and not a private tribunal appointed by the parties. Through various judgements the Court tries to inform that if there is special tribunal to address any issue, the matter cannot be referred for arbitration, if the decision has an impact on the third-party matter cannot be entertained by the arbitrator.

The public policy concern on setting aside of arbitral award and enforcement of arbitral award is on the following grounds as:

[1] foreign arbitration on grounds of (a) fundamental policy of Indian law, (b) interest of India; (c) justice or morality

[2] domestic arbitration on ground of (a) fundamental policy of Indian law, where the arbitration process should follow the natural justice principle, fair and reasonable procedure has to be followed (b) interest of India; (c) justice or morality, and (d) patent illegality which is applicable when there is an error of law [a]apparent on the face of record, [b] that goes to the root of the matter [c] violation of statutory law which is trivial in nature [d] a n award that shock the consciousness of the Court.

After amendment as per Sec.34, Explanation I- For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if - (i) the making of that award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or (ii) it is in contravention with the fundamental policy of Indian law; or (iii) it is in conflict with the most basic notions of morality or justice. Explanation 2 - For the avoidance of any doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not

[15] Civil Appeal No. 16850 of 2017 (Arising out of S.L.P. (C) No. 27722/2017) and (D. No. 21033/2017).

entail a review on the merits of the dispute. The term interest of India was excluded in case of both domestic and international award.

The vague nature of the term public policy grants huge powers to the Court to interfere and review the arbitral award. The concept of public policy remains an elusive concept and the Indian courts have stuck, what has been suggested to be a discordant note.[16]

There exists no uniform standard to decide the term public policy. This itself is creating confusion in the public while entering into an agreement for referring a matter for arbitration. Parties choose arbitration for its finality, efficiency, and relative economy.[17]

Settling patent disputes through arbitration

Art. II (1) and V (1)(a) of the New York Convention mentions about the laws governing arbitrability.[18] Settling intellectual property disputes through arbitration is not a new idea. World intellectual property organisation has its's own mediation and arbitration centres and rules to settle intellectual property disputes.[19] Queen Mary, London University, School of International Arbitration carried out a survey in 2008 which mentions that 6% of the corporates used international arbitration to settle the matter. Arbitration of intellectual property disputes, especially patent is limited on basis of objective arbitrability in different jurisdictions. The major issue involved in arbitrability of patent disputes include party autonomy in arbitration.

There are nations which completely exclude arbitrability of patent disputes either expressly or impliedly.[20] Belgium,[21] US[22] expressly allows arbitrability of patent disputes. The contract drafted by the parties have clarity regarding the matters to be referred for arbitration. Thus, private contract issues are allowed to be arbitrable in majority of the jurisdiction's[23] in case of patents, utility models,

[16] Badrinath Srinivasan, 'Arbitration and the Supreme Court: A Tale of Discordance between the Text and Judicial Determination' (2011) 4 NUJS L Rev 639. 645.

[17] A See Christopher S. Gibson, Arbitration, Civilization and Public Policy: Seeking Counterpoise between Arbitral Autonomy and the Public Policy Defense in View of Foreign Mandatory Public Law, 113 PENN ST. L. REV. 1227, 1228 (2009) (claiming that a "reformed concept of substantive public policy" is required in order to uphold the balance between finality and justice). melia C Rendeiro, "Indian Arbitration and Public Policy" (2011) 89:3 Tex L Rev 699.

[18] B. Hanotiau, "The Law Applicable to arbitrability", ICCA Congress Series 9 (1999): 154.

[19] WIPO administered more than 110IP arbitration matters.

[20] The Patent Act and Arbitration and conciliation Act didn't mention about arbitrability of patent disputes in India. But Court through various judgments tried to give a clarity for the same. In India subject matter arbitration is restricted on basis of public policy. Art.18(1) of Patent Act, 1978.

[21] Belgium Patent Act, Art.51 (1).

[22] 35 USC s. 294.

[23] US, UK, India.

registered trade marks concerns related to public policy arises. Parties are not allowed to challenge the validity of the majority of the intellectual property rights.

Challenge towards the granted patent can happen in different stages. Starting from the time the patent application is submitted, application itself can be challenged, once the patent is granted the validity of the patent granted can be challenged.

The arbitrability of patent disputes arises in different stages. Jurisdiction of the arbitrator to entertain the patent dispute will be first challenge. The special tribunals for deciding the matter including the High Court is in existence in India.

Lack of jurisdiction of the arbitrator to entertain the matter will in turn lead to setting aside of arbitral award once the decision is passed on validity of patent disputes. Even enforcement of the arbitral award will be difficult.

