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CROSS-BORDER ARBITRATION CLAUSES IN TECHNOLOGY AND IP AGREEMENTS

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Abstract

The increasing globalization and heavy dependency on digital transactions has resulted in sudden demand in cross-border technology and intellectual property (IP) agreements. There are certain factors that makes cross-border agreements more complex some of them may come from licensing issue, data sharing, and proprietary rights because of involvement of parties belonging to different jurisdictions which may increase the probability of inconsistencies in decisions.

This paper dives into deep analysis of role and importance of cross-border arbitration clauses in the field of technology and IP agreements, through examining and analyzing the essential elements which includes the seat of arbitration, institutional mechanism, legal system by which it is governed, and scope of disputes. Furthermore, it examines the critical issues and challenges that may arise in this domain, specifically those related to arbitrability of IP disputes, interim relief, and protection of sensitive information from public eye, and procedural inconsistencies due to involvement of different jurisdiction.

Moreover, it provides explanation of legal framework on which international arbitration functions, examination of both Indian and international perspectives. Analysis of landmark judgments which contributed in the evolution of arbitration jurisprudence and providing arbitration-friendly regime.

The paper draws conclusion by focusing on the current requirement of harmonization in the field of international arbitration practice in order to provide predictability and consistency in dispute resolution. It also analyses india moving towards global arbitration hub. Overall, the paper gives detailed analysis of cross-border arbitration in the dynamic landscape of technology and IP law.

Keywords: cross-border arbitration, intellectual property (IP), New York Convention, UNCITRAL Model Law Confidentiality, Interim relief, governing law, jurisdictional inconsistencies, enforceability, Indian arbitration framework.

Introduction¹¹⁴⁰¹¹⁴¹

Globalization has played a crucial role in the evolution of fundamental nature of commercial transactions, specifically in the area of intellectual property (IP) and technology. In this rapid growth of closely connected digital economy, it has become common to for

business to routinely engage in cross-border collaborations that includes data sharing, software licensing, cloud computing, artificial intelligence, and various other technology related arrangements. These commercial transactions are not limited to national boundaries, but also includes parties working across various jurisdictions with their own particular regulatory frameworks, legal systems, and enforcement mechanisms. It has resulted in internationalization of technology and IP

¹¹⁴⁰ World Intellectual Property Organization (WIPO), “What is Intellectual Property?”

¹¹⁴¹ United Nations Commission on International Trade Law (UNCITRAL), *Model Law on International Commercial Arbitration*

agreements which raises complex legal questions when disputes arise.

Growing dependency upon intangible assets which includes patents, trade secrets, copyrights, and proprietary technologies calls for robust contractual frameworks. In recent times technologies and IP agreement carry some critical aspects of ownership right, confidentiality obligations, licensing terms, and usage restrictions. Giving the situations that this domain contain like the high commercial value and sensitivity of such assents, the disputes in this area often involve significant financial stakes such as concerns regarding maintainability of confidential information and competitive advantage. Traditional litigation procedure that is carried out in the domestic courts, may not always work in the resolution of these type of disputes because of problems relating to jurisdictional uncertainty, overburdened court resulting in procedural delays, shortage of technical experts, and problems regarding public disclosure of confidential information.

In this context, it has become paramount for reliable and effective dispute resolution mechanisms. Cross-border arbitration has become highly preferred mode for resolving disputes regarding technology and IP agreements. Arbitration is a mode of dispute resolution that provides various options to the parties it's like a neutral forum for the parties that contains procedural flexibility, and provides opportunity to the parties to appoint arbitrators with specialized expertise in technical and legal matters. Additionally, there is an advantage for traditional court with the enforceability of arbitral awards across jurisdiction under New York Convention on Recognition and Enforcement of Foreign Arbitral Awards.¹¹⁴²

The introduction and implementation of well-drafted cross-border arbitration clauses has emerged as a crucial feature in IP and technological agreements. These clauses plays

a major role in preventing legal risks, enhancing disputes resolution in the complex growth of global commercial environment, which helps in providing certainty.

