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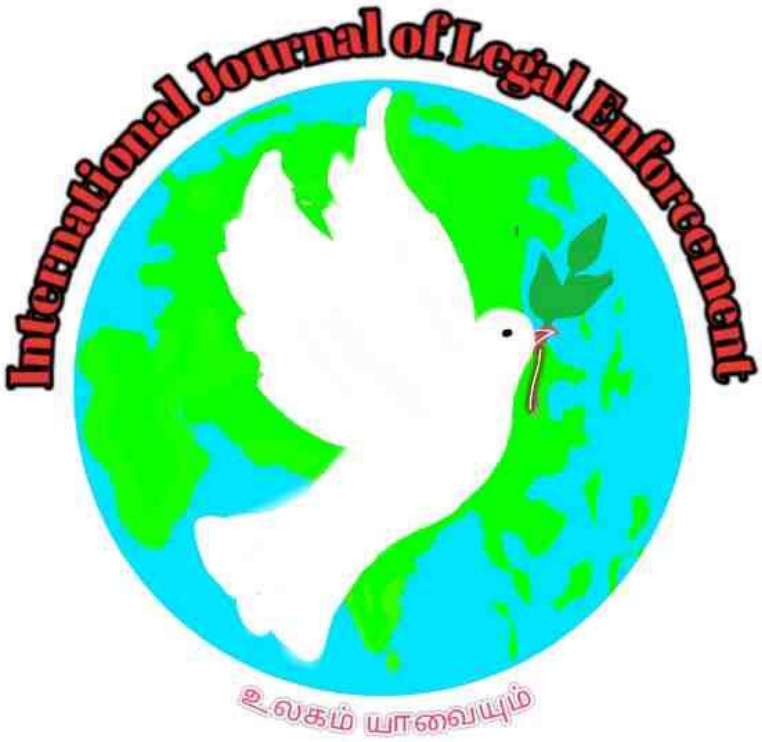

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Article on

IPR Dispute Resolution Through Arbitration: Endorsed by World and Confused in India

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Abstract

At present, intellectual property disputes are often associated with the rule of law of several states and several respondents, covering issues that are an integral part of new and fast-growing technologies. Numerous researches conducted in the field of the effective resolution of IP disputes have shown that IP litigation means significant costs, especially for small and medium businesses. Because of costly litigation, the number of high-tech research and development, as well as the possibility of investing in high-yield startups, is significantly reducing. IP disputes arise in a wide range of business sectors, including telecommunications, biotechnology, pharmaceuticals, and other areas of science and technology, ranging from basic contracts to multi-billion dollar claims for violations related to the issuance of a patent license. The arbitration procedure in international intellectual property disputes is a unique problem due to the fact that it is a valuable asset. The cost, duration and complexity in resolving intellectual property disputes are increasingly encouraging the parties to seek alternatives. Often, issues related to IP are solved by reaching a compromise directly in the settlement process or by arbitration. However, in case of impossibility to apply alternative procedures, arbitration is increasingly viewed as an effective way to resolve a dispute. This article analyses and compares the judicial and arbitration methods of dispute resolution in intellectual property. The conclusions made in the course of the study reveal the strengths and weaknesses of the arbitration procedure for intellectual disputes. Furthermore this article also talks about the confusing status of arbitrability of IPR disputes in India.

Keywords

1. IPR
2. Arbitration
3. Dispute Resolution
4. Copyright
5. Arbitrability

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Introduction

There is a rise of importance of IP in business, especially in relation to cross-border transfers. As such, the determination to protect such rights is getting stronger. Disputes about IP rights are conventionally found to be dealt with in the land courts. However, in the last few years there has been a major shift in focus. There is a need for extensive technical knowledge to decide Intellectual Property disputes, that is why the national courts are not always a valid forum to resolve disputes of IPR. Coupled with the most common parts of the state for such disputes, companies are increasingly willing to settle disputes by arbitral tribunals rather than state courts. To meet the specific requirements of technology and IP disputes, the World Intellectual Property Organization has developed a WIPO Arbitration and Mediation Center[1] and specific arbitration (Expedited and Non-Expedited), arbitration mechanisms and professional determination. Important statistics published by the WIPO Center show the universal utilization of its mechanisms in the TMT and IP sectors (WIPO Mediation, Arbitration and Expert Determination Cases)[2] and the number of cases managed by the WIPO Center is growing continuously, indicating an increasing need for these specific specialized services. In short, the essential features of the WIPO arbitration regime are:

WIPO Neutrals: The World Intellectual Property Organization Center holds a complete list of specialists in various fields serving as judges.

