



## THE STORY BEHIND CHOOSING A DISPUTE RESOLUTION MECHANISM IN INTELLECTUAL PROPERTY MATTERS

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### ABSTRACT

Choosing an appropriate dispute resolution mechanism is a bewildering task in an Intellectual property matter, as IP law is one of the most technical subjects of law that requires deep investigation into the subject matter of the dispute. In an Intellectual Property dispute before opting for a dispute resolution mechanism, disputing parties predominantly need to analyze the desired outcomes they expect or want, as each dispute resolution has a distinctive way of dealing with a dispute. This research article exemplifies the rationality behind opting for a particular dispute resolution mechanism in Intellectual property matters such as arbitration, mediation, negotiation, early neutral evaluation, litigation, and dispute resolution through World Intellectual Property Organization.

**KEYWORDS:** Intellectual property disputes, Intellectual property rights, Alternate dispute settlement, remedies, mediation, negotiation, arbitration, determinative outcome, confidentiality,

flexibility, Trade secret, Trademark infringement, reputation, Copyright, Domain name dispute, Patent dispute, judicial settlement, Commercial relationship, desired outcome, and commercial agreements.

### Introduction

Today, we are surrounded by the flamboyant world of Intellectual property rights. These rights are publicized by creating them as an asset for the company or in an individual capacity. To own these rights without remedy would be a vain thing to imagine<sup>1</sup>the two being reciprocal terms, the parties while asserting their rights in a commercial relationship of Intellectual property rights not only zoom into the terms of rights and remedy; they seek a determinative outcome which might relate to financial gain, reputation, confidentiality, future dealings, or for maintaining the goodwill of the company.

As it is said a bad compromise is better than a successful lawsuit (*un mauvais arrangement vaut mieux qu'un bon procès*)<sup>2</sup>. This old French adage is very often cited in the scholarly works about dispute resolution irrespective of the field of law, whether in civil procedure law, contract law, or intellectual property law to highlight the attraction of party autonomy over litigation. Additionally, it is a fundamental problem of Intellectual property law that the development of technology is rapid, but the legislative movements are slow. Recently, courts took a step into the digital future this year when a judge accepted a court order served through Instagram. Fox Williams Intellectual property partner Simon Bennett used Instagram to serve notice on

<sup>1</sup> Quote by Holt C.J. in *Ashby V. White* (1703), 2 Ld Ryam at 938, 953

<sup>2</sup> Strauss, Emanuel (1994). *Dictionary of European proverbs* (Volume 2 ed.). Routledge. p. 68



behalf of claimant Holland Cooper<sup>3</sup>. Therefore, for keeping pace in this techno world, barriers such as territorial rights and other jurisdictional issues are also to be investigated before entering into any commercial agreement related to Intellectual property.

Indeed, it may seem that a pragmatic approach while determining appropriate dispute resolution mechanism is a dynamic step but given the constraints, resources, and otherwise, within and without the contemporary justice system<sup>4</sup>, parties are unlikely to succeed in the case. However, the characterization of the term ‘successful’ in an Intellectual property dispute depends upon what outcome the parties are looking for. Like for example in a Trademark Infringement case<sup>5</sup>, where actions for trademark infringement and passing off have resulted in the loss of the claimants' trademarks that were clearly in danger from the outset, while resulting in victory for the claimant in each case on the ground of passing off. This type of victory is worthless for any Trademark Company.

In the light of these circumstances, this article will critically analyze the forms of Intellectual property dispute resolution mechanisms available for Intellectual property and the rationality behind opting a form of dispute resolution mechanism. The rationality can be predicted through analyzing what the disputing party wants? Further as quoted<sup>6</sup>

*“Dispute resolution isn’t like painting by numbers: you have to watch for opportunities, developments and problems that weren’t catered for in your original dispute resolution plan – and be prepared to act swiftly and decisively when they occur”*

In like manner, it necessary to understand the type of dispute resolution mechanism available against an infringing party. Arbitration, mediation, negotiation, early neutral evaluation, litigation, and dispute resolution through World Intellectual Property Organization are the most popular methods of dispute resolution. Thus, the following essay will illustrate various Intellectual Property cases resolved through dispute resolution mechanism and their difficulties concerning their commercial agreement and desired outcomes of the infringing and non-infringing parties.