Concept of Arbitration¹¹⁴³

Arbitration is a mode of alternative dispute resolution (ADR) this helps the parties to submit their disputes to a neutral third party i.e., arbitrator or arbitral tribunal rather than going for traditional court which eventually helps the parties in providing speedy resolution of the disputes. This process is based on party autonomy,¹¹⁴⁴ here the parties are free to decide various aspects of disputes resolution process, which includes the choice of arbitrator's, seat of arbitration, procedural rules, and governing law in contrast of litigation that works on the rigid domestic legal systems, arbitration contains more flexible, efficient, and confidentiality in resolving disputes, specifically cross-border commercial relationships.

Neutrality stands to be one of the main advantage of arbitration. There is high probability that Difference may lead to bias and unfamiliar legal systems, which may prevent parties among international transaction to submit to other parties. The mechanism of arbitration lays down the option before the parties to choose neutral and independent arbitrators, hence it helps in ensuring fairness and impartiality. Moreover, in arbitration proceedings maintains confidentiality, which is the most important in disputes relating to technology and IP agreements that includes sensitive information's such as proprietary software, trade secrets, and business strategies.

Another very crucial advantage of arbitration is expertise of arbitrators. In complexity of commercial disputes which involves technicalities of the subject matter, parties have the option to appoint specialized arbitrators of that specific subject matter. This mechanism makes sure that the decisions are well informed

¹¹⁴² Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958.

¹¹⁴³ New York Convention on Recognition and Enforcement of Foreign Arbitral Awards

¹¹⁴⁴ UNCITRAL Model Law on International Commercial Arbitration

and provides more efficient adjudication than the traditional courts. Furthermore, compared to traditional courts arbitration is more speedy and cost-effective mode of dispute resolution. It helps in avoiding prolonged procedure delays and helps the parties to decide the proceedings according to their requirement.

A crucial factor that helps arbitration globally accepted is the enforceability of arbitral awards. This is heavily enforced by New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, which is one of the most important international instruments in the field of arbitration.

The convention was adopted in 1958, it resulted in uniform legal framework for recognition and implementation of foreign arbitral awards across 160 countries. It becomes obligatory for the contracting states to enforce arbitral awards and recognize arbitration agreements. The convention has very crucial role in increasing the enforceability and credibility of arbitration as a mode of dispute resolution in international commerce. As a result, minimizing uncertainty for the parties involved in the cross-border agreements through ensuring enforceability of arbitral awards with less judicial interference regarding disputes related to intellectual property and technology transactions. Rights and obligations of the parties are upheld effectively by the New York Convention. It helped in reinforcing faith in arbitration and maintain its credibility, thereby making it more reliable and preferable mode of dispute resolution especially international commercial disputes by providing facilities such as confidentiality, flexibility, expertise, neutrality, and enhanced enforcement framework supported by international conventions.

Cross-Border Arbitration Clauses¹¹⁴⁵¹¹⁴⁶

Cross-border clauses makes up an important part of modern international commercial

agreements, mainly in the area of intellectual property and technology. These clauses contains prior agreements to resolve disputes through the process of arbitration unlike litigation, which guarantees the parties a structured and predictable dispute resolution mechanism. Parties are subject to different regulatory environment, currencies, and legal system under cross-border transaction, therefore it becomes crucial that there are a well-drafted arbitration clauses that helps in reducing legal uncertainty and preventing jurisdictional conflicts.

Essential elements for cross-border arbitration clauses

1. seat of arbitration (Lex Arbitri):

The seat of arbitration provides the procedural law governing the supervisory jurisdiction of courts. It is an important aspect of the clauses, as it helps in addressing and minimizing problems related to annulment of awards, interim relief, and judicial intervention. For a fact, opting for a pro-arbitration jurisdiction as the seat improves the enforceability and credibility of the process. It is necessary to distinguish between “seats” and “venue”, as the latter is just related to the physical location where hearings will be done.

2. Laws governing contract:

It is related to substantive laws upon the obligations and rights of the parties involved in the agreement. Parties entering into contract have the option to go for commercially expert and neutral legal procedure to resolve matters arising out the contractual relationship. The law governing the contract must function independently of the seat of arbitration and it must be explicitly explained to prevent ambiguity.