Specific rules for interim injunctions: Immediate suspension of infringement is often the root cause of IP disputes - hence, the WIPO arbitration regime gives specific focus to interim decisions.[3]

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[1] WIPO, *WIPO Arbitration and Mediation Center*, WORLD INTEELECTUAL PROPERTY ORGANISATION (Jan 01, 2021, 08:00 PM), https://www.wipo.int/amc/en/center/background.html.

[2] WIPO, *WIPO Mediation, Arbitration, Expedited Arbitration and Expert Determination Rules and Clauses*, WORLD INTEELECTUAL PROPERTY ORGANISATION(Jan 1, 2021, 09:00 PM), https://www.wipo.int/publications/en/details.jsp?id=3399&plang=EN.

[3] King and Wood Mallesons, *Applications for injunctive orders in IP arbitration*, LEXOLOGY (Jan 2, 2021, 10:00pm), https://www.lexology.com/library/detail.aspx?g=f19a6d8f-122c-433e-b74d-177a237cc94d.

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Rule of privacy: Intellectual Property and technical appointments often involve knowing trade secrets. The World Intellectual Property Organization rules provide for certain types of provisions that deal with information that is confidential in nature presented in a proceeding of arbitration.

Proceedings of Evidence: World Intellectual Property Organization rules provide certain services for the testimony of expert witnesses, along with conducting the assessment during arbitration.[4] But how do these two things fit together – Arbitration and disputes of IP? When discussing arbitration of IP disputes, two important things must be taken into account. Is there any arbitration clause present? The essential component of numerous IP disputes is the IP proprietor's entitlement to stop or prevent others from utilizing its IP (stop and erase the case). Truth be told, there is frequently no agreement between the opposite parties. What's more, regardless of whether there are (for instance authorizing agreement, specialized agreement, trademark encroachment agreement or exchange agreement containing IP-related issues), such agreement by and large don't contain explicit IP proviso or arbitration clause. Is the matter at hand arbitrable? In disputes of IP, the presence, lawfulness, proprietorship or degree of certain IP rights are at any rate the primary inquiries that ought to be settled before deciding the merits of the case. As to registered IP, (for example, licenses, models of utilization, trademarks or organization), the topic of concern is whether that IPR has been legitimately registered by the authority is normally settled under the watchful eye of national courts and specialists, not by private designers. This can prompt a circumstance where organization A, which has patent holders in numerous nations, is confronting a contender, organization B, which is showcasing the item with the capability of breaking a few markets. A and B took part in patent encroachment cases under the watchful eye of a few state courts with the end goal for A to make sure about the offer of the contender's producer at long last to recoup harms. This may prompt conflicting national choices on (i) the legitimacy of one patent in various nations, (ii) regardless of whether the contending item encroaches on the patent, and (iii) the estimation of harm to each market. With respect to the arbitrability of disputes about the legitimateness of registered IP rights, as long as the primary question can be settled between the parties, it is frequently held that this question must be overcome. Here we go to the round trip: the

[4] Michael Woller, *IP Arbitration*, SCHONHERR (Jan 4, 2021, 05:00 PM), https://www.schoenherr.eu/publications/publication-detail/ip-arbitration-on-the-rise-1/.

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chance of arbitrating IP disputes is reflected by the ever-expanding number of IP cases being settled through WIPO arbitration. In any case, the topic of whether IP disputes are arbitrable in the code is rehashed and once more. This is a background marked by the supposition that IP rights favor open strategy. Nowadays it goes past the contention that the vast majority of the cases are arbitrable - in any event with regards to globalization. This has to do with the way that resistance to absence of arbitration isn't as frequently brought all things considered up in scholastic conversation[5]. Many of the IP disputes achieved as goals come from legally binding issues. Contract disputes are, be that as it may, consistently viewed as arbitrable in numerous nations, regardless of whether they are identified with licensed innovation rights (lawfulness and degree which might be the first inquiry in quite a while).

