LEXONOMICA
Vol. 8, No. 1, pp. 65-76, June 2016

LEXONOMICA

Resolving Intellectual Property Disputes

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Abstract Within recent decades, increasing the complexity of international trade has resulted in changing many dimensions of doing business with other nations and relevant problems to it. Rising the importance of intellectual property rights as intangible assets of companies is considered among most important characters of modern business process which applies to multinational enterprises and other forms of companies who intend to enter the global market place equally. Benefiting from global marketplace and at the same time protecting IPRs is a difficult goal to achieve due to intangible and diverse nature of such rights which results. In practice of international trade, there is high probability for companies to face with IPR related disputes. Therefore, choice of proper IP Dispute Resolution mechanism is an important step in designing overall IP strategy of the firm as an improper IP dispute resolution method can impose high financial costs as well as affecting reputation of the firm. Current paper tries to answer to the question of what is the most suitable dispute resolution method for IP related disputes. And in order to achieve this objective, paper explores different types of IP disputes, different approaches for resolving IP disputes, factors affecting the choice of method for resolving IP disputes and finally, it will analyse application of dispute resolution mechanisms in different types of IP related disputes.

KEYWORDS: • intellectual property rights • dispute resolution • international trade • litigation • alternative dispute resolution

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DOI 10.18690/18557147.8.65-73(2016), UDK: 346.546.5:347.45, JEL: K12, K21
ISSN 1855-7147 Print / 1855-7155 On-line
Available on-line at http://journals.lexonomica.press.

1 Introduction

Increase in number and amount complicity of international transactions has affected the nature of corporate assets and relevant disputes to them. To be more precise, within last half a century, the relevant values of intangible assets of companies are increased more than their tangible assets (Hanel, 2008: 895). Intellectual property rights (IPRs) including patents, trademarks, copyrights and others are known among most valuable intangible business assets in international trade (Barney, 1991: 110). As a result, it is possible to consider IPRs as factors which positively affect the firm's added value (Terpstra, Sarathy & Russow, 2005: 320).

International IP disputes are risky practice for firm as on one hand, product life cycle in high tech segment has been shortened due to rapid technological developments and traditional long term litigation process might incur serious damages on profitability of company. Therefore, current paper tries to address the problem of which dispute resolution methods are have the capability to address IPR disputes? In doing so, paper will start with defining different types of IP related disputes, and their particular characteristics. Later, special requirements which are necessary to be met in resolving IP disputes will be discussed and finally different types of alternative dispute resolution (ADR) used in resolving IP disputes will be discussed.

2 Literature review

Firms can incorporate IPRs in their business model, and gain respective added value via commercialization of their innovative products and services, licencing them out, take them as a source of bargaining power in trade negotiations and finally used them as leverage in attracting external finance (Kamiyamra, Sheehan & Martinez, 2006: 20). Additionally, internationalization of trade in recent time has resulted in strong dependency of overall corporate profit rate on generation, exploitation and protection of IPRs in global arena rather than headquarter (Barsky & Marchant, 2000: 60). This claim is proved by result of empirical studies. For example, result of a study shows increase in value of intangible assets of S&P (Standard and Poor) 500 companies to their total asset from 17% in 1975 to 80% in 2010[1]. In another study, result of survey done by World Intellectual Property Rights Organization (WIPO) on IPR owners from 62 countries indicated that more than 90 percent of respondents had technology related contracts with foreign party subjected to other jurisdiction where more than 80 percent of contracts concluded on technologies patented in more than one jurisdictions (WIPO, 2013). This can result in increasing IP related disputes as different interests with different personal and legal view to IPRs are involved in day to day operation of firms active in international trade. The famous dispute between Apple and Samsung can be considered as such disputes which may occur more often in currently existing international business framework (Delerue & Lejeune, 2011:

140). On the other hand, getting involved in IP disputes can damage the firm's reputation seriously in global market place (Lee, 2013: 175). From the above mentioned discussion, it is obvious that choice of the right method for resolving IP disputes is of utmost importance for active firms in international trade (Delerue & Lejeune, 2011: 141).

