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**METHOD OF ADR IN RESOLUTION OF INTELLECTUAL PROPERTY  
DISPUTE**- Sreejan Pankaj<sup>1</sup>**ABSTRACT**

With the existence of people in society and their interaction with each other, occurrence of dispute is natural. The practice of resolution of dispute and harmonious existence is the aim of the society. The practice of Alternate Dispute Resolution is based on the general principle of adjudication of dispute by a neutral third party without a trial. Advantages of ADR include inexpensive process, flexibility in approach, autonomy of parties, expertise and confidentiality. Intellectual Property plays an important role in global trade and economic progress of a nation. Though IP is an exclusive right these only exists for a certain period of time. For maximum commercial exploitation of the IP it is necessary that any dispute be quickly resolved before the rights against it ceases to exist. The national laws relating to arbitability of the subject matter of IP differ from nation to nation. Infringement of rights, licensing agreement, assignment, breach of confidentiality etc. is some of the matter that fall in the arbitable jurisdiction. In this review we shall briefly discuss about the scope of arbitability of Intellectual property disputes and what are the various international and national provisions regulating these alternative dispute resolution mechanisms. Further we shall analyze effectiveness of ADR in IP disputes and what are pitfalls to avoid while adjudicating upon the subject matter.

**Keywords:** *Alternate Dispute Resolution, Intellectual Property, Arbitration, Litigation, Negotiation*

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## **INTRODUCTION**

INTELLECTUAL PROPERTY IS TRADE OF KNOWLEDGE AND ASSOCIATED INDUSTRIAL PROPERTY. DUE TO INCREASE IN NUMBER OF TRANSACTION AND CROSS BORDER TRADE THERE IS A GROWTH IN INTELLECTUAL PROPERTY DISPUTE GLOBALLY. SWIFT TECHNOLOGICAL INNOVATION AND ITS CONVERGENCE WITH ISSUES OF CLIMATE CHANGE, ENVIRONMENT PROTECTION, BIODIVERSITY PRESERVATION, DRUG DEVELOPMENT, ACQUISITION AND DEVELOPMENT OF TRADITIONAL KNOWLEDGE AND TRADITIONAL CULTURAL EXPRESSION ARE SOME OF THE MAJOR EMERGING DOMAINS IN IP DISPUTES. DUE TO THE PANDEMIC THE GLOBAL TRADE WITNESSED AN ECONOMIC SLOWDOWN WHICH HAS MOTIVATED THE INDUSTRY TO LOOK FOR AN ALTERNATE, EFFICIENT AND SWIFT DISPUTE RESOLUTION MECHANISMS RATHER THAN OPTING FOR LENGTHY AND EXPENSIVE TRADITIONAL LITIGATION. ADR SEEMS TO BE AN INCENTIVE IN THIS GLOBAL DOWNTURN AND EXTREME BUSINESS ENVIRONMENT.

The institution of ADR is based on the mechanism where parties to a dispute mutually agree to refer it to a neutral third party to provide for a resolution outside the court. The neutral member can be from any jurisdiction, qualified on the subject matter and not actively involved with the disputed parties. The perks of adopting ADR includes economizing the resources and time, control of the parties, promote and maintain trade relation, and secure confidentiality. The single processes offer edge to the global trade organization by maintain neutrality and counsel of an expert on the subject matter.

There has been a rise in Intellectual Property disputes in India specially since the economy is going digital. Commerce is truth of life and everyone wants speedy service from fast delivery to instantaneous resolution of dispute. The intergovernmental organization are adopting and promoting diverse mechanism for adjudication of dispute. WTO has adopted a dispute resolution system where different governments can approach the forum to settle inter-nation disputes through consultation without disrupting the global trade. WIPO has initiated Uniform Domain Name Dispute Resolution Policy (UDRP) and related policies for resolution of disputes related to domain name.