The location of IP disputes inviting opposition to the lack of arbitration is limited and that only some specific categories of IPR are compromised that can be lodged with the arbitration center. These Specific rights, as described above, are completely regarding the (in)validity and (in)existence of a registered IPR. The final drawback of the problematic position is that the party/ies do not allow to dispute the severity of the concerned IPR because they cannot or do not want to. Most IP disputes are based on licensing agreements that is why this happens more often. But most of the time these items contain “non-contest” or “non-challenge” phrases that hinder the viability of IP rights in attack. If the viability of IPR itself is not an arbitrable question, then issues related to arbitration are prevented from occurring. It is crystal clear: if a particular process happens, IPR disputes can be largely decided by tribunals of arbitration. Surely, the effect of such an amendment will not cause any kind of 3rd party effect and may not obligate the national register authorities to perform any specific actions regarding the registration of IPR that were subject to arbitration. However, it is on the arbitrator to decide on the validity of the parties whether the claimant can legally enforce a patent against himself or not. However, because of the uncertainties in this case, it is crucial to note whether those situations would render, under certain state laws, the award of arbitration unenforceable. While drafting a clause of arbitration in contracts of IP, the dispute often arises whether claims for damages relief (or previous penalties) should also be considered during arbitration or they might be decided by ordinary courts. However, a limited clause of arbitration that uses arbitration in any arising dispute out of or relating to a particular

[5] T. Cook and A. Garcia, International Intellectual Property Arbitration, 2010, pp. 52/53.

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agreement, but without the actions of a specific employee, such as damaging relief (most common in IP disputes is often a basic application) in practice. In a decision made in the case Henry Schein, Inc.[6]The United States Supreme Court concluded that the first question of whether such claims were not brought into light by the claimant before the regular courts itself should be decided arbitrarily. This leads to a situation (at least in the US) where in the first instance, it may need to be decided in proceedings of arbitration that whether a specific claim (i.e. relief) is heard in ordinary courts or in arbitration, and secondly, such claims may need to be decided by arbitration (or be held in ordinary courts, as the case may be). When writing technical agreements and IP or even dealing with the (arbitrariness) of a forum, parties should consider a special IP limitation as an acceptable alternative to file a lawsuit in court. However, it should be carefully considered that this method is most appropriate for the intended purpose.

The relationship between Arbitration and IPR

Settling Intellectual Property disputes through the procedure of Alternate Dispute Resolution was far in the turn of events, the arbitration of disputes particularly; institutional arbitration has gotten significant importance in India's developing segments with regards to progression and globalization. Intellectual Property Rights are as solid as could be expected under the circumstances. For this situation, arbitration, as a private and secret procedure, is progressively used to determine disputes including IPR, particularly when the parties originate from various scenarios. Institutional arbitration is a procedure that doesn't establish "basic" or arbitrarily chose by the parties to a dispute in a commonly settled upon or co-picked by the courts but is decided by a panel of the tribunal that is deliberately chosen for different fields, and should follow methodology, remembering for regard of the accounts, imposed by the institution.[7] Every one of these areas are getting progressively obvious in international trade, where material laws fluctuate from nation to nation and join a significant level of aptitude in the domain involved. As a general rule, given the way that licenses are constrained, and innovation can rapidly vanish, which is the reason the period of time taken by the courts to determine disputes, the degree of the grievance is

[6] Henry Schein, Inc., et al. v. Archer & White Sales, Inc., 586 U.S. (2019).

[7] Kartik Tyagi, *Arbitration and IPR,* LEGAL SERVICES INDIA (Jan 6, 2021, 08:00 PM), http://www.legalserviceindia.com/legal/article-360-arbitration-and-intellectual-property-rights.html#:~:text=Relation%20Between%20Arbitration%20And%20IPR&text=It%20is%20the%20arbitration%20of,that%20exist%20to%20enforce%20them.

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in opposition to the interests of the parties. Arbitration hence gives these segments the most significant advantages to them. The greatest obstruction to the utilization of arbitration to determine IPR disputes is the issue of its case resolution. Intellectual Property Rights are all inclusive and get essentially from the legal assurance standing to the purview of the local authority, which gives the holder certain restrictive rights to exercise and endeavor the rights. It is concluded that disputes regarding his operator, the authenticity and degree of the rights presented should just be controlled by the ward that has conceded the privilege or in specific cases the courts to be caught. This brought about IP rights and lawful issues emerging out of those rights couldn't be controlled or considered by the arbitration tribunals. Be that as it may, as parties go into programs identifying with the turn of events, use, showcasing or move of IP-conceded rights, disputes emerging out of such business game plans might be settled without contest emerging out of its arbitration disputes. Such issues are commonly viewed as the selling matter of internal parties and are the courts.[8]

Why is arbitration used as a mechanism to solve the dispute in Intellectual Property Rights Conflicts?