### 1. Arbitration

An arbitration is defined as an "Uncontrolled decision", the settlement of a question at issue by one to whom the parties agree to refer their claims to obtain an equitable decision. The motivations to pursue alternative dispute resolution are canvassed, drawing upon empirical research relevant to Intellectual property litigation that is (a) the nature of the case/ nature of the dispute; (b) the relationship between the parties/ disputants (c) the relief sought by the plaintiff; (e) the size and complexity of the

<sup>3</sup> Article – Journal Instagram first paves way for online court orders New Law Journal, 20 February 2019, Accessed on 30/03/2019

<sup>4</sup> David Caron, “The World of Intellectual Property and Decision to Arbitrate” (2003) 19 Arbitrator International 441

<sup>5</sup> The Ukulele Orchestra of Great Britain v Clausen & Another) [2015] EWHC 1772 (IPEC)) [

<sup>6</sup> Nancy Neal Yeend and Cathy E. Rincon, “ADR and Intellectual Property: A Prudent Option” (1996) IDEA: The Journal of Law and Technology 601.



claim.<sup>7</sup> (including the amount at stake, the potential costs, and the desired speed of resolution.

Therefore, parties may find themselves best suited for arbitration, because of the desired outcome of having a contractual relationship, occasionally a commercial agreement including terms, prescribing a particular method for resolving disputes under the agreement. The inclusion of such terms is relatively common in connection with licensing agreements involving IP and IT matters.

### 1.1. Confidentiality: Preserving the treasure of the Company

Intellectual property disputes often involve proprietary know-how with respect to a patented invention or a trade secret with other proprietary information. Bring in a lawsuit, at a public court of law against a trade secret infringer presents a risk of losing the confidentiality of that trade secret and its value. What makes trade secrets commercially valuable is the exclusive use of that property. Where the disputed issue is the right of the owners to control possession and use of the property, normal legal remedies such as monetary damages or restitution are inadequate. The Trade secret law has a special intangible nature that requires secrecy and confidentiality of an agreement is best to serve through Arbitration. Taking an example of *perfumes*<sup>8</sup>, fragrance and flavor ingredients are not required to be listed individually being ingredients of a trade

secret in the US. However, a complainant party may claim that the same is not applicable in their jurisdiction. In such kinds of cases, a confidentiality agreement between the parties by agreeing to arbitrate may help to maintain their Trade secret.

Also, in a Trade secret case, one party might want to reveal certain aspects for litigation and the other party does not agree to such disclosure. The same may be mutually agreed upon between the parties in an arbitration. However, in a commercial agreement, the wording of an arbitration agreement is critical. Like for example in an arbitration a question may arise as to the permissible scope of discovery, the issue is to be primarily interpreted by an arbitrator unless it has been specifically agreed upon between the parties. Although parties might have agreed on the terms of confidentiality in certain jurisdiction (federal courts) disagree concerning the ability of arbitrators to subpoena parties for disposition<sup>9</sup>. Therefore, although arbitration has varied advantages of being flexible sometimes in matters relating to Trade Secrets it might lead to exploitation of assets of the Company.

### 1.2- Flexibility: Maintaining place in the market

Parties may also prefer arbitration where the outcome provides a win-win solution, where each party can claim victory and maintain a unique and distinctive perspective on the case. As happened in the case of *IBM-Fujitsu*<sup>10</sup>, this case involved six years of bitter

<sup>7</sup> "Using Process Observation to Teach Alternative Dispute Resolution: Alternatives to Simulation" (1987) 37 *Journal of Legal Education* 46.

<sup>8</sup> The Fair Packaging and labeling Act of US, Title 21, Code of Federal Regulations (CFR), Part 701.3(a).

<sup>9</sup> Nat'l Fire insurance Co. V. Marsh USA 2004 US Dist. LEXIS 12716

<sup>10</sup> IBM V. Fujitsu (1992) 14 (5) *European Intellectual Property Review* 183



conflict over an infringement of Copyright. Wherein IBM granted a license to Fujitsu, the latter company did not admit to copyright infringement. The companies engaged themselves in negotiation which turned to be futile. Ultimately, with the intervention of 2 arbitrators, the matter was settled wherein the arbitrator made no findings on wrongdoing although acknowledged the legitimacy of IBM' claim by way of compensation and assured immunity from claims of copyright violation to the company as well as allowed Fujitsu to use software with certain restrictions.