### **Constitutionality of ADR**

“A new tool develops to resolve the conflict between the parties and that is alternative dispute

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resolution mechanism they are various form of alternative dispute resolution like arbitration, conciliation, mediation, negotiation LokAdalat. Alternative dispute resolution mechanism is cost effective and provide speedy justice to the disputed parties it is as efficient as the litigation. ADR is not a new concept, it was travelling from ancient time. Panchayat or village assembly and existed in ancient India as self-governing institution which had distinct and well defined function. It represents not on the collective will, but also the collective wisdom of the entire ruler community. Village panchayat based on the principle of "PanchParmeshwar" of Gram Panchayat"<sup>2</sup>.

As per the latest statistics published by the Supreme Court of India on 2<sup>nd</sup> march 2022 there are total 70,154 cases pending alone in the apex court. Out of these almost 14000 cases are those which have not even been listed for hearing. The numbers septuplets when we reach high courts on the nation. The constitution of India imposes the duty on the state to work for the welfare of the nation and its people. One of the objective of welfare state is that it must provide for protection of legal right and equal access to justice without any discrimination. In order to do so the state is to setup various judicial and non-judicial dispute resolution mechanism for an efficient and speedy justice delivery system. But it's evident from the statistic that the goal of access to justice is a farfetched dream.

The preamble talks about the idea of the Constitution. In here the ideals of justice has been explained. It's not limited to the idea of legal justice but also includes social and economic justice. Justice delivery system includes district courts, family court, consumer forums, tribunals, mediation centers, arbitration institutions etc. All these systems are distinguishable form of alternate dispute resolution mechanism. Article 21 of the constitution states that "No person shall be deprived of his life or personal liberty except according to procedure established by law"<sup>3</sup>. The Supreme Court in the case of "*HussainaraKhatoon v State of Bihar*"<sup>4</sup> has explained that right to life and personal and liberty includes right to speedy trial.

Directive principles of state policy, "Article 39A of the Constitution gives the poor and destitute the right to legal aid and justice, which, in a country like India, is obligatory since a large part of the population does not have proper means to fight year-long cases and hire efficient

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<sup>2</sup> ADR and The Objective of Constitution of India at <https://viamediationcentre.org/readnews/MjMx/ADR-the-objective-of-constitution-of-India> (Visited on 07 April 2022).

<sup>3</sup> Constitution of India 1950.

<sup>4</sup>(1980) 1 SCC 98.

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lawyers”<sup>5</sup>. The article casts a duty on the state to make provision to ensure access of justice without any discrimination.

The concept of ADR has been adopted in India since 19<sup>th</sup> century. The first legislation was passed by British Raj in 1899 and later replaced in the 1940 by new and revised arbitration rules. These legislations promoted arbitration as an alternative to litigation. After the independence several legislations were passed and incorporated to encourage people to adopt arbitration as an alternate dispute resolution mechanism. The Chief justice of India N. V. Ramana has highlighted the unscrupulous litigation practices which has led to overburden of judicial and administrative case. “He added that given the growing scope of mediation, the time has come for India to push mediation in a mission mode. He advocated launching a movement to popularize mediation as a cheaper and faster dispute resolution mechanism”<sup>6</sup>.

- THE ARBITRATION AND CONCILIATION ACT, 1996  
THE ACT WAS DRAFTED ON THE BASIS OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL) MODEL LAW. THE ACT DEALS WITH PROVISIONS FOR GOVERNING COMMERCIAL ARBITRATION AT NATIONAL AND INTERNATIONAL STAGE AND CONCILIATION. IT ALSO DEALS WITH ENFORCEMENT OF NATIONAL AND FOREIGN ARBITRAL AWARDS.
- CIVIL PROCEDURE CODE, 1908  
SECTION 89 SETTLEMENT OF DISPUTE OUTSIDE THE COURT WAS ADDED BY THE CODE OF CIVIL PROCEDURE (AMENDMENT) ACT, 1999. IT EMPOWERS THE COURT TO FORMULATE OUT OF COURT SETTLEMENT BY ARBITRATION, CONCILIATION, LOKADALAT (JUDICIAL SETTLEMENT) OR MEDIATION PROVIDED THAT THE PARTIES TO DISPUTE HAVE PREVIOUSLY AGREED THE TERMS OF SETTLEMENT.