IPRs are granted for the purpose of protecting legal rights of creators of inventions, artistic works, literature and innovative symbols, designs, expressions and indications for a defined time period (WIPO, 1997). The origin of IP disputes generally goes back to use of an exclusive intellectual property right without the consent of its owner. Depending on the type of IPRs, respective disputes might be different by nature (Bernstein, 2005: 150). Broadly speaking, IPRs have been divided into four main categories: patent, industrial design, trade mark and copyright which of each protect specific intellectual creations. For example, while patents are protecting useful and novel inventions, copyright is protecting artistic works and literature which are in written format. This difference results in various types of disputes which are specifically result of protecting a special type of industrial property. On the basis of classification by Grantham (1996: 184) and Sohn & Park (2004: 205), regardless to the type of IP, relevant disputes to this subject matter can be divided into three main group of: contract disputes, IP infringement disputes, and last but not the least, IP ownership disputes.

IP contract disputes are results of disagreement over the contract between parties where the owner can delegate the authority for using IP to the other party in full or in partial. Therefore, IP disputes on contract generally depend on the type of contract[2]. Different types of IP contract can be listed as:

- contracts of transfer of IP rights,
- licencing contracts,
- contracts based on the level of IP commercialization (Lee, Ju-Yeon 2015: 155).

Therefore, conflicts over any of above issues will result in first group of intellectual property disputes which should be resolved by taking the most appropriate method of dispute resolution.

Second group of IP disputes are relevant to infringement of intellectual property and estimation of related damages. Such types of conflicts are result of infringing intellectual property rights of an owner by third parties. In judgment of such cases, it is difficult to define the level of damage or whether or not IP has been infringed. Apple vs. Samsung is a very good example of such disputes. Even in case of clarification of infringement, there will be remaining disputes on degree of resulted damage from infringement and level of compensation attributed to damage due to lack of standard measures for IP valuation of damage estimation in case of IP infringement.

Third group of intellectual property disputes are disagreements over validity, scope or duration of intellectual property rights. Such disputes need final decision to be taken by official authorities in order to ensure that IP rights which are granted by government bodies and after conducting due examinations are meeting the legal requirements and relevant standards. Copyright is the only exception which can be obtained without approval of administrative organizations.

3 Research Method

Current article takes normative and comparative methods in approaching the research problem and answering research questions. Requirements for normative approach are satisfied by defining and in-depth study of available scientific literature on intellectual property rights disputes and relevant methods to resolve them. On the basis of electronic research in academic databases, a comparative study has taken place among exiting literature on application of dispute resolution methods in IPR related methods to define different styles of applicable dispute resolution methods and their relevant attributes intellectual property rights disputes.

4 Approaches to resolving IP disputes

IP disputes are generally result of breach of contract or emergence of conflict of interest among parties (Lewicki, Saunders, Barry & Minton, 2004: 240). Although, it is inevitable to face with such disputes in international trade where parties have different perceptions, interests and perceptions but, it is possible to resolve them by using different dispute resolution mechanisms. IPRs have territorial scope (Bradley, 1997: 514–515), therefore, dispute resolution methods applicable to them are different in accordance with political system, economic, culture, social circumstances and national history which have been embodied in national laws (Sohn & Park, 2004: 204–205). There are two main dispute resolution mechanisms applied to IP disputes: litigation and alternative dispute resolution methods.

Traditionally, majority of disputes are resolved by judgment of courts. However, by the end of last century , turnout to alternative dispute resolution in resolving IP disputes started to grow due to their numerus advantages like lower costs, shorter time, and less complication in comparison with traditional litigation process.

As a result, negotiation, conciliation, arbitration and mediation started to gain popularity in different business sectors as main ADR mechanisms effective in resolving IP and non-IP disputes. This section will explore application of litigation and ADR methods in more detail and tries to shed lights on advantages and disadvantages of each method in resolving IPR disputes.