Thus, both the companies were satisfied, and each side felt justified in claiming that their rights have been recognized and upheld, in a way this sort of outcome helped the company to maintain a healthy and competitive rivalry in the marketplace

Admittedly, arbitration offers numerous measurable advantages over litigation, including cheapness, speed, flexibility, confidentiality, and the binding nature. This is important in the IP cases where parties may elect to fashion a settlement that involves a short term license, a cross-licensing agreement or an agreement about periods or fields for limited use of information or technology, shared royalties, and other solutions that could not be achieved in court<sup>11</sup>. Hence, "*Choice—the opportunity to tailor procedures to business goals and prioritize—is the fundamental advantage of arbitration over litigation.*"<sup>12</sup> and prioritizing by the characterizing of the value of an Intellectual property is a preliminary step before choosing a dispute settlement mechanism.

<sup>11</sup> Los Angeles, Daily Journal Wednesday 17, 2016 Intellectual Property "*Trade secrets troubles are well suited for early mediation – Lisabeth Hasse*

## 2. Mediation and Settlement agreement

Indeed, arbitration is proved to be an effective method of resolution of dispute resolution in IP but sometimes, arbitration leads to a heavy cost burden on the parties, time-consuming, and an unsatisfactory settlement. Mediation might fill in these gaps wherein a neutral third-Party facilitates communication among the parties to a dispute in reaching a mutually acceptable resolution. Similarly, negotiation can be an obvious choice of reaching consensus and to promise to the controversy by not involving the third party and resolving the dispute within the boundaries.

### 2.1 Med- Leg: Mutual understanding and prevention of loss

Issues such as inventorship, obviousness, infringement, conception, and corroboration can be very intricate both factually and legally in a Patent dispute. A mediator with expertise in the applicable law and business can confidentially provide each party with a candid neutral assessment of the strengths and weaknesses of its case. In the world of innovation, Patent disputes embrace paramount importance on time and technicalities. For this purpose, mediation can serve the purpose of the parties

Considering a situation wherein the owner of several patents wants to sell its business related to the patents to a buyer, but a pending patent infringement lawsuit between the patent owner and a third party concerning one of the patents became an obstacle. The third party had staked its future on using

<sup>12</sup> Thomas J. Stipanowich, *Arbitration, and Choice: Taking Charge of the "New Litigation,"* 7 DePaul Bus. & Comm. L.J. 3 (2009)



technology that allegedly infringed on one of the patents the patent owner wanted to sell. With the help of a mediator, the representatives of the patent owner and the third party were able to share information, get to know and understand one another, and craft a mutually satisfactory solution—allowing the patent owner to dispose of the patents. The parties were able to accommodate each other's interests and needs beyond what a judge could have done<sup>13</sup>.

From, the abovementioned example one can analyze that claimant's (patent owner) aim in such kind of disputes is not only to claim damages in an ongoing infringement suit additionally the owner through mediation, helped the party to attain additional monetary gains either by licensing or assigning or selling the product. However, mediation can be only chosen as a dispute resolution where parties are actually will to resolve a dispute otherwise, the non-binding effect of mediation may lead to climbing the stairs of court.

### 2.1 Settlement: Maintaining business relationship

Similarly, parties having an ongoing business relationship are often or most likely to have Intellectual property disputes. For example, parties to the dispute may have a licensing relationship in existence before the dispute. In such a situation, the parties may appreciate the opportunity to use a mechanism that is much less formal and aggressive than litigation, and the negotiation method helps

parties to work out their differences without souring their relationship or ability to work together in the future.

Like for example a 5 year long battle between two competing companies *Google and Microsoft* had come to an end as both companies decided to end the feud and drop around 20 lawsuits in the US and Germany. The tech titans have been clashing since 2010 over royalties related to technology in the Xbox game console and smartphones from Motorola Mobility, which Google-owned up until January 2014, when it sold off the division to Lenovo but kept many of its patents. The companies did not disclose the financial terms of the deal but pledged to work together to strengthen the defense of Intellectual property<sup>14</sup>.