## Industrial Dispute Act, 1947

<sup>5</sup> Zara Suhail Ahmed, HussainaraKhatoon v State of Bihar- Case Analysis at [https://lawcorner.in/hussainara-khatoon-v-state-of-bihar/#\\_ftn2](https://lawcorner.in/hussainara-khatoon-v-state-of-bihar/#_ftn2) (Visited on 07 April 2022).

<sup>6</sup> CJI NV Ramana bats for mediation to curb pendency of cases at <https://www.newindianexpress.com/thesundaystandard/2021/jul/18/cjinv-ramana-bats-for-mediation-to-curb-pendency-of-cases-2331677.html> (Visited on 07 April 2022).

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“CONCILIATION HAS BEEN ACCEPTED BY LAW AS AN EFFECTIVE METHOD FOR RESOLVING DISPUTES IN RELATION TO DISPUTES BETWEEN EMPLOYEES AND MANAGEMENT. THE INDUSTRIAL DISPUTE ACT, 1947 CALLS FOR CONCILIATION AS WELL AS ARBITRATION FOR DISPUTE SETTLEMENT PURPOSES”<sup>7</sup>.

### Advantages and Limitation of ADR

“A business contract is the foundation of a commercial relationship and also sets the guiding principles for operations. Yet, commercial relationships often run into choppy waters. In recent times, **Alternate Dispute Resolution** (ADR) mechanisms have found favor in the commercial-legal ecosystem to adjudicate on grievances in commercial relationships. **Arbitration** has emerged as the preferred mode of ADR”<sup>8</sup>. There has been an increase in disputes related to IP in the corporate sector which has recognized the advantages of ADR.

- **Cost Effective:** Resolution of disputes through litigation is a tedious and lengthy process hence costlier. IP rights exist for a limited period hence ADR serves the purpose.
- **Autonomy of Parties:** Parties to a dispute can decide the manner in which their dispute is to be resolved. They can narrow down the IP issues and iron out an agreement for settlement.
- **Quick and Effective:** Where on average a traditional litigation takes 3 to 6 years to reach its verdict, the Act makes it mandatory to complete the arbitration in 12 months and pass an arbitral award.
- **Expertise:** The parties can bring in arbitrators who are subject matter experts and have technical qualifications related to Intellectual Property to understand the point of controversy. Whereas the expertise of judges in a litigation is mostly limited to procedural knowhow.
- **Rules of Evidence and Procedure:** The verbose provisions of evidence and procedure do not apply to ADR mechanisms. Especially in case of international arbitration where these procedures are not uniform. IP disputes on matters related to global patent litigation where parallel litigation can result into conflicting results.

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<sup>7</sup> Priscilla Rodrigues, Legal and Constitutional Provision Regarding ADR at <https://blog.ipleaders.in/legal-constitutional-provisions-regarding-adr/> (Visited on 07 April 2022).

<sup>8</sup> [BIG OR SMALL BUSINESS, WHY AN ARBITRATION CLAUSE IN YOUR CONTRACT CAN BE BENEFICIAL AT  
HTTPS://ECONOMICTIMES.INDIATIMES.COM/SMALL-BIZ/LEGAL/BIG-OR-SMALL-BUSINESS-WHY-AN-  
ARBITRATION-CLAUSE-IN-YOUR-CONTRACT-CAN-BE-BENEFICIAL/ARTICLESHOW/81908642.CMS?FROM=MDR](https://ECONOMICTIMES.INDIATIMES.COM/SMALL-BIZ/LEGAL/BIG-OR-SMALL-BUSINESS-WHY-AN-ARBITRATION-CLAUSE-IN-YOUR-CONTRACT-CAN-BE-BENEFICIAL/ARTICLESHOW/81908642.CMS?FROM=MDR)  
(VISITED ON 07 APRIL 2022).

- Confidentiality: ADR not only assist in quickly furthering the interest of the but at the same time it also protects the interest of the parties. In IP disputes related to Trade Secret, patent, design etc. there is huge insistence on secrecy and confidentiality of subject matter.