3. Arbitration institution and guidelines:

Arbitral institution will be designated by the parties that will contain the rules governing the proceedings. Leading institutions lays down established procedural frameworks that contribute in enhancing the efficiency and credibility some of these institutions are Singapore International Arbitration Centre,

¹¹⁴⁵ United Nations Commission on International Trade Law

¹¹⁴⁶ Gary B. Born, *International Commercial Arbitration*, Kluwer Law International.

International Chamber of Commerce, and London Court of International. Above all these institutional arbitration provides standardized rules, administrative support, and mechanisms for appointing arbitrators.

4. Incorporation of arbitral tribunal:

The clause must include the number arbitrators to be appointed and the procedure of their appointment. There should be at least a panel of three arbitrators in high-value technology and IP disputes for ensuring impartial, balanced, and expert decision-making.

5. Language of arbitration:

There parties belonging to different linguistic background in cross-border agreements. Providing specific language will help in preventing procedural complications and ensure smooth functioning of the procedure.

6. Range of arbitration clause:

These clauses must clearly state the disputes covered, it should consist of board language like “all disputes out of in or in connection with this agreement”. A broad scope that makes sure that disputes are resolved with the help of single mechanism, minimizing fragmentation.

Importance in technology and IP agreements
1147

Due to its unique nature of transaction cross-border arbitration clause becomes very crucial in technology and IP agreements.

1. Ensuring confidentiality:

Sensitive assets like source code, trade secrets, algorithms, and proprietary data. Arbitration makes sure that the confidentiality of sensitive information is maintained, unlike traditional courts.

2. Specialized and neutral adjudication:

Considering the complexity of the disputes that involves patents, software, or digital platforms, arbitration offers the option to appoint arbitrators with relevant expertise.

3. Preventing jurisdictional conflicts:

Designation of proper forum for litigation in cross-border tech transaction is challenging process. Arbitration clauses provides certainty

through agreed neutral forum, which helps in preventing multiple proceedings.

4. Enforceability across jurisdiction:

Tech companies exists and operates in multiple countries, thereby making it difficult to enforce decisions. International mechanisms enhances the effectiveness of dispute resolution which benefits the arbitral awards.

5. Flexibility and party autonomy:

Parties have the option to modify the procedures according to the nature of the transaction. For example, parties are able to include expedited procedures, provisions for emergency arbitration, or specific confidentiality obligations suited to technology-driven disputes.

Special Issues in Technology and Intellectual Property Arbitration

Arbitration is the most effective mechanism for resolving cross border disputes but its implementation holds unique and complex challenges. These complexities in the application exists due to intangible nature of IP rights, interrelation of private contractual rights with public regulatory frameworks, and evolution of technology. Therefore it becomes increasingly important that there is nuanced understanding of these special issues for the purpose of evaluating the effectiveness of arbitration in this domain.

Arbitrability of Intellectual Property Disputes^{1148,1149,1150}

The most talked about issue in IP arbitration is the question is arbitrability that are there disputes that can be resolved with arbitration. IP disputes like assignment, licensing, royalty payments, and breach of confidentiality are generally arbitrable whereas disputes regarding grant of IP rights often comes under the jurisdiction of national courts.

This difference is embedded in the fact the intellectual property rights, specifically trademarks and patents are territorial in nature

¹¹⁴⁸ *Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd.*, (2011) 5 SCC 532
¹¹⁴⁹ Anand & Anand, “Arbitrability of Intellectual Property Disputes in India”
¹¹⁵⁰ Asia IP, “Arbitrability of Intellectual Property Disputes in India”

¹¹⁴⁷ World Intellectual Property Organization

and allowed by the sovereign states. As a result, patent validity and revocation put forward the questions regarding public policy and administrative authority, which minimizing there arbitrability under certain jurisdiction. However, it can be seen that there is a shift among some jurisdiction towards recognizing the arbitrability of such disputes specifically that arises incidentally in contractual contexts. Irrespective of this transition, the gap in the uniformity among jurisdiction continues, resulting in uncertainty in cross-border technology agreements.

Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd draws a clear distinction between rights in rem and rights in personam in providing probability of arbitrability of disputes arising out of intellectual property. The supreme court clarified that since rights in rem effect the public at large which includes patents, trademark ownership will only be decided by the courts itself but rights in personam arises out of contractual relationship such as licensing agreement, and royalty payment dispute it is arbitrable. This highlights the need for balanced approach, where courts handles issues relating to public rights, while arbitration resolves contractual and commercial disputes between parties.

Confidentiality Concerns¹¹⁵¹¹¹⁵²

One of the major advantages of arbitration is protection of confidential information, particularly in disputes related to IP and technology. These agreements consists of many sensitive information such as trade secrets, source data, proprietary data, and research and development data. There are high chances of loss of competitive advantage and substantial commercial harm.

Arbitration proceedings involve confidentiality obligations imposed by the institutions on the parties, arbitrators, and administrators.

However, confidentiality in arbitration vary depending upon the applicable rules, laws, and conduct of the parties. Disclosure of confidential information can be necessary or where mandated by the law, hence the confidentiality is not absolute. Therefore, in order to protect certain sensitive information the parties must incorporate specific confidentiality clauses within their agreements.¹¹⁵³

Interim Relief and Emergency Measures¹¹⁵⁴¹¹⁵⁵

There is urgent need for interim relief in technology and IP disputes. For instance, a party may seek injunction in order to stop unauthorized use of patented technology, infringement of intellectual property rights, or illegal use of confidential information. The arbitral tribunal has the authority to grant interim measures but certain practical implication may arise in the way.

Arbitral institutions introduced provisions such as emergency arbitration, allowing parties to get immediate relief to the formation of the tribunal in order to prevent this issue. These developments still cannot prevent parties from approaching the national court for interim relief, particularly when there is need of immediate enforcement. This dual mechanism, leads to overlap between arbitration and judicial intervention, which should be cautiously addressed.¹¹⁵⁶

Jurisdictional Conflicts and Parallel Proceedings

There are multiple jurisdiction that is involved in cross-border jurisdiction, governed by their own legal framework of intellectual property rights and dispute resolution. This process can result in jurisdictional conflicts, mainly when the parties go for parallel proceedings in different forums. While a contractual dispute can be settled through arbitration but matters relating

¹¹⁵¹ International Chamber of Commerce (ICC), “Confidentiality in Arbitration”

¹¹⁵² World Intellectual Property Organization (WIPO), “Arbitration and Mediation Center”

¹¹⁵³ “Confidentiality in International Arbitration”, Transnational Dispute Management.

¹¹⁵⁴ Singapore International Arbitration Centre (SIAC), “Emergency Arbitrator Provisions”

¹¹⁵⁵ UNCITRAL Model Law on International Commercial Arbitration, 1985 (as amended in 2006).

¹¹⁵⁶ *Amazon.com NV Investment Holdings LLC v. Future Retail Ltd.*, (2021).

to IP validity and infringement may be brought before the national courts simultaneously.

This dual systems can cause difficulty in arriving to a decision, high cost, and procedural inconsistencies. While arbitration clauses are made to establish a single, unified mode for dispute resolution but the fragment nature of IP laws can undermine the effectiveness of these arbitration clauses. There may be interference of courts at various stages of the proceedings, such as reviewing arbitral awards or granting interim relief, leading to further complications in dispute resolution.

Legal Framework and Case Law Analysis¹¹⁵⁷

The impact of cross-border arbitration in technology and intellectual property is mostly shaped by judicial interpretation across the world. Domestic arbitration and international conventions play a crucial part in determine the enforceability, scope, and procedural integrity of arbitral proceedings. Judicial interpretations played a major role in determine the key principles like role of seat of arbitrations, scope judicial intervention, and arbitral intervention. A thorough analysis of international and Indian legal positions helps in understanding how it highlights the pro-arbitration approach adopted by the courts.¹¹⁵⁸

Indian Perspective¹¹⁵⁹

Indian arbitration system is governed by Arbitration and conciliation act, 1996, which is based on UNCITRAL Model Law. Over the years, a progressive shift can be seen in India towards pro-arbitration stance, leading to reduced judicial intervention and importance of party autonomy in cross-border disputes.