Thus, in an IP dispute, the nature of a commercial relationship whether it is competitive or affable between parties, negotiation amongst parties is a well-thought process at the initial stage. Settlement helps the parties to settle down their claim within four walls instead of publicizing distrust.

Therefore, one way to think of modern litigation is a negotiation done inefficiently and with an attitude<sup>15</sup> to raise the value of your Intellectual property with your competition in high spirit. But sometimes settlement turns out to futile as Influential Companies try to bargain a favorable settlement for example the proposed *settlement of Google to continue scanning copyrighted books* into its search index and

<sup>13</sup> Mary Pat Thyng, "Mediation in Patent Cases—One Judge's Perspective," 997 PLI/Pat 296 (March 2010)

<sup>14</sup>The Google Settlement: a Brief Overview Volume 10, Issue 3 September 2010, pp. 181-183

<sup>15</sup>James Pooley, Successful Mediation of Intellectual Property Disputes, <http://www.ipfrontline.com/printtemplate.asp?id=8171> (last visited April 5, 2019).



displaying the text to its users in exchange for the payment of license fees to copyright holders<sup>16</sup> came under intense scrutiny and criticism, and, interestingly, several foreign copyright holders and foreign governments opposed the deal. Hence, for settlement to be an effective remedy other parties concerned must be aware and satisfied with the outcome of it and an agreement to that effect will be valid and binding only through the verdict of the court's decision provided through litigation.

### 3. Early Neutral Evaluation: Resembling good faith

Although mediation and arbitration are getting inked in the Alternate Dispute Resolution press, opting for neutral evaluation for resolving Intellectual property Disputes is high on demand. Early Neutral Evaluation in contrast with mediation, arbitration, and settlement conference has been defined as '*a non-binding process, typically required under relevant rules of court, wherein parties and their counsel shortly meet after initiation of court proceeding and confidentially present the factual and legal bases of their cases to each other and third-party lawyer experienced in the substantive area*'.<sup>17</sup>

The early Neutral evaluation is often beneficial for cases that present not just legal or factual issues, but also where the parties desire an understanding of technical aspects, privacy, and avoiding the negative

consequences of litigation. Especially high-tech and trademark disputes are perfect applicants for a neutral evaluation process. Even the judges of the English Courts encourage the use of neutral evaluation.<sup>18</sup>

Considering the case of *Hells Angle V. Marvel Comics*<sup>19</sup>, in this case, a character called "Hell's Angel" in Marvel Comics violated the Hell's Angels trademark and diluted the value of the Hell's Angels' trade name. The complainant in this case sort for damages, injunction, and profit. The court, in this case, denied the motion to dismiss and the case was assigned at its outset to Early Neutral evaluation<sup>20</sup>. Through private caucuses spread over several hours, the evaluator succeeded in getting the parties to move beyond their positions to the interests that lay behind them.<sup>21</sup> In this case, Hell's Angels' interest was that Marvel does not profit from the "Hell's Angel" name, and on the other hand, the interest of Marvel's was to resolve the lawsuit in a way that would not directly benefit Hell's Angels.

The result was that the evaluator assisted the parties to discover several creative solutions. The parties ultimately reached a consensus wherein: *Marvel agreed to contribute \$35,000 to the Ronald McDonald House for Children, a charity chosen by Hell's Angels, and to forego the use of the term "Hell's*

<sup>16</sup> Guild v. Google, Inc., No. 05-CV-8136-DC, slip op. at 1, 29 (S.D.N.Y. Mar. 22, 2011)

<sup>17</sup> Andrew Pirrie *ADR: Skills, Science and the Law* (Toronto, ON: Irwin Law, 2000), at 336.

<sup>18</sup> Regina V. Brown 1994 1 ALL ER 34 and CPR 3.1(2)(m).