Competence – competence principle followed in deciding the jurisdiction will be an issue of major concern. Under sec.16 of Arbitration and Conciliation Act, 1996 in India, arbitrators have the right to decide their own jurisdiction. The contract and arbitration clause will provide clarity to arbitrator to decide on their jurisdiction in arbitration matters. The validity of the arbitration agreement will be in challenge if the question related to jurisdiction arises.

Whether tribunal themselves are entrusted to entertain non arbitrability disputes? National Court's in majority of the jurisdiction has the right to decide whether a dispute is arbitrable or not. While enforcing the arbitral awards the patent validity concerns and jurisdictional issues again arises.

Public policy concerns in patent arbitration

How public policy as a fundamental rule limits the autonomy of the party and the independent arbitrator in structuring the arbitration process needs more clarity. To what extend can there be a uniformity in the policies limiting arbitration especially on basis of subject matter is another question to be addressed seriously. And the third matter which has to be addressed seriously is Whether arbitration proceedings is subject to public policy?

Life style equity ventures Vs. QDSeatoman Designs Pvt. Ltd.

Lifestyle Equities CV is a Dutch limited have registered office at Chennai, Life style and QDS were running business of apparels and garments. The first agreement was for a period of 3 years and before three years the issue arise. Clause 40 was the arbitration clause in the agreement is as follows: Clause 40: Any dispute arising out of or in connection with this Agreement, shall first be resolved mutually by the Parties through negotiations. If the Parties are not able to settle the same through negotiations, each party may appoint an arbitrator and such appointed arbitrators shall appoint a third arbitrator for arbitration. The

arbitration shall be conducted in accordance with the Arbitration and Conciliation Act, 1996. The place of arbitration shall be Chennai, India and the language of arbitration shall be in English.'

Life style filed sec.9 application before the single judge for interim measures. QDS claimed that sec.9 application is not maintainable as the matter to be referred is a non-arbitrable subject matter. Intellectual property rights are rights in rem, and hence are not arbitrable. Where in Court had pointed out that patent validity disputes are matters of right in rem, hence the same cannot be referred for arbitration, while infringement matters are right in personam which can be referred for arbitration. The reason given for non-arbitrability of patent disputes are not conclusive in nature.

Arbitration of patent disputes and public policy concerns

1. The major concern regarding public policy issues in arbitration is the state involvement in granting patent. The sovereign nature of the state is reflected throughout. The patent is registered with the patent office, the same is not allowed to be invalidated by an arbitral tribunal. The final authority to decide whether a patent should be granted is the state. Patent rights are monopoly rights granted. Public authorities grant these titles. State delegate the power to different authorities. Where the concerned authorities will scrutinize the applications and grant patent. Thus only the state and not private parties has the right to undo the grant of patent.[24] A private arbitral tribunal didn't have the right to take decision on this matter. On basis of an agreement parties didn't have the right to decide on these matters. Thus, state involvement and state granted right is the first objection towards allowing arbitrability of patent dispute on basis of public policy.
2. Patent right is an exclusive right granted to an applicant. The state extracts some subjects matters from public domain and place the same under the control of certain individuals. Thus, individuals are granted powers to modify the patent rights and state thus oust the jurisdiction of state to certain extend.
3. Patent grants exclusive monopoly right to the holder of the patent. The public policy justification for grant of patent right is further advancement of science and technology for the benefit of the society.[25] Grant of patent will boost more inventions which will benefit the public.

[24] Cf. P. Janicke, 'Maybe we shouldn't Arbitrate', *Houston Law Review 39 (2002) : 702.*
[25] See. T. cook, 'A User's Guide to Patents'. 2nd edn (London: Tottel Publishing, 2007). 15-20.

4. Granting powers to a private body to decide such disputes can greatly affect the existence of the patent, which in turn will have a direct impact on the society and economy at large.
5. Specific bodies are in existence to decide the validity of the patent. State grants exclusive jurisdiction to certain authorities to decide on the validity of patent disputes. In India patent office can decide on the validity of patent. The High Court further has the right to decide on the patent validity dispute.
6. Enforceability of the arbitral award in patent disputes is the biggest issue. The patent holder can create agreement with other party for licensing, assigning or transferring the rights. Through these agreements he can create arbitration clause for referring matters for arbitration.
7. Monopoly right granted will remove the patent from public domain. This monopoly right is granted for the interest and protection of the patent holder. If patent holder uses patent for his benefit, why for validity reasons he is prevented from drafting an arbitration clause. It is difficult to understand the public interest involved in the patent validity issues. When parties submit their disputes to arbitration, they are not interfering with any state interest. The functioning of the patent system is in no way affected. The exclusive right to decide on the patent validity disputes vests with the patent office and the Court's now. As arbitration is between two parties, it is in no way affecting or interfering into the Court or tribunal jurisdiction.