A landmark judgment in relation to this is ¹¹⁶⁰*Bharat Aluminium Co. V. Kaiser Aluminium Technical Services Inc...* This landmark judgment resulted in significant shift in India arbitration

jurisprudence. The Supreme Court affirmed the principle of territoriality by holding that the seat of arbitration determines the jurisdiction of courts. It specified that Part I of Arbitration and Conciliation Act, 1996 is applicable only on the arbitrators seated in India, and not to foreign-seated arbitrators. As a result, Indian courts do not have the authority to grant interim relief or entertain challenges related to awards of foreign seated arbitration.¹¹⁶¹

Those judgment provided the clarity needed for cross-border arbitration involving Indian parties. It emphasized on the relevance of “seat” as judicial home of arbitration and balanced Indian laws with internationally approved principles. This resulted in minimal judicial intervention, which was the major issue previously in Indian arbitration regime. Reduced court interference enhanced India’s credibility leading to arbitration friendly jurisdiction, specifically among international commercial agreements, involving disputes related to technology and IP.

Additionally, several other subsequent amendments in the Arbitration and Conciliation Act have provided in strengthening the effectiveness of arbitration framework by incorporating provisions interim relief in certain foreign-seated arbitrations and advocating for institutional arbitration. These enhancements shows a consistent effort of indignant legislature judiciary to establish a strong and effective dispute resolution environment.¹¹⁶²

International Approach

The courts have been consistent in adopting pro-arbitration approach at the international level, thereby reducing judicial interference and favoring enforcement arbitration agreements. A landmark case related to this is *Fiona Trust & Holding Corporation v. Privalov*¹¹⁶³, given by House of Lords in the United Kingdom.

¹¹⁵⁷ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958.

¹¹⁵⁸ Kluwer Arbitration, “Parallel Proceedings in International Arbitration”.

¹¹⁵⁹ *Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc.*, (2012) 9 SCC 552.

¹¹⁶⁰ *Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc.*, (2012) 9 SCC 552

¹¹⁶¹ Arbitration and Conciliation Act, 1996 (India).

¹¹⁶² Law Commission of India, 246th Report on Amendments to the Arbitration and Conciliation Act, 1996.

¹¹⁶³ *Fiona Trust & Holding Corporation v. Privalov* [2007] UKHL 40.

The main issue in this case was whether allegations of fraud could invalidate an arbitration clause in the contract. The court came to a decision that clauses within the arbitration agreement should be interpreted in broad and liberal way, considering the intention of the parties to resolve disputes through arbitration. It resulted in establishment of a principle that all arbitration clauses are presumed to cover all the disputes arising out of contractual relationship, including allegations of fraud unless expressly excluded.

This judgment is fundamental in showing the relevance of doctrine of separability, thereby perceiving arbitration clause independent of the main contract. In case the underlying contract becomes invalid, the arbitration clause will not lose its validity and it may still be enforceable. The judgment emphasized the principle of “kompetenz-kompetenz,” that is arbitral tribunal has the authority to decide their own jurisdiction.

The Fiona case shows powerful judicial policy that upholds arbitration agreements and minimizes irrelevant court intervention. This approach has been highly influential and in continuously upheld in international arbitration norms.

Comparative Insight¹¹⁶⁴

Comparison between international and Indian approaches shows that there has been a shift towards pro-arbitration principles. Both jurisdiction favors party autonomy, the relevance of seat arbitration, and minimized court intervention in arbitral proceeding. While, international courts has long upheld these principles, India’s arbitration has evolved gradually through multiple judicial interpretations and legislative reforms.