4.1 Litigation

Litigation is referring the legal case to national court in order to resolve the IP dispute in public and on the basis of national law (McConnaughay, 2002). Litigation happens when a party opens a legal case against one or more parties in the public court in order to settle the exiting conflict without requiring their consent (WIPO, 2009). Despite the fact that litigation is the most practiced dispute resolution mechanism in general , due to some shortcomings , it application to IP disputes can be limited:

- Litigation is time consuming and costly, since court follows standard procedures, cost of litigation over a complicated patent case might be burdensome for the company (Smith, 2009: 113–115). Results of survey done by American Intellectual Property Law Association (AIPLA) in 2009 shows that costs of patent litigation fluctuates between 1 to 25 million USD while the average costs might hit 3 million USD.
- Resolving international IP disputes via litigation are extremely difficult due to the territoriality of IP rights as they are subjected to the national law (Mattli, 2001: 919).
- Due to the short life span of many technologies, time consuming and costly litigation might result in bearing loss by company due to outdating of the technology and relevant IPR before getting court order.
- Since patent has limited time, spending a long period in court in order to solve ownership or infringement claims will result in its expiry without gaining projected profit by company.

4.2 Alternative dispute resolution mechanisms

Various forms of ADR as a private dispute settlement mechanism can help parties to resolve their problem in another way rather than referring to court. Among others, negotiation, mediation (conciliation) and arbitration are most used ADR models which can be implemented separately or in combination with each other. While using negotiation, parties try to resolve problem by themselves (Sohn & Park, 2004: 204–205). Possibility for persuasion of other party and providing parties to have direct control on outcome of conflict by keeping it privately among themselves is the biggest advantage of negotiation. However, there is always possibility for failure of negotiations and also non-binding nature of negotiation can create troubles in implementation of achieved results. When parties fail to solve their dispute via negotiation there is need for involvement of third party which leads ADR process towards Mediation or Arbitration as more formal dispute resolution methods.

Mediation (or conciliation) is a flexible method known also as assisted negotiation which follows the goal of improving collaborative attitude among parties in dispute. The difference between negotiation and mediation lays in role of mediator who helps parties to solve their conflict on the basis of mutual consent (WIPO,

2009). Within recent years, mediation has gained popularity as an effective alternative method for litigation in resolving disputes searching to achieve voluntary solution. The drawback of mediation is lacking of binding nature as the decision of mediator and achieved agreement between parties cannot be enforced and the party who does not consider the decision in her favour may refuse to abide it later.

Arbitration, unlike mediation, is a quasi-judicial mechanism in which arbitration award can be enforced in the same manner as the court order (Schimmel, Kapcor, 2009: 1–6). Arbitration proceeding has formal rules and regulations which makes it somehow similar to standard court procedure, however, parties are free to choose applicable substantive and procedural rules of arbitration which makes it much more flexible than litigation (Mattli, 2001: 919). Arbitral tribune consists of one or three arbitrators chosen based on parties agreement. Final award by the tribune is binding and party to whose favour award is issued can enforce it by going to the court. Enforceability of award, inclusion of business norms and customs in the decision of arbitration tribune, tendency to resolve dispute on the basis of leaving ground for further cooperation between parties, and issuing fairer and more appropriate award than litigation as outcome of appointing business experts in arbitrational tribune can be mentioned as advantages which resulted in increasing popularity of arbitration and its recognition as the main ADR mechanism in resoling IP disputes within recent decades. However, there are problems regarding arbitrability of IPRs in case of patents. As it was discussed before, IPRs have territorial nature and arbitrability of them is also subjected to national law (Grantham, 1996: 173). While some countries are pro arbitration and provide parties with opportunity to refer all types of their disputes to arbitration, some others like Germany do not show such open attitude. According to German Law, "all disputes relating to property rights maybe arbitrated, but disputes over patent invalidation and revocation of compulsory licencing cannot be arbitrated"[3]. Other disadvantages of arbitration are difficulties in obtaining injunction quickly[4], desire of wining party to make the award public , and difficulties to achieve punitive damages even they are included in arbitration agreement (Adamo, 2011: 14).