<sup>19</sup> Hell's Angels Motorcycle Corp. v. Marvel Entertainment Group Inc., No. 92-CV4008 BAC (N.D. Cal. 1992)

<sup>20</sup> Roger Fisher and William Ury, *Getting to Yes* 42 (Bruce Patton ed., 1981)

<sup>21</sup> Ibid



*Angel" in connection with any of its characters or publications'*<sup>22</sup>

Thus, the process of neutral evaluation parties in a trademark infringement case is not just seeking damages or injunction. The process in a way allows having a reality check of their positioning. In this case, the infringing party although had to pay a heavy cost to that effect, however, it did not lose its reputation of being a popular mark by contribution to a charity which was chosen by Hell's kitchen. Conclusively, settlement is not the primary purpose of a Trademark infringement case, through the process of neutral evaluation both Parties were able to re-create its reputation instead of creating an outcome of damages by drawing a consensus on its own with the help of a neutral evaluator and the same relief may not have been granted by a court under litigation. Thus, such dispute resolution provides parties with an early and frank evaluation by an objective observer of both the merits of the case and in an expeditious manner to achieve resolution.

However, the neutral evaluation also leads to knowledge of weaknesses, which may lead to a strong argument at the litigation if the matter is not resolved at this stage. Therefore, neutral evaluation as a dispute resolution must be consciously chosen, only when both parties are willing to resolve the dispute otherwise it may turn out to be a disadvantageous position in a litigation proceeding.

#### **4. Litigation: Approach of each territory with respect to competition law**

As a general principle, Intellectual property rights are territorial in scope. The right in each country is determined by the law of that country and is independent of equivalent rights governing the same subject matter such as an invention or trademark in other countries<sup>23</sup>. Litigation, as a mechanism of IP dispute resolution, in a national court, is based on a state's jurisdiction. Litigation is still one of the popular forms of dispute resolution because certain types of agreements, which might be reached between parties through Alternate Dispute Resolution, if not imposed by court order may violate the *Competition Act* or Competition Bureau guidelines.

In patent litigation, involving the cost of R & D an economic assessment is essential on three aspects the probability of litigation, the pattern of outcomes (settlement rates), and the costs of settling and going to trial. Like, in the European Union, an owner of Intellectual Property is compelled to grant a license on reasonable terms of EU competition law otherwise it would violate the rights of market-dominant position<sup>24</sup>. Evidence in the EU has now been accumulated with the fact that '*the grant of an exclusive right for a limited period to the inventor to the exploit the invention is a necessary incentive for investment in R&D, innovation, and imitation*'<sup>25</sup>. Therefore, an assessment of practice in EU parties seeking (licensee) relief by way of licensing or for the

<sup>22</sup> Angela Baughman, Skadden Stretches a Settlement in Comic Book Flight, THE RECORDER, Feb. 11, 1995, at 5

<sup>24</sup> Microsoft Corp V. Commission (2007) ECR II-3601

<sup>25</sup> C. Taylor and Silverstone, The Economic Impact of the Patent System (Cambridge, 1984) at p.198



grant of exclusive rights for Research and Development demonstrates the fact that EC competition law regulates Intellectual Property Rights legislation in the interest of innovation encouraging competition in the most flexible way.

Additionally, the assessment of the competition law defense can vary in each jurisdiction. In countries( such as Netherland) where speedy private competition law redress is at hand, the enforcement of an Intellectual Property may not significantly hinder the market entry of the party seeking a license at all, since it can easily obtain a license in a parallel proceeding.<sup>26</sup> Thus, to base the competition law defense on the finding of an independent under Treaty of functioning of European Union<sup>27</sup> in the form of enforcement of an IPR can lead to contradictory decisions, since the interpretation of TFEU with regards to Article 102, aimed at preventing undertakings who hold a dominant position in a market would ultimately depend on the effectiveness and particularities of the respective national codes of procedure.

Thus, the complication of remedies in Intellectual property law is that for varied rights only the equitable remedies for an injunction are suitable, effective, or of value. Damages are secondary to the power to stop an unfair competitor in its tracks<sup>28</sup>Hence, the territorial Nature of Intellectual property rights and advantageous position of law concerning Intellectual property rights encourages Intellectual property holder to prefer litigation as the court has a better

understanding of its laws and the scope of which could help both the licensor and the licensee to balance out the Intellectual property rights and Competition law concerning their territories.

### **5. WIPO: Uniform Domain Name Dispute resolution- When damages are a secondary concern**

The World Intellectual Property Organization- Arbitration and Mediation Center provides time- and cost-efficient mechanisms to resolve internet domain name disputes, without the need for court litigation. This service also includes Uniform Domain Name Dispute Resolution Policy (UDRP), under which the WIPO Center has processed over 42,000 cases<sup>29</sup>.