The Supreme Court of the United States has taken into consideration this question a few times, with answers relying upon explicit conditions. In AT&T Technologies Inc. v. Communication Workers of America[9]The court decided that the dispute of whether the parties consented to arbitration ought to be chosen by the court, not the arbitrator, except if the parties were in any case furnished with sensible uncertainty. Granite Rock Co. International Brotherhood of Teamstersreached[10] brings about comparable outcomes. The court may arrange a discretion of a specific case where the respective court is satisfied that the parties have consented to arbitrate and frame an arbitration agreement. Yet, in Rent A Center West v. Jackson[11]The court said that the appointed authorities chose the subject of to what extent a specific issue was under dispute was settled since the parties accommodated the unmistakable and unambiguous nature of the choice

[8] Heleigh Bostwick, *IPR disputes*, LEGALZOOM (Jan 8, 2021, 01:00 PM), https://www.legalzoom.com/articles/top-5-intellectual-property-disputes.
[9] AT&T Technologies, Inc. v. CWA, 475 U.S. 643 (1986).
[10] Granite Rock Co. v. International Brotherhood of Teamstersreached, 561 U.S. 287 (2010).
[11] Rent-A-Center, West, Inc. v. Jackson, 561 U.S. 63 (2010).

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and the legitimacy of the consent to determine such issues has been legitimately tested. IP arbitration is uncommon in light of the fact that, inter alia, IP disputes frequently don't include previous legally binding connections. Arbitration anyway requires a legally binding consent to arbitrate. Moreover, a few states don't permit arbitral courts to settle on patent performance undeniably frequently demonstrated as a barrier to an activity brought under a license agreement; these disputes are regularly dismissed in court. Such disputes are regularly joined by open approach on numerous fronts despite the fact that the particular limitations of open arrangement utilized may restrict the arbitration of Intellectual Property Disputes in specific nations. Accordingly, the explanations behind irreconcilable situations in IP disputes are extremely little and ought to not keep parties from comprehending and arranging ahead of time how protected IP arbitration can be successfully composed and what components ought to be considered in this structure.

Legal Position on the Arbitrability of IPR Disputes

The first run through the Indian courts have tended to the concern of legal position on the arbitrability of IPR disputes in India is in Booz Allen & Hamilton Inc. v SBI Home Finance Ltd. (2011)[12] in which the Supreme Court of India gave a structure called the "Booz Allen Framework" for the arbitration of any dispute. It contends that, if the disputes depend on the assertion of rights in personam[13]It is equipped for arbitration. Else, it isn't. It further held: “Every civil or commercial dispute, either contractual or non-contractual, and which can be decided by a court, is in principle capable of being adjudicated and resolved by arbitration unless it is excluded either expressly or by necessary implication. Though the arbitrability of IPR disputes was not in issue, the Supreme Court notwithstanding disputes of patent, trademarks and copyright in class of generally non-arbitrable disputes. Since the inquiry was not an issue of the case, it is contended that the above end was an obiter dicta[14] and not ratio decidendi”[15].

[12]Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd. & Ors., AIR 2011 SC 2507.

[13] The judgement in personem is in form, as well as substance, between the parties claiming the right; and that it is so inter parties appears by the record itself.

[14] A judge's expression of opinion uttered in court or in a written judgement, but not essential to the decision and therefore not legally binding as a precedent.

[15] The rule of law on which a judicial decision is based.

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Mundipharma AG Vs. Wockhardt Ltd.[16]Delhi High Court has held that where copyright in any work is encroached, remedies in the form of injunction damages, accounts and in any case as could conceivably be given by law infringing upon that right, will not be arbitrable. In IPRS v. Entertainment Network[17], the Bombay High Court put aside that award wherein a contestant decided the legitimateness of the copyright enlistment of one of the parties. Afterward, in Vikas Sales Corp.[18], the Supreme Court decided that these rights could be included for the meaning of a movable property and are rights in rem. This essential presumption will make the Booz Allen Framework infer that all IPR disputes are arbitrable. However, in the case known as Eros v. Telemax[19] (which has been followed in numerous resulting cases), the Bombay High Court permitted arbitration of IPR disputes allowed by the parties. It is to be noticed that in spite of the fact that Booz Allen Framework given to arbitration of both 'legally binding just as non-authoritative questions, of business/common nature or those which are not banished by express or inferred arrangement,' yet for this situation, the HC included a qualifier 'authoritative' for arbitration of IPR disputes, accordingly negating the Supreme Court's position. These choices show that the appointed authority neglected to give an unmistakable legitimate adjudication on the issue. Going to the lawful status of India, section 2 (3) of the Arbitration and Reconciliation Act, 1996[20] gives: This Part shall not affect any other law for the time being in force by virtue of which certain disputes may not be submitted to arbitration.' Since Indian law (counting IPR laws) doesn't give any finite rundown of which disputes can be denied and which ones are not, it is dependent upon the courts to choose the issue, giving the courts reasonable power of adjudication. Various courts render clashing decisions or render comparable decisions for various reasons, in this way rendering the law ambiguous as well as of clashing assessments. Parliament may enact the sections of the Arbitration and Reconciliation Act, 1996 to include a statement that may explain matters that can't be arbitrated and that can be arbitrated. Those contractual disputes in nature and emerging from understandings between the parties when one of the gatherings has a substantial IPR on the topic ought to be announced as certain. Furthermore, the legislature must determine the issues where an arbitral tribunal can move an award: the legitimacy of IPR, IPR proprietorship or some