But it would be callous to say that ADR is a perfect and faultless. Though it has numerous advantages there exists certain limitations in the structure.

- Non- Cooperation: The exercise of ADR is completely a cooperation based action. Sometimes party walk out of the process, which leads to its failure.
- Anticipation: It is difficult to anticipate what kind of dispute and what mode would be better suited to resolve it. What will be the language of proceeding, chair of arbitration, number of arbitrator etc. is tedious task to figure out.
- Enforceability of Award: even though the whole process is resolved quickly one still has to approach the court which can delay the process. Certain nations have the provision of appeal if not satisfied by the award.

### International Forum

ADR as a method of for reconciliation of disputes has been prevalent in the International public law domain. Especially intra-governmental disputes related to territory dispute, extradition, trade etc. One such instance is the Italian Marines case which strained the relation between India and Italy. The case was finally settled by Permanent Court of Arbitration (PCA) in Hague in 2020 and it ordered to pay compensation for loss of life and damages suffered.

“The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), better known as the New York Convention, is one of the most important United Nations treaties in the area of international trade law and the cornerstone of the international arbitration system”<sup>9</sup>. *United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, 1976* provided for a model policy on arbitration which was based on the recommendations of the New York Convention. “The UNCITRAL Arbitration Rules provide a comprehensive set of procedural rules upon which parties may agree for the conduct of arbitral proceedings arising out of their commercial relationship and are widely used in ad hoc arbitrations as well as administered arbitrations. The Rules cover all aspects of the arbitral process, providing a model arbitration clause, setting out procedural rules regarding the appointment of arbitrators and the conduct of arbitral proceedings, and establishing rules in

<sup>9</sup> International Commercial Arbitration at <https://uncitral.un.org/en/texts/arbitration> (Visited on 07 April 2022).  
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relation to the form, effect and interpretation of the award”<sup>10</sup>.

“The World Intellectual Property Organization (“WIPO”) offers specialized procedures at the WIPO Arbitration and Mediation Center focused on technology and IP disputes. The WIPO Arbitration and Mediation Center was established in 1994 in Geneva, with the idea of offering an option for the resolution of international commercial disputes between private parties specifically tailored to IP disputes. WIPO has its own set of procedural rules, the WIPO Arbitration Rules, the WIPO Expedited Arbitration Rules, and the WIPO Mediation Rules, the most recent version effective as of 1 January 2020”<sup>11</sup>.

“Certain international arbitration institutions also provide for a specifically-designated panels of arbitrators specialized in IP disputes: Example- WIPO Neutrals, HKIAC Panel of Arbitrators for Intellectual Property Disputes, CPR Panels of Distinguished Neutrals and SIAC’s Panel of Arbitrators for Intellectual Property Disputes”<sup>12</sup>. “In December 1999, the WIPO Arbitration and Mediation Center began offering domain name dispute resolution services under the Uniform Domain Name Dispute Resolution Policy (UDRP)”<sup>13</sup>. UDRP is legal framework to swift resolution of disputes relating to abuse of registration and use of an Internet domain name in the generic top level domains.

### Judicial Approach in India

**THE ARBITRATION AND CONCILIATION ACT, 1996 DOES NOT CONTAIN ANY SPECIFIC PROVISION OR CHAPTERS RELATED TO RESOLUTION OF IP DISPUTES. PATENT ACT, 1970, TRADE MARK ACT, 1999, COPYRIGHT ACT, 1957 AND OTHER SIMILAR IP LEGISLATIONS DO NOT CONTAIN ANY GUIDANCE ON THE ARBITABILITY OF THE SUCH DISPUTES. THE COURTS HAVE PLAYED A VERY IMPORTANT ROLE IN LAYING DOWN PRECEDENTS ON WHAT SUBJECT MATTER OF INTELLECTUAL PROPERTY DISPUTES ARE ARBITABLE IN NATURE.**

In the case of *ShreeVardhman Rice & Gen Mills v. Amar Singh Chawalwala*<sup>14</sup> the Supreme court highlighted the need for expeditious resolution of the disputes relating to Intellectual

<sup>10</sup> UNICITRAL Arbitration Rules at

<https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration#:~:text=The%20UNCITRAL%20Arbitration%20Rules%20provide,as%20well%20as%20administered%20arbitrations> (Visited on 07 April 2022).

