EXAMINING INDIA'S JOURNEY TOWARDS SPECIALIZED IP JURISDICTIONS– CHARTING A TRAIL FROM COMPARATIVE LAW AND HISTORY

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Abstract

The following paper explores the 'promise to practice 'dilemma of specialized IP jurisdictions in India. The Focus is on the IP division bench of the Delhi High Court ('IPD') and the abolished Intellectual Property Appellate Board ('IPAB'). The paper explores whether the failure of the IPAB has been remedied by the subsequent establishment of the IPD, and analyzes the satisfactoriness of the existing dispute resolution regime. As 'failure' and 'success' are relative terms, the paper explores this within the metrices of vacancies, disposals, expert involvement, subject matter competency, and whether these bodies have ultimately fulfilled their intended object. Furthermore, our focus here is almost exclusively on patents, and patent adjudication. Not only does this narrow down the scope of the paper, but using patents showcases a stronger reasoning for why IP matters require specialized adjudication in the first place.

Keywords: Intellectual Property Division, Delhi High Court, IPD, Specialized Courts, Judicial Expertise

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INTRODUCTION

The following paper explores the 'promise to practice' dilemma of specialized IP jurisdictions in India. The focus is on the IP division bench of the Delhi High Court ("IPD") and the abolished Intellectual Property Appellate Board ("IPAB"). The paper explores whether the failure of the IPAB has been remedied by the subsequent establishment of the IPD and analyzes the overall satisfactoriness of the existing dispute resolution regime. As 'failure' and 'success' are relative terms, the paper explores these within the metrices of vacancies, disposals, expert involvement, subject matter competency, and whether these bodies have ultimately fulfilled their intended object. Furthermore, our focus here is almost exclusively on patents, and patent adjudication. Not only does this narrow down the scope of the paper, but using patents showcases a stronger reasoning for why IP matters require specialized adjudication in the first place.

In the interest of being reader-friendly, it is important to qualify the thesis by answering a few preliminary questions. The first of these are the fundamental 'why' and 'what', *i.e.*,

A. Why do we need specialized intellectual property courts?

B. What is it about intellectual property matters that necessitates such a unique forum? and;

C. What possible benefits accrue to the jurisdiction as a result of its implementation?

To answer these questions, first, one may consider that intellectual property rights themselves are limited rights with a lifespan. For instance, a patent has a maximum lifetime of 20 years in India,[1] and

1 The Patents Act 1970, s 53.

litigation in the near past could easily last for a decade.[2] Thus, it is in the best interest of inventors and right-holders to have a 'speedy trial,' which is often a salient feature of these specialized courts. Next, the degree of complexity that the subject matter itself entails renders the resolution of its issues challenging for ordinary courts. This is particularly true with reference to patent law, which is a highly technical field, and where judges often find themselves adjudicating upon intricate matters of science. And, to address our third question, there are many benefits that accrue to a jurisdiction as a result of specialized IP courts even at a superficial level. First, a natural consequence of such courts is that you have a limited number of judges with a technical background dealing with a wide variety of cases. This allows them to develop a high degree of specialization that not only translates into quality judgments, but also faster trials. Lastly, the result of a sophisticated jurisprudence is that over time, certainty develops and there is a level of predictability. A lack of such precedent turns the country into an unattractive investment destination for businesses focused on innovation. Although these observations can be applied generally, they are especially important for developing economies, and particularly, as shall be explored later, for India.

IP COURTS – A GENERAL EXAMINATION OF GLOBAL TRENDS AND MERITS

A. International Framework Review

The discourse pertaining to the need for a specialized forum for intellectual property always performs on the understanding that they are not deemed essential parts of each and every country's judicial infrastructure. According to the language of Article 41 para 5 of the

[2] In this regard, one may consider the 'twin spark plug' case, which lasted for 12 years (eventually concluding in a settlement) out of the 20-year lifetime of a patent, i.e., TVS Motor Company Limited v Bajaj Auto Limited 2009 SCC OnLine Mad 901.