These developments plays a huge role in the field of technology and IP agreements. Parties require stability and enforceability of arbitration clauses and awards, considering the complex

nature of cross-border transactions. There is huge contribution of judicial precedents like BALCO and Fiona in providing certainty by specifying the key aspects of arbitration law and regaining the confidence in the arbitral process.¹¹⁶⁵

Challenges and Criticism of Cross-Border Arbitration

Irrespective of the significant increase in cross-border arbitration as an effective mechanism for resolving international commercial disputes, it still has to go through many challenges and criticism. These issues get even more pronounced in the context of technology and (IP) agreements because of the complex nature of the disputes, and the interference of multiple jurisdictions. Among many issues the most relevant are those relating to cost, enforcement, and application of public policy exceptions.

Cost Implications¹¹⁶⁶

One of the major concerns of arbitration is potentially its high cost. While it is said that arbitration is a cost-effective mode of dispute resolution on the other hand it emerges as extremely expensive in practice particularly due to complex nature of cross-border disputes specifically those related to technology and IP. Cost related to institutional charges, legal representation, arbitrator’s fees, and administrative expenses.

Where parties are involved in high-value technology disputes they usually opt for a panel of three arbitrators with specialized expertise, that turns out to be quite expensive. Furthermore, these proceedings include extensive documents, prolonged hearings, and technical expertise, adding more expense. While domestic litigation in certain jurisdiction where comparatively low, arbitration requires the parties to bear the full cost of the process. This acts as the main issue in cross-border arbitration particularly for small business and startups involved in technology agreements.

¹¹⁶⁴ UNCITRAL Model Law on International Commercial Arbitration, 1985 (as amended in 2006).

¹¹⁶⁵ *Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc.*, (2012) 9 SCC 552 (Supreme Court of India).

¹¹⁶⁶ International Chamber of Commerce (ICC), “Costs of Arbitration”

Enforcement Issues¹¹⁶⁷

Enforceability of arbitral awards is still a concern because it is not free from challenges even after establishment of New York Convention on Recognition and Enforcement of Foreign Arbitral Awards. National courts have the authority to reject enforcement of arbitral awards on certain grounds, which may result to unnecessary delay and a lot of uncertainty.

Enforcement in cross-border technology disputes becomes complicated due to difference in location of jurisdictions and denial of compliance by the losing party. Enforcement can get affected or delayed due to multiple reasons like differences in domestic legal systems, judicial attitudes towards arbitration, and procedural requirement. It gets even more complicated when the parties involved gets into strategic litigation in order to delay the enforcement.¹¹⁶⁸

Public Policy Exceptions¹¹⁶⁹

Public policy exception plays a significant role in limiting the enforcement of arbitral awards. There are high chances that the arbitral awards may get rejected by the court if it is found contrary to the public policy of the enforcing state. While this exception is provided in order to protect the fundamental legal principles, its interpretation can vary across the jurisdiction.

In disputes related to technology and IP agreements, public policy issues may arise from matters like data protection, validity of intellectual property rights or matters involving competition. Courts may scrutinize especially when these issues are involved, which causes inconsistent outcomes.

Conclusion and Suggestions

Cross-border has developed to be a concerning mode of dispute resolution in international technology and intellectual property (IP) agreements, providing neutrality,

flexibility, and enforceability in digitally globalized economy. Through this paper it has been examined that efficiency of arbitration is often challenged with issues like enforceability hurdles, inconsistent approaches to irritability, and difference in interpretation of public policy across jurisdictions. These challenges shows the immediate need for greater harmonization in international arbitration law and practice.

Harmonization will lead to standardizing the interpretation of key principles such as arbitrability and public policy, aligning domestic arbitration laws, and promoting uniformity in enforcement mechanisms. Greater convergence across jurisdiction would provide legal certainty and increase predictability of outcomes, which plays a crucial role for parties involved in high-value technology and IP transactions.

Considering India in this context it possess more potential to be a global arbitration hub. India can be seen moving towards a more arbitration friendly regime with progressive judicial reforms, establishment of institutional arbitration centers, and legislative reforms to the Arbitration and Conciliation Act, 1996. There has been many positive developments like recognition of party autonomy, less judicial interference, and support for institutional arbitration.

¹¹⁶⁷ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958

¹¹⁶⁸ UNCITRAL, “Recognition and Enforcement of Arbitral Awards”

¹¹⁶⁹ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, Article V(2)(b).



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