<sup>11</sup> International Arbitration and Intellectual Property (IP) Disputes at <https://www.acerislaw.com/international-arbitration-and-intellectual-property-ip-disputes/#:~:text=Accordingly%2C%20international%20arbitration%2C%20as%20a,or%20parties%20from%20multiple%20jurisdictions>. (Visited on 07 April 2022).

<sup>12</sup> Id.

<sup>13</sup> Domain Name Dispute Resolution Service for Generic Top-Level Domains at <https://www.wipo.int/amc/en/domains/gtld/> (Visited on 07 April 2022).

<sup>14</sup> (2009)10 SCC 257.

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Property. “Without going into the merits of the controversy, we are of the opinion that the matters relating to trademarks, copyrights and patents should be finally decided expeditiously by the Trial Court instead of merely granting or refusing to grant injunction. In the matters of trademarks, copyrights and patents, litigation is mainly fought between the parties about the temporary injunction and that goes on for years and years and the result is that the suit is hardly decided finally. This is not proper...In our opinion, in matters relating to trademarks, copyright and patents, the proviso to Order XVII Rule 1(2) C.P.C. should be strictly complied with by all the Courts, and the hearing of the suit in such matters should proceed on a day to day basis and the final judgment should be given normally within four months from the date of the filing of the suit”<sup>15</sup>.

**THE SUPREME COURT IN *BOOZ ALLEN AND HAMILTON INC. V. SBI HOME FINANCE LTD.*<sup>16</sup> EXPLAINED WHAT KIND DISPUTES ARE ARBITABLE IN NATURE. THE COURT CLARIFIED THAT ONLY DISPUTES CONCERNING RIGHT IN PERSONAM ARE ARBITABLE IN NATURE BECAUSE THE PARTIES HAVE AGREED FOR AN AMICABLE RESOLUTION AND ALLOWED THE ARBITRATOR TO ADJUDICATE ON IT. HOWEVER, ANY DISPUTE RELATING TO RIGHT IN REM CANNOT BE REFERRED TO ARBITRATION AS IT’S A RIGHT AGAINST PUBLIC AT LARGE AND WHO HAVE NOT AGREED TO ADJUDICATION BY THE ARBITRATOR.**

In the case of *Eros International Media Ltd. v. Telemax Links India (P) Ltd.*<sup>17</sup> the Bombay High court said that disputes relating to Intellectual property are arbitable in nature. The same year in the case of *Indian Performing Right Society Ltd. v. Entertainment Network (India) Ltd*<sup>18</sup> the court while explaining the distinction between right in personam and right in rem as subject matter of an Intellectual property dispute said that validity of an IP cannot be adjudicated by arbitration. The court said that the licensing of any IP will fall within domain of right in rem. The Madras High Court in the case of *Lifestyle Equities CV v. QDSeatoman Designs (P) Ltd*<sup>19</sup> propounded the new concept of ‘judgement in rem’ and ‘judgement in personam’ while deciding on the arbitability of IP dispute. “A judgment in personam refers to a judgment against a person and a judgment in rem refers to a judgment against a thing, right or status or condition of property”<sup>20</sup>

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<sup>15</sup> Id.

<sup>16</sup> (2011) 5 SCC 532.

<sup>17</sup> 2016 SCC OnLineBom 2179.

<sup>18</sup> 2016 SCC OnLineBom 5893.

<sup>19</sup> 2017 SCC OnLine Mad 7055.

<sup>20</sup> Id.