Trade-Related Aspects of Intellectual Property Rights Agreement ('**TRIPS**'),[3] there is no obligation, international or otherwise to install a specialized forum for matters relating to IP and its surrounding areas such as competition and trade laws. In fact, there is a consensus among this incertitude that a bespoke mechanism is sufficient – be it tribunals or an ad-hoc structure within the existing judicial framework – as long as it makes up an effective means of IP dispute resolution. This point is strengthened by the fact that any court that primarily or extensively deals in intellectual property matters can be deemed a specialized court regardless of the fact that its jurisdiction spills over to countenance other disputes.[4]

Jacques de Werra, in his paper for the Centre of International Intellectual Property Studies (CEIPI) and the International Centre for Trade Law and Development (ICTD), observes that the diversity in IP disputes presents uncertainty regarding a perfect answer in favour of or against specialized courts and their efficacy.[5] Therefore, a multitude of indications have been suggested to ascertain whether or not a country needs to establish such a court based on its economic and social attributes, along with balancing its potential transaction costs and negative effects within each country. Naturally, these considerations also endeavor to forecast whether such an establishment would manifest the obvious benefits such as larger reach, better quality of justice, and the competence to deal with complicated issues that are not satisfied by a black letter knowledge of the law. Therefore, bearing the economic justification of these rights,

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3 Trade-Related Aspects of Intellectual Property Rights Agreement 1995, art 41 (TRIPS 1995).

4 For example, the CAFC in the United States extends beyond IP matters strictly but is considered a specialized Patent Court.

5 Jacques de Werra, 'Specialized Intellectual Property Courts – Issues and Challenges' 2 CEIPI-ICTSD (2016) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id =2761209> accessed 2 November 2022.

this deliberation is not limited to the matter of IP alone but a plethora of prevailing economic and market conditions in a country which influence it.[6]

Most developed and developing countries have adopted some mode of centralisation over the course of the last two decades. This is due to the growing need to cement a system where the enforcement of a negative right can be smoothly promulgated. But the kind of specialization established differs not only with jurisdiction but also on a 'need' basis, given the time period and industry incentives. Initially, specialized courts were seen as simply isolating IP matters and their interdisciplinary connections from general law in terms of access to justice. However, albeit for the purposes of international compliance and the underlying "economy-first" motives, the setting up of such courts allowed for easier administrative decrees and focused legislation. Evidence from ASEAN countries shows that specialized courts are best utilised when given ample room and powers set in procedural guidelines which do not caper or dance from statute to statute (such as between an array of legislations that would result in complicated harmonious constructions).[7] Christopher Antons summarises in his piece on courts in South Asian countries – specifically the Central IP and International Trade Law court in Thailand and the Indonesian Commercial Courts – that basic requirements such as the maintenance of a minimum quorum, stoic academic qualifications for the judges, along with jurisdictions wide enough to accommodate civil and criminal disputes, are the most beneficial precursors in common law countries.[8] The last

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6 Ibid.

7 Christoph Antons, 'Intellectual Property Law in ASEAN Countries: A Survey' 13(3) EIPR (1991).

8 Christoph Antons, 'Specialized intellectual property courts in Southeast Asia' in A. Kur, S. Luginbühl and E. Waage (eds), *und sie bewegt sich doch! Patent Law on the Move Festschrift fur Gert Kolle und Dieter Stauder* (Carl Heymann Verlag 2005).

recommendation invariably solves the problem of a country lacking a notable case load coming from this direction at that time.

However, there has been a recent trend towards definite micro-specialization of IP courts in developing countries for highly technical and specialized matters such as in the case of patents. This is not to imply that the aforementioned observations with respect to power and quorum would be vitiated in their entirety, but their anatomy can certainly be bent and modified to give rise to the most effective means of an adjudicatory body based on the prioritised area. An example can be the difference between the Central Appeals for the Federal Circuit ('**CAFC**') in the United States and the IP High Court ('**IPHC**') in Japan where although there is commonality in promoting distinct adjudication of patents (through exclusive jurisdiction), there also exist differing approaches with regard to judge qualification.[9] The jurisdiction of the former covers a wider range of intangible assets and technology, and requires judges to meet specific academic qualifications. The latter is an independent IP court, but relies more on research officials and third-party contributions, as its judges are required to have the same qualifications as judges in other courts. Another point of connection is the upcoming Unified Patent Court, which is theorised to strengthen existing patent litigation and shows the diversification of expertise given the clamour for the subject matter.[10]

Given these tendencies in developed and developing countries, the contemplation regarding the need for a court loses import, for the

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9 David Tilt, 'Comparative Perspectives on Specialized Intellectual Property Courts: Understanding Japan's Intellectual Property High Court Through the Lens of the US Federal Circuit' 16(2) AJCL (2021).