[16]Mundipharma AG v. Wockhardt Ltd., (1991) ILR 1 Delhi 606.
[17] Indian Performing Rights Society v. Entertainment Networks, 2016 SCC OnLine Bom 5893.
[18] Vikas Sales Corp. and Anr. V. Commissioner of Commercial Taxes and Anr., (1996) 134 CTR 0152.
[19] Eros International Media Limited v. Telemax Links India Pvt. Ltd. and Ors., 2016 (6) Bom CR 321.
[20] Arbitration and Conciliation Act 1996, No.26, Acts of Parliament, 1996.

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other lawful freedoms, and so on to an outsider in the arbitration agreement. One route is to change different IPR rules to give uncertain clashes. For instance, section 62 of the Copyright Act, 1957[21], which engages civil courts can be amended by including that IPR disputes emerging out of an agreement between the parties, one of whom has substantial IPR ownership can be settled by an arbitral tribunal. In particular, the way that those regions where the court was unable to obtain the award will be plainly expressed. Obviously, the Indian courts have not had the option to see away from as followed in the matter of arbitration of IPR questions. As referred above, various courts render various decisions or give comparable decisions for various reasons. This makes the law appealing according to men in business. This prompts superfluous clashes and deferrals. It requires some investment for the lawmaking body to think of a lot of changes that totally settle the issue and expel the case from the first. It would not just lead to quicker goals of questions in the 2.6 trillion-market analyst however it would likewise spare significant time for a troubled legal executive.

Case laws

- Hon'ble Supreme Court of India in Ayyasamy v. A. Paramasivam[22], while tending to the fundamental concern before it which was arbitrability of fraud, opined that patents, trademarks and copyrights were disputes of non-arbitrable in nature. Be that as it may, the opinion can't be supposed to be an authority in the arbitrability of IP disputes, since it was just a court opinion. Along these lines, it very well may be said that the issue alluded to as far as IP disputes resolution isn't totally settled in this choice.

- The High Court of Delhi in Mundipharma AG v. Wockhardt Ltd.[23], inferred that if the copyrights were encroached, the cures as the remedies in the form of punishment, damages, accounts in any case as given by the Copyright law, can't involve litigation. This end additionally follows from the rule that contentions of rights despite everything stay uncertain.

[21] The Copyright Act, 1957, No.14, Acts of Parliament, 1957.
[22] Ayyasamy v. A. Paramasivam, *(2016) 10 SCC 386.*
[23] Mundipharma AG v. Wockhardt Ltd., (1991) ILR 1 Delhi 606.

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- Honorable High Court of Delhi in the Ministry of Sound International Ltd. v. Indus Renaissance Partners[24], held that IPR disputes could be settled in light of the fact that there are no thorough cutoff points on arbitration including inquiries with respect to IPR and the more extensive way to deal with arbitration were acknowledged by the Hon'ble court. Be that as it may, the genuine network that prompted this holding was that the administering law was English (whereby no understanding could be settled upon) and the arbitration provision was wide enough to cover any dispute emerging from the agreement between the parties. Furthermore, the Hon'ble court allowed the application recorded under section 8 of the Arbitration and Conciliation Act, 1996 and therefore dismissed the suit and expanded the interim directive period accommodated under section 9 of the Act.