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- **The Dovetail Test of Non- Arbitability**

The Supreme Court in the case of *VidyaDrolia & Ors. Vs. Durga Trading Corporation*<sup>21</sup> has formulated a 4 step test named “The Dovetail Test” to decide on the arbitability of a dispute. “Any dispute shall be non-arbitable if the cause of action and/or subject matter of the dispute is:

- i. relates to actions *in rem*, that do not pertain to subordinate rights *in personam* that arise from rights *in rem*.
- ii. affects third party rights; have *erga omnes* (towards all) effect; require centralized adjudication, and mutual adjudication would not be appropriate and enforceable.
- iii. relate to the inalienable sovereign and public functions of the State and, hence, mutual adjudication would be unenforceable; and
- iv. is expressly or by necessary implication non-arbitable as per mandatory statutes”<sup>22</sup>.

“The SC clarified that although these tests are not ‘watertight compartments’ they ‘dovetail and overlap’ and when applied pragmatically and holistically it would be of great help to determine when a particular subject would be arbitable or not under the Indian law”<sup>23</sup>.

### **Right in Rem and Right in Persona**

“A Latin term meaning “against a person.” An *in personam* proceeding decides the personal rights and interests of the parties named in the action. For example, a plaintiff may bring an *in personam* action against a defendant for breach of a contract. An *in personam* proceeding is distinct from an *in rem* proceeding, which decides the rights to a piece of property for every potential rights holder, even potential rights holders not named in the lawsuit”<sup>24</sup>.

### **Applicability of ADR in IP**

- Patent: It is a monopoly right granted to an inventor for his new and innovative creation. Disputes relating to licensing of patent or infringement of patent is arbitable but disputes relating to validity of patent shall avail for administrative remedy.

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<sup>21</sup> (2022) 2 SCC 1.

<sup>22</sup> Deepak Deshmukh, Soumya Gulati, Swati Singh, Arbitrability of IP Disputes: Examining Rights *In Rem* and Rights *In Personam* at <http://naiknaik.com/arbitrability-of-ip-disputes-examining-rights-in-rem-and-rights-in-personam.html> (Visited on 07 April 2022).

<sup>23</sup> Id.

<sup>24</sup> Thomson Reuters Practical Law at [https://uk.practicallaw.thomsonreuters.com/w-016-8614?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/w-016-8614?transitionType=Default&contextData=(sc.Default)&firstPage=true) (Visited on 07 April 2022).

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- Copyright: It is legal right given to the author for his artistic or literary work. “Copyright disputes typically include all copyright-related contractual infringements and copyright-related contractual arrangements, such as, for instance, software licensing”<sup>25</sup>.
- Trade Mark: It consists of sign or symbol for identifying any good or services. Assignments, licensing, franchising and distribution agreements can be the essence of a Trademark dispute arising out of contract with arbitration clause signed by the parties.
- Trade Secret: It is a practice or process which is not generally known and provide for a competitive advantage to a company over its competitors. Here arbitration is preferred mode of adjudication of disputes because of the existence of elements secrecy and confidentiality in the process.
- Geographical Indication: It is an indication by sign or symbol of the origin, quality or reputation possessed by a certain good. GI is a public good belonging to a community or nation. Disputes related to origin of GI and its validity are not arbitable subject matter.

Arbitrability of an Intellectual Property will depend on the nature of the right associated as the subject matter. State policy and public interest are excluded within the domain of adjudication as it concerns public at large.

### Conclusion

The 16<sup>th</sup> President of the United States, Abraham Lincoln, has recurrently advocated in favor of Arbitration, “Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses, and waste of time”. Gradual development of new domain of commercial disputes related to IP has broadened the domain of ADR and its applicability. Regardless of absence of any proper provision authorizing the use of ADR the courts have played a very important role laying precedents on the arbitrability of IP. “Whereas in a dispute where validity or ownership of an IP right is to be determined, it can only be done by the court or assigned public administration, the rationale being that the dispute would result in a judgment affecting the general public’s right to use such IP”<sup>26</sup>.

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<sup>25</sup> International Arbitration and Intellectual Property (IP) Disputes, supra note 10.

<sup>26</sup> Arbitrability of IP Disputes: Examining Rights *In Rem* and Rights *In Personam* supra note 21.

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