As the shift towards information society continues, the internet has become an exciting commercial medium for Trade Enterprises. Domain names are prime real estate on the information superhighway Especially, in the case of sports' body, it has become a useful marketing tool and a kind of 'shop window' to showcase its sport. Due to the sporting deadlines and maintaining a relationship with the sponsors involved. A speedy and international regularized mechanism with a technical and public-oriented approach is required to support and deal with cases involving cybersquatting. The introduction of UDR through the World Intellectual Property Organization was

<sup>26</sup> Joint Cases No 316533/HA ZA 08-2522 and 316535/HA ZA 08-2524 Koninklijke Philips Electronics NV v SK Kassetten GmbH & Co. KG

<sup>27</sup> Article 102 TFEU

<sup>28</sup> Dimock, Ronald E: *Intellectual Property Disputes: Resolutions and Remedies* 2003 pg. 44 1<sup>st</sup> edition

<sup>29</sup> <https://www.wipo.int/amc/en/domains>





introduced to administrative proceeding designed to resolve cybersquatting cases<sup>30</sup>.

For example, in the case of *FIFA*, the premier event is the world's most popular and biggest sporting event. The Trademark, the domain name needs protection and a failure to do so affects in way that commercial partners like the sponsors would not be prepared to pay such large sums of money if an immunity to that effect is not seen to be granted. The Intellectual property kicks in a while, licensing and merchandising rights concerning major sports events, such as the FIFA World Cup, are 'hot properties' commanding high returns for the rights owners ('licensors') and concessionaires ('licensees').

Owing to the advantageous outcomes for a well know association FIFA prefers such kind of dispute resolution mechanism which understands the urgency involved. Therefore, in one of the cases, FIFA filed a Complaint against the South Korean with the WIPO Center requesting the transfer of this domain name to the Complainant, who had not authorized the use of this name by a third party<sup>31</sup>. The complaint was resolved within 3 months the domain names were transferred to FIFA instantaneously and helping attain additional domain names for the world cup held in 2002. Although damages cannot be claimed in such kinds of disputes, huge brands and associations such as FIFA consider complication of remedies in IP law is that for many types of rights only the

equitable remedies of an injunction are suitable along with the advantage of using the right enjoyed by the infringing parties in the past.

Thus, the UDRP already has a faithful following, particularly among practitioners. Proponents stress that the decisions is fair, and the process is quick, inexpensive, and simple.<sup>32</sup> While humming its praises, proponents are quick to note that the Policy has strict limits the Policy like limits to clear-cut cases of abusive registration and use, and is not well suited to complex factual disputes.<sup>33</sup> Despite its limitations, most practitioners see the UDRP as an excellent tool and plan to use it in tandem with litigation.<sup>34</sup>

#### Conclusion:

Hence, selecting a dispute resolution in an IP dispute is a tricky notion. From their very inception these intangible rights, need to be protected by way of lawful ownership, registration, licensing, and other legal formalities involved in an Intellectual property dispute. To defend these Intellectual property rights, it is not just the law that will protect the rights instead it is more about the strategy of an Intellectual property owner to defend it. Disputes interfere with the effective use of commercialization of IP rights. Providing means for resolving them as fairly and efficiently as possible, without disrupting underlying business relationships, reputation, goodwill is, therefore, an important challenge for international IP

<sup>30</sup>ICANN, Uniform Domain-Name Dispute-Resolution Policy, General Information, at <http://www.icann.org/udrp/udrp.htm> (last modified June 17, 2000)

<sup>31</sup> SL Marketing AG, and The Federation Internationale de Football Association v. J.Y. Chung,

Worldcup2002.com, W Co., and Worldcup 2002 Case No. D2000-0034

<sup>32</sup> Matt Railo, Trademark Owners Weigh Court vs. UDRP, NAT'L L.J., July 24, 2000, at C1;

<sup>33</sup> See Ritchenya A. Shepard, Counsels' Domain-Name Pains, NAT'L L.J., Sept. 4, 2000, at B 1

<sup>34</sup> Ibid



policy. Each dispute resolution mechanism offers a unique method of resolving method in the same fashion every Intellectual property offers a remedy to satisfy the Party. This satisfaction through the dispute resolution mechanism depends upon what the parties aim to achieve at the end of the dispute.