- The Hon'ble High Court of Bombay in Steel Authority of India Ltd. v. SKS Ispat and Power Ltd.[25]defendants made an application in an encroachment suit recorded by the plaintiff party. Here the plaintiff had permanent injunction against the defendants from encroaching the plaintiff's enlisted trademark. The plaintiff likewise looked for some damages. An application under section 8 of the Act documented by the plaintiff depending on an agreement of arbitration went into between the parties to the issue. The application was dismissed by the court asserting that the suit was encroaching and had passed and showed up without rights the trademark and related cures which are matters in rem and not personam, and along these lines, the matter is not arbitrable.

- Bombay High Court in Eros International Media Limited v. Telemax Links India Pvt. Ltd.[26],is confronting a claim wherein a criminal complaint against the respondent documented by Eros International. The respondent (Telemax) documented a case under section 8 of the Act, expressing that as the disputes are in contract and the parties have consented to resolve them through arbitration. In any case, in spite of respondent's submission, the Hon'ble court presumed that in case of commercial disputes issues and the parties have chosen to move these disputes from that agreement to a private forum, there is no doubt of such dispute being non arbitrable. Such activities

[24] Ministry of Sound International Ltd. v. Indus Renaissance Partners, 156 (2009) DLT 406.

[25] Steel Authority of India Ltd. v. SKS Ispat and Power Ltd., Notice of Motion (L) No. 2097 of 2014 in Suit No. 673 of 2014, decided on 21st November 2014.

[26] Bombay High Court in Eros International Media Limited v. Telemax Links India Pvt. Ltd. also, Ors., 2016 (6) Bom CR 321.

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are constantly done in personam, one party looking for specific relief from a particular party, not against the world at large.

• The Hon'ble High Court of Bombay, in Indian Performing Right Society Limited (IPRS) v. The Entertainment Network[27], talked about the perspectives taken by Eros International just as the Steel Authority of India forced and distinguished the judgment in Eros' Case, while deciding a petition under section 34 of the Act putting aside the award. The Bench noticed that the arbitral award being referred to held that the respondent party didn't enjoy copyright in the basic works since they were practically indistinguishable from the sound recording and in this manner the respondent party was not obliged to acquire a permit from the claimant to broadcast the recording. This decision of the arbitrator read the respondent as well as would be an affirmation of the respondent's status around the world. As needs be, the arbitral award was put aside that relief of that sort with regards to right in rem[28] cannot be provided through arbitration.

• Madras High Court in Livesyle Equities CV v. QD Seatoman Designs Pvt. Ltd.[29],the court noticed the choices of the Delhi High Court and the Bombay High Court alluded to above and numerous different decisions and presumed that related issue 'better utilization of copyright' emerging out of the agreement between the parties (at the end of the day a counter-copyright guarantee for the items created during the contract) and the legitimateness or enlistment of the copyright (which will stay inside the area of the lawful specialists under copyright law or the court). It was additionally noticed that one Judge decided that the discoveries were a smart thought and ought to be at long last administered by an arbitral tribunal. In view of this position, the Bench inferred that disputes could be alluded to arbitration however the issue of arbitration would be available to judgment before an arbitral tribunal.

Conclusion

[27] Indian Performing Right Society Limited (IPRS) v. The Entertainment Network, a decision dated 31 August 2016, in Arbitration Petition No 341 of 2012.
[28] A judgment in rem is an adjudication, pronounced upon the status of some particular subject-matter, by a tribunal having competent authority for that purpose.
[29] Madras High Court in Livesyle Equities CV v. QD Seatoman Designs Pvt. Ltd., with a resolution of 13 October 2017 in O.S.A. Nos.216 and 249 of 2017.

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At the international level dispute resolution of IPR disputes is going on with a great pace due to the extensive support of International organizations like WIPO. Arbitration of IPR disputes is also supported by many countries like the U.S. to expedite the business disputes resolution process. Taking into account the above mentioned, it is reasoned that IP disputes on the off chance that they influence rights in personam viz. contractual rights for example breach of privacy agreement or IP encroachment and so forth., would be arbitrable; and if disputes influence rights in rem, authorization of IP rights, and so forth., the equivalent may not be arbitrable. Nonetheless, this end/preliminary would be firmly reliant on the realities and conditions of each case. The process of IPR dispute resolution through arbitration has a confusing status in India. There are contradictory opinions of several High Courts and the Hon'ble Supreme Court, even sometimes SC itself gives contradictory judgments on the status of arbitrability of IPR disputes. Now it's the time for SC to give a landmark judgment on arbitrability of IPR disputes to get rid of this confusion. It is also the time for the legislature to make changes to the Arbitration and Conciliation act, 1996[30] to allow the arbitration of IPR disputes in India.

[30] Supra.