Party autonomy and arbitration in patent disputes

Patent autonomy is the key element in an arbitration proceeding. Party autonomy will have applicability only for right in persona. Public policy concerns in different jurisdictions can limit the party autonomy. State sovereignty in any way cannot be affected by party autonomy. Arbitration clauses can be framed without affecting the rights of third party or taking away the rights granted by the sovereign power.[26]

Arbitrability of IP disputes are limited on basis of public policy. Indian Courts have allowed arbitrability of certain IP disputes. But arbitrability of patent validity disputes are limited on ground of public policy concerns.

[26] Art.2059 & Art.2060 of French Civil code not allow arbitrators to interfere on state sovereignty. Sec1 (b) of English Arbitration Act, 1996 states that "Parties are free to agree on how the dispute are resolved, subject only to such safeguards as are necessary in the public interest".

Validity of the decisions submitted to arbitration is the major concern in intellectual property dispute arbitrations. Party autonomy and public policy concerns are considered as taking extreme positions. Thus, arbitrable subject matter and public policy concerns in major jurisdictions act as a limitation to the party autonomy to refer certain disputes to arbitration.

Patent validity disputes can be addressed by an arbitrator who is an expert in the field. Where the parties can have the autonomy to decide the language of their choice. As far as patent validity disputes are concerned the language and the seat and venue should be decided by giving preference to the patent office regulations where the patent is registered or yet to be registered.

In patent infringement matters, depending upon the third party and the kind of infringement that happened, the patent license agreements can be drafted accordingly to provide an additional clause for referring patent infringement matters to be settled by either mediation or arbitration.

The parties can choose arbitrators depending upon the experience and expertise in a filed including technical expertise. Thus, the arbitrators will get the privilege of understanding the real disputes in the subject matter, and proceeding accordingly to reach a final decision on basis of the experience. The arbitrators themselves would be able to undertake the fact-finding and decision – making processes required to resolve the highly complex disputes.[27]

The length of the arbitration proceeding in a patent dispute can be decided by the parties on basis of the nationality of the parties to the dispute, the experience and expertise needed by the concerned neutral third person, the subject matter in dispute. lack of clarity in the domestic legislations related to arbitration of patent disputes is the major concern. International standard's related to arbitration is enhancing day by day. And more disputes are been referred to arbitration.

Neutral third party as an arbitrator in a patent dispute

Parties to a patent dispute can be either from the same nation or from the different nations, designing a neutral code of ethics for proceeding with the arbitration can help the parties in multiple ways. The benefits are as follows:

1. The neutral code of ethics will help in conducting the proceeding in a fair and reasonable manner
2. The neutral will be doing the justice to the parties and will address the subject matter in dispute in an efficient manner

[27] See P. Nuzi, "Intellectual Property Arbitration", European Intellectual Property Review (1997) : 4.

3. Neutral will be aware of the jurisdictional limits and at the same time parties will be in a position to understand whether the neutral third person acting as an arbitrator is not exceeding the jurisdictional limits granted to him.
4. The neutral third party or arbitrator will be more cautious and will inform the parties regarding any kind of official or personal bias.
5. The neutral third party appointed by the parties will have required experience and qualification to address the issue. For addressing patent disputes, as it is more technical in nature, scientific background is required. The parties can choose the person who have experience and qualification both in science and legal field. The international Survey of Specialised intellectual property Courts and tribunals[28] clearly point out that the tribunal judges specialised in IP disputes are less in number. Majority of the nations are not giving more significance to the need of a specialist in addressing IP disputes. Choosing a right decision maker has it's own benefits in arbitration.
6. The evidentiary value in a patent dispute is higher as compared to any other civil disputes. The arbitrator who has expertise in both patent and arbitration can clearly identify the authenticity of the documents submitted and provide a proper justice to the parties.

Patent cases are multi-jurisdictional in nature

Patent rights are territorial in nature. The disputes related to patent in multiple jurisdictions can be an issue, if for the same dispute multiple judgements are available. And the enforcement of these judgments will be an issue for the patent holder. Arbitration as a dispute resolution mechanism can resolve this issue to certain extend.

Single proceeding to resolve multi-jurisdictional dispute is a greater relief.

With consent of the parties' agreements can be drafted for deciding the disputes, in multiple jurisdiction's which will help the parties in saving cost and time. This takes time for the parties to a dispute to agree upon the arbitration clause. All the ADR mechanisms including arbitration is voluntary in nature.

[28] IBA 2006.