In the continuing globalization of business transaction, the efforts of the companies and individuals have been to protect these Intellectual property Rights and therefore the global economy demands dispute resolution mechanisms such as Arbitration, Mediation, Negotiation, Early neutral evaluation, settlement, and Court litigation particularly in the context of disputes with multijurisdictional dimensions. Not to mention it has been observed that "*the prospects of a cheap, quick and just resolution of IP disputes still seems a pipe dream.*"<sup>35</sup> Thus, ADR is an umbrella term catching the eyes of the litigants in an IP dispute as to the parties in an IP suit not only want to relish the advantageous scheme of speedy, cost-effective mechanism etc but always want an outcome quintessential form of Private Justice depending upon which IP is at Stake. Likewise, many disputants find themselves having to seriously consider what compromises they could live with, and increasingly, parties to a dispute are looking at the prospects for alternative dispute resolution to address parts, or even the whole, of their dispute. Further, the introduction of the World Intellectual Property Organization is a welcoming feature that removes the impediments of cross-border litigation and serves as a platform to

ease the complexities involved in an Intellectual property dispute.

However, a clarion call to decide the dispute resolution involving a combination of competition law and Intellectual property is critical based on territorial rights and therefore calls for litigation as a dispute settlement mechanism. Efforts have been to resolve such disputes involving intangible nature through Alternative dispute resolution however parties have often failed to receive their due reward. On the contrary, it is almost quotidian to observe that the adjudicative model of dispute resolution is cumbersome, expensive in terms of time and resources (for the litigant and society at large), and slow to produce results<sup>36</sup> but the same applies to ADR methods as well.

Therefore, while determining a dispute resolution mechanism for an Intellectual property dispute an economic assessment concerning the nature of the commercial agreement as to whether it is for competitive purpose or maintaining business relation, the territorial nature of the Intellectual property rights, and the desired outcome depending upon the availability of financial resources. Litigation along with the combination of ADR seems to be a popular mode of dispute settlement mechanism especially Patent and Copyright related rights. According to the EU Commission, originator companies appear to be inclined to settle mostly when the weakness of their position in litigation is clear or when interim injunctions are not obtainable, whilst generics companies settle to avoid the high cost of litigation and

<sup>35</sup> Remo Imports Ltd. V. Jaguar Cars Ltd, 2007 FCA 258

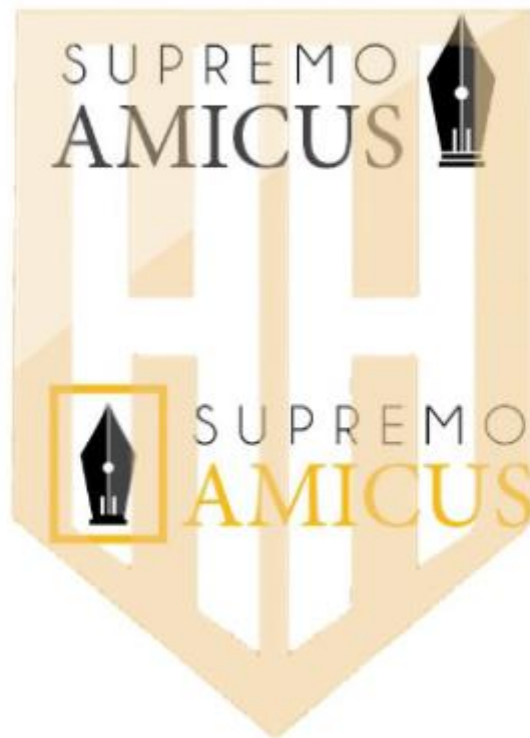
<sup>36</sup> Ronald Dimock and Peter Stabins, "*IP Litigation in the Federal Court Under the New Rules*" (1998) 5(2) Intellectual Property 274 at 274.



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uncertainties involved in litigation.<sup>37</sup> Hence, expecting an outcome by vigilantly choosing between adjudication and appropriate Alternate dispute resolution mechanism conclusively depends upon an intangible magic wand in the toolbox of each Intellectual property dispute resolution mechanism which surprises the parties with outcomes which they could have never imagined.

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<sup>37</sup> European Commission, *Pharmaceutical sector inquiry: Final report* (8 July 2009), paras. 262–267.