10 KP Mahne, 'A Unitary Patent and Unified Patent Court for the European Union: An Analysis of Europe's Long-Standing Attempt to Create a Supranational Patent System' 94(2) Journal of the Patents and Trademark Office Society (2012).

same has already been presumed and implemented in *some* manner. Instead, a consideration which comes at this juncture is the importance of choosing in what form the specialized court might function, under this wide and purposely vague definition. This is because the success of a specialized IP court over a general court is not dictated by its existence alone as a recourse but by its penchant to provide various levels of expertise at the adjudicatory level. Explaining this in a different manner would require borrowing words from Justice Louis Harms in 'The Role of the Judiciary in Enforcement of Intellectual Property Rights' where he commented that cases before experienced and proficient judges are shorter and cheaper than those run by novices.[11] The convenience to efficacious resolution with the help of well-administered injunctions is one such boon. However, it can be safely deduced that the emphasis placed on the maestro by these measures extends beyond simply maintaining and strengthening the current intellectual property regime. Instead, it allows for adaptability to contemporary and emerging issues in the field. This is made possible not only by friends of the court in determining pre-decided questions of law but the preceding equipment of the court for the framing of such questions later explored.[12]

B. The Indian Context

In the Indian context, the need for a forum (tribunal or court division) for specialized IP adjudication was acutely felt not merely for the boons of speedy trials to benefit right-bearers within the lifespan of the right, and incentive to innovate (though these were undoubtedly leading factors). There was also the aforementioned need highlighted

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[11] Honorable Mr. Justice Louis Harms, 'The role of the judiciary in enforcement of intellectual property rights; Intellectual property litigation…' World Intellectual Property Organisation, Advisory Committee on Enforcement – Second Session (2004).

[12] Jay P. Kesan and Gwendolyn Ball, 'Judicial Experience and Accuracy of Patent Adjudication' 24(2) HJLT (2011).

by Justice Louis Harms to create a group of judges who would at least by virtue of concentrated exposure gain the expertise and experience required to adjudicate IP matters. These however, are not particular to India *per* se, and such generic reasons easily translate to other jurisdictions. For India, there were, and are, other subtle nuances pertaining to its economic role in the globalized world.

India is not just a destination for production and investment, it is also an attractive consumer market. As there are diverse categories of purchasing power embodied in this subcontinent, that also means that resident consumers will be purchasing both premium and counterfeit products, or atleast products that have a lower price point due to infringed technology (resulting in lesser Research & Development expenditure). Therefore, when such a cause of action against an erring company arises in India, it is crucial to signal to the international community not just the attractiveness of Indian courts as a reliable forum, but also India's commitment to Intellectual Property Rights.

To understand this better, we can consider the case of *Nokio v. Oppo*, where Nokia (a Finnish entity) deliberately chose seven jurisdictions to sue Oppo (a Chinese entity) interestingly opting out of China itself, and naturally challenged the jurisdiction of Chinese Courts when Oppo instituted a counter suit. The aspect of "speedy" here becomes essential because when the defendant is a company from a jurisdiction with a weaker IP regime (as "Chinese Courts are not independent, but are in practice part of the local government"[13]) the risk of an arbitrary anti suit injunction looms heavily. There is also the risk that certain defendants may opt to move their assets out of a jurisdiction to evade damages.

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13 Omar Ramon Serrano Oswald, 'China and India's insertion in the intellectual property rights regime: sustaining or disrupting the rules?' 21(4) New Political Economy (2016).