4.3 Factors affecting the choice of Dispute Resolution Mechanism in IP dispute

Since IPR disputes have different natures, the range of choice for dispute resolution mechanism for them is also divergent from informal negotiation to highly standard court procedure. Due to the intangible nature of intellectual property rights, majority of IP disputes will end up in settlement with conciliation between parties (Lee, 2015: 166). However, studies of Jabaly (2010: 730–735), Schimmel & Kapoor (2009: 1–6) and Martin (1997: 917) identified five main factors affecting the choice of dispute resolution methods in IP related disputes: expertise, internationality, flexibility, confidentiality and expeditiousness.

4.3.1 Expertise

Resolving IP related disputes is in need of specific expertise and thorough understanding of technology as they are legal rights granted to knowledge, technology, information, trademark and other intangible property resulted from creative human activities (Lee, 2013: 175). This can be witnessed in patent disputes where interpretation of a relevant claim to patent is in need of proper understanding from pure technical information about an invention (Smith, 2009: 117). Lack of sufficient capability and skills in adjudicator or arbitrator to discover fact of the case can result in prolongation of the claim and increasing cost of involved parties in dispute (Martin, 1997: 950). It is also noted that rapid technology development has resulted in further complication of IP related disputes (Lee, 2013: 177). Since legal development is not really moving forwards with the same pace of technological development, IP disputes can create serious confusions for court (Martin, 1991: 965). Disputes related complex problems like patent cases can be solved more efficiently by ADR mechanisms since parties can refer to an expert in subject matter who is also familiar with national rules and prevailing customs in the given industry in contrast with litigation which does not provide such advantage to them.

4.3.2 Confidentiality

In majority of IP related disputes, confidentiality and protection of know-how, commercial and technical information and trade secrets is the main concern for parties. It is essential for parties to do their best in protecting such assets as disclosing them to competitors can result in huge loses. Since public courts follow standard and formal process, there is always risk of disclosure of technical knowledge and trade secrets during the time of court proceedings. However, ADR mechanisms provide parties with chance for controlling disclosure of sensitive information and guarantee for safeguarding relevant trade secrets.

4.3.3 Expeditiousness

Rapid pace of technology development has shortened the product life cycle in high tech sector. Meanwhile products in this sector are subjected to highest number of IP disputes as some of them are under numerous patents (Lee, 2013: 175). Therefore, IP disputes are in need of rapid mechanism of conflict resolution as standard litigation process might take more than product life cycle of patented technology while keeping the safely of patent on the stake (Yun, 2002: 157). As result resolving such disputes via ADR mechanism is not only concern for biotechnology, software and pharmaceutical and other high tech businesses but also for governments of different countries as taking IP disputes to litigation might impose high risk of loss on patent owners as well as being against public policy since high tech products are result of high level of R&D spending which are sometimes covered from public funds.

4.3.4 Internationality

Improving the level of international trade in addition to intangible and transferrable nature if intellectual property rights resulted in internationalization of IP related disputes (Delios & Bearish, 2001: 1031–1032). In case of existence of necessary technological base, reproduction of IP assets are easy and cost effective in any part of the globe. Therefore, IP disputes show tendency to arise simultaneously in different countries (Lee, 2015: 167). Other factors which can be considered in internationalization of IP disputes are globalization of information and communication technology (ICT), technological dependency of countries to each other in global arena (Martin, 1991: 940–945) and shifting of business models in international firms towards open innovation and outsourcing of knowledge (Chesbrough, 2003: 37). This makes protection of IP rights difficult in national courts due to few reasons. First of all, IP rights are protected nationally while they have no application out of national borders. In case of international IP disputes, different IP laws in countries of involved parties create difficulty in the process of defining applicable law. Even in case of defining the applicable law to the dispute, different level of enforcement among countries will create troubles on the way of enforcement of the judgement. Let alone the length of time and cost of obtaining the court order.

However, ADR mechanisms can be really helpful in resolving international IP disputes due to their more rapid nature and also global recognition of Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) which is instrumental in using arbitration for resolving international.

4.3.5 Flexibility

Due to the complexity of the nature of IP disputes and lack of capability in law to develop with the same pace of technology development, there is need for blend of innovation and legal knowledge to meet the requirements for resolving any particular IP dispute (Lee, 2013: 177). This requires creation of flexible framework for dispute resolution which is impossible to be expected from formal and standard litigation process. Flexible dispute resolution framework offered by ADR mechanisms demonstrates the capacity for application to different substantive laws and resolve the dispute without affecting commercial relations between parties (Mattli, 2001: 940).