Patent dispute and confidentiality in the dispute settlement mechanisms

Party autonomy can be reflected throughout the arbitration process. The main advantage of an arbitration is the confidentiality throughout the proceeding. Which can effectively be utilized for the patent dispute settlement. The confidentiality of the arbitration can be fixed by the parties in the arbitration. Confidentiality clauses will be included in the arbitration clause. The institutions providing arbitration will also provide arbitration clauses.[29] Arbitral institutions as SIAC, American Arbitration Association are not imposing any specific Rules for confidentiality. Thus, if institutions are silent the arbitration agreement drafted by the parties has to provide clarity regarding the same. Accepting confidentiality in arbitration varies from nation to nation. Where US Court's considers that confidentiality clauses to be expressly mentioned. In English Court's, they impose clear responsibility of confidentiality upon the parties.

Thus, in patent disputes due to the nature of subject matter involved in the disputes, parties can decide on the confidentiality throughout the proceedings.

Hybrid ADR mechanisms as a patent dispute settlement mechanism

Parties depending upon the subject matter can decide which ADR mechanism to be utilized. In certain matters where parties are more concerned about the future relationship, they can rely on MED- Arbitration, where parties will start with mediation, which help them focus more on the interest and need of the parties and identifying the strength and weakness of each party. Later they can start with the arbitration process to reach the final settlement of the dispute.

The parties have the discretion to decide whether the same tribunal will continue through out the license agreement in a patent or not. This decision can be taken either in the beginning while drafting arbitration agreement or after constituting the tribunal to decide the first dispute between the parties.[30]

Arbitrator decision didn't have *Erga omnes effect*. With over thousands of international commercial arbitrations taking place across the globe, India's chances of being the most sought-after choice of seat depends largely on the nature of its laws.[31]

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[29] WIPO Arbitration Rules, Articles 72 to 76. CIETAC Article.33, LCIA Rules Article. 30, Swiss Chamber of Commerce Article Article.43.

[30] Sec. 30 of Arbitration and conciliation Act, 1996.

[31] Sankalp Udgata & Ayush Chatuvedi, Contours of Commercial Arbitration: A Disquisition into the Arbitrability of IP Disputes in India, 25 Annals FAC. L.U. ZENICA 127 (2020), Heinonline accessed on Fri Dec 18

Conclusion and suggestions

1. Arbitrator's experience & expertise can help the parties in identifying the actual procedure depending upon the subject matter and helps in speedy disposal of the dispute.
2. Arbitral awards can be set-aside but not appealed. This can provide speedy remedy to the parties.
3. Two- tier arbitral proceedings can be allowed for deciding patent disputes. As the MNC's or companies are spending lot of money for funding research. Single forum for deciding the same without appeal can affect the parties. Additional quality assessment mechanisms are needed for concluding a dispute in the correct manner. More number of panel members in a dispute settlement mechanism like arbitration can provide justice to parties. Agreeing to judicial review on the merits of the case can lead parties to all kind of disadvantages which are reflected in a normal judicial dispute resolution mechanism. Judicial review can delay the enforcement of the award made by spending lot of money in the arbitration proceeding and the research for getting a patent. The final clause is added to avoid any further scrutiny on the same issues unless it is on basis of specific grounds. Thus two- tier arbitration proceeding can be best alternative in any proceeding, where parties themselves can agree through the arbitration agreement.
4. Tribunal cannot invalidate the IPR with *erga omnes* effect.
5. A neutral third person who has sound knowledge in the specific technical field and in arbitration can only entertain patent disputes settlement through arbitration. Identifying such an expert will be hectic task for the parties to a dispute.
6. An in-depth analysis of the reason for in arbitrability issues is needed. The international conventions and model laws have to be looked into and analysed carefully to bring fruitful changes in the national arbitration legislations.
7. The reason for the non-applicability in patent disputes is not clear. Inter- party effect of the arbitration agreement related to patent validity disputes can be taken into consideration for allowing patent validity disputes to arbitration.
8. Narrow interpretation has been given to the subject matter arbitrability of disputes. The term public policy is decided by each state.

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9. Arbitral awards has interparty effect in certain matters, through modification in the national legislations the applicability of arbitral award can be extended to third party.
10. The justification given for non-arbitrability on basis of sovereign power of the sate cannot be accepted as such, as at the moment the state grants monopoly right to the patent holder, the right itself is taken from the public domain. He/she has the exclusive right to decide on the further modifications or the way in which dispute related to patent can be granted. State after undergoing lot of examination had granted patent. There are nations as Switzerland who considers that grant of patent is not a sovereign act and thus tribunals can invalidate the patente.[32]
Thus, arbitrability of patent validity and patent infringement dispute's is an urgent need to attract more investments in the research and for development of a nation. Intellectual skills are to be protected by the state for economic and national development. The protection can be provided by the state only if the dispute resolution mechanisms are effective enough to address the same. Arbitration of patent disputes can also be an additional dispute resolution mechanism which will definitely provide speedy settlement of the dispute.

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