From another perspective, for a developing country the existence of IP forums (such as an IPAB or the IPD) is an important 'rule of law' signal. Joseph Raz, who is well recognized as one of the most authoritative voices on the rule of law framework outlines eight essentials, of which three are: (1) an independent judiciary, (2) Courts should be easily accessible, not characterized by excessive delays and costs, and, (3) the Principles of Natural Justice with the absence of bias must be observed. [14] This is a valuable consideration because there is data to show that a stronger rule of law framework (facilitated by such forums such as the IPAB or the IPD) translates into higher amounts of foreign investment. [15]A predictable and stable judiciary and jurisprudence is also valuable from the client's perspective because it justifies the litigation costs in India viz-a-viz the probability of a favorable outcome. This in turn injects revenue into the Indian economy by supporting Indian lawyers.

India's status as a "knowledge-based economy" and its aspirations for being a thought leader to the globe necessitate technology transfers from developed nations to India. As foreign firms invest in India to gain access to Indian expertise and knowledge (via joint ventures for instance), India has a symbiotic need to import knowledge from foreign nations (via licenses for instance) to enhance its own pool. As studied have repeatedly concluded that stronger IPR frameworks in a country attract technology transfers (especially from firms with heavy R&D activity), we may infer that an IP court which is intended to guarantee clear, specialized and prioritized adjudication of IP matters

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14 Joseph Raz, 'The Rule of Law and its Virtue' in Richard Bellamy (ed), *The Rule of Law and the Separation of Powers* (Routeledge 2005).

15 Xiujie Zhang and Weihua Liu, 'The Rule of Law and Foreign Direct Investment' (ICEMCI 2021) <https://www.atlantis-press.com/proceedings/-icemci-21/125965842> accessed 7 July 2023.

will further facilitate the same. [16] The heightened sensitivity of the international community to these aspects is illustrated by the cases initiated by the United States [17] and Europe against China at the WTO for violations of the TRIPS due to its restrictive regime of anti-suit injunctions (especially for SEP matters), as well as other factors that prevent foreign inventors and patent owners from enforcing their rights in China. [18]

There is a difference between a pre-existing court absorbing IP matters through the creation of an IP division versus a standalone administrative body. Tribunalisation is a common practice to reduce the burden on conventional courts and also ingrain a stratum of expertise at a cost-effective and approachable level. The most successful example of the same would perhaps be the National Green Tribunal, which was able to overcome most of the well-reasoned fears accompanied in the establishment of an administrative body to handle a rather developing and abstract area of the law.[19] Additionally, the performance of this tribunal has only validated the need of its existence in the first place as a relatively decisive medium for all the interplays between various civil and criminal law with environmental law. The above discussion is now pertinent because, in response to India's demand for a specialized IP jurisdiction, the IPAB, was constituted on September 15, 2003. Its jurisdiction had developed to cover appeals against the decisions of the Registrar of trademarks, geographical

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16 Biswajit Dhar and Reji Joseph, 'Foreign Direct Investment, Intellectual Property Rights and Technology Transfer' (UNCTAD 2012) <https://unctad.org/system/files/official-document/ecidc2012_bp6.pdf> accessed 26 June 2023.

17 Ton Zuijdwijk, 'Understanding the intellectual property disputes between China and the United States' (CIGI 2019) <https://www.cigionline.org/articles/understanding-intellectual-property-disputes-between-china-and-united-states/#:~:text=Effectively%2C%20the%20United%20States%20challenged,outside%20of%20the%20WTO%20Agreement> accessed 5 May 2023.

18 DS611 – China Enforcement of Intellectual Property Rights.

19 Geetanjali Gill, 'Environmental Justice in India: The National Green Tribunal and Expert Members' 5(1) Transnational Environmental Law (2015).

indications of goods, and patents. However, on April 4 2021 by means of the Tribunal Reforms Bill,[20] the IPAB was abolished. Subsequently, of course, a replacement mechanism in the form of the IPD was announced on July 7, 2021.

With the dissolution of the Intellectual Property Appellate Board and the subsequent establishment of the IPD, a myriad of questions is posed, such as "Why was the IPAB abolished? Were the reasons proportionate to the decision?" And to reiterate our thesis, "What were the ramifications of this decision, and to what extent is the IPD a functional replacement?"