5 Choice of dispute resolution mechanism for IP dispute resolution

Factors affecting the choice of conflict resolution strategy are mostly relevant to dispute's context as each type of conflict will have different consequences on involved parties (Tjosvold, 2008: 25). Therefore, existence of numerous factors, and interactive attributes makes the choice of conflict resolution mechanism is a

multi-criteria decision making process (Lee, Nari & Norrgard, 2012: 170). Analytical Hierarchy Process or AHP is the recommended methodology by researchers including Falkenr and Benhajala (1990, 105–107) and Lee (2015: 170) for defining priorities of decision maker different researchers. According to Satty (1995), AHP is capable of quantifying the subjective decision making judgements of the person via estimating relevant numerical values on the basis of importance of involved factors. Such capability provides AHP the chance to be used in study of different complex decisions including planning process of organizational resources, alternative evaluation and choice of best alternative (Albayrakoglu, 1996: 71–76). Lee (2015: 170) used AHP method in defining the method of choice for resolving IP disputes among parties including researchers, patent managers, patent attorneys and patent examiners by considering litigation and ADR mechanisms as main dispute resolution methods and expertise, confidentiality, internationality, expeditiousness and flexibility as factors for making the choice over method of resolving dispute.

On the basis of Lee's (2015: 170) findings, IP contract disputes, IP ownership and IP infringement disputes can be referred to negotiation. However, negotiation is used at minimum level in disputes over IP ownership and validity of IPR as such disputes are mostly resolved by litigation as the final decision on IPR validity is mostly taken by administrative officials. Lee concludes that ADR mechanisms, particularly arbitration are effective in resolving IP contract disputes by considering future cooperation and mutual consent of parties in the process of resolving disputes. Additionally, Lee further defines expertise as the most important factor in choice of method for resolving IP disputes due to its importance in defining the IP infringement. Internationality is the other important factor which is more applicable to IP contract disputes rather than conflicts on IP validity.

6 Conclusion

IPRs are different in nature which results in diversity of problems and disputes relevant to them. Therefore, choosing a single dispute resolution method for resolving IP conflicts will not be effective and efficient strategy for involved parties. In the other hand, IPRs are subjected to national laws diversity of national laws can make resolution of IP disputes even more complicated. Although, litigation was the method of choice for resolving IP related disputes up until 1980s, within recent decades increasing importance of IP as intangible assets of firm, rapid technology development and need for protecting IPRs which are mostly involved in international licencing has created ground for raise of need for a more cost effective and rapid conflict resolution method for IP disputes as part of overall IPR strategy of the firm. By referring to studies of other scholars in IP dispute resolution, current paper defined different types of IP disputes, methods of choice for resolving IP disputes and also most important factors in decision making process of parties in choice of the best method for resolving their dispute.

Based on findings of the paper, it is possible to argue that no particular dispute resolution mechanism can meet all requirements for being the method choice in resolving all types of IP disputes. Nature of dispute and necessary expertise for resolving it should be considered as the most important factor in making decision over referring the IP dispute to litigation or trying to resolve it by ADR mechanisms. Although, ADR methods are gaining more importance in resolving IP disputes, still litigation is the method of choice for cases of dispute on validity of IP where ADR mechanisms will be more effective in resolving IP contract disputes.

Notes

[1] Ocean Tomos Annual Study of Intangible Asset Market Value (2010), http://www.oceantomo.com/2011/04/04/intangible_asset_market_value-2010/[accessed 28.01.2016].

[2] IP Neutrals of Canada, Types of dispute and issues that may be suitable for mediation, from http://www.ipneutralscanada.com/typesOfDisputes.asp. [accessed 28.01.2016].

[3] Zivilprozbordnung [ZPO] [German Code of Civil Procedure], July 27, 2001, [BGBL. 1] 1887, § 1030.

[4] Merrill Lynch v. Salvano, 999 F.2d 211, 214 (7th Cir. 1993).

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