THE IPAB – THE IMPRECATIONS OF TRIBUNALS

The 'National IPR Policy' by DPIIT released in 2016 places emphasis on the need for a specialized court.[21] It states that "it would be desirable to adjudicate on IPR disputes through specialized commercial courts" and goes further to outline how this objective would be achieved such as through the setting up of commercial courts at the appropriate level. In light of this admission, the government's decision to abolish India's sole specialized jurisdiction for the handling of IP matters seems puzzling. The statement of objects and reasons of the Tribunal Reforms Bill[22] observes that such abolition is intended to lead to speedy justice because such tribunals have not led to faster trials, and often add another layer to litigation. The reasons listed also question the significance of judgments rendered, and state that the most important cases fail to achieve finality in these tribunals and are litigated all the way to the High Courts and Supreme Courts. As these criticisms are oft-repeated, the paper will begin its analysis of the IPAB by addressing them sequentially.

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20 The Tribunals Reforms Bill, 2021.
21 Department For Promotion of Industry and Internal Trade, 'National IPR Policy' (2016).
22 The Tribunal Reforms Bill, 2021.

For the IPAB, the concerns regarding time, efficiency etc., are not unfounded. Dr. Shamnad Basheer in his global report finds that the pendency rate of the IPAB between 2005-2012 was 50.53 percent, while the rates of the various High Courts were about 10 percent.[23] This essentially indicates a 90 percent disposal rate at the High Courts and a meagre 50 percent disposal rate at the IPAB.[24] While this comparison is significant, it needs to be contextualized by the problems the IPAB had faced since its inception. The IPAB was headquartered in Chennai, with hearings conducted in Mumbai, Delhi, Kolkata, Chennai and Ahmedabad. While the decision to headquarter it in Chennai is a matter that begs inquiry in itself (as addressed later in the paper), it faced the additional challenge of improper infrastructure in the remaining four cities. As a result, the Asian Patent Attorney's Association filed W.P.(C) No.2251/2011 demanding that a permanent bench be set up in Delhi. Another grievance raised was that a timely appointment of the Chairman and Technical Member must be mandated. While the Hon'ble Court in its 2015 order directed the government to address the need in Delhi, the issue of timely appointments went unaddressed.[25] The next factor in contextualizing these concerns around efficiency would be to compare it with the condition in the High Courts. At this juncture, it would be apt to quote Dr. Abhishek Manu Singhvi on the same, wherein he states:

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23 Shamnad Basheer, 'Specialized IP Adjudication: An Indian Perspective', in Jaques De Werra, *Specialized Intellectual Property Courts – Issues and Challenges* (CEIPI-ICTSD 2016).

24 As cautioned by Dr. Basheer, such data does not reveal the percentage of Intellectual Property cases disposed at the High Courts, and thus is not an entirely equitable comparison.

25 Ultimately, the proposal to headquarter it in New Delhi, or any other geographically central location such as Nagpur, or Jabalpur remained unsuccessful due to political pressures in Chennai. *See* Gireesh Babu, 'Proposed relocation of IPAB from Chennai invites criticism from DMK' (*Business Standard*, 22 January 2020) <https://www.business-standard.com/article/economy-policy/proposed-ipab-relocation-from-chennai-invites-criticism-from-dmk-120012200698_1.html> accessed 15 June 2021.

> "*tribunals… (were created for) … the over clogged arteries of the high courts across the country. Secondly, that clogging has only increased because over 33 per cent of all judicial posts at the high court level are at any given time vacant and unfilled…matters of intellectual property are complex and expertise oriented and take much more time than other civil or criminal matters.*" [26]

Proceeding to the next criticism in the statement of object and reasons, the assertion regarding the lack of finality in IPAB cases, and the tarnish on the significance of its judgments is erroneous on multiple accounts. Of the 3793 cases disposed by the IPAB, a paltry 3 percent have been appealed, and among these, only less than 1 percent have been reversed on such appeals.[27] Moreover, the IPAB's contribution to India's IP jurisprudence with important decisions such as *Novartis* (upheld by the Supreme Court),[28] *Bayer Corporation v Natco Pharma*,[29] the *N95 Case*,[30] *Ferid Allani*,[31] etc., clearly highlight its competency and render the aforementioned reasons for abolishing it untenable.

A lot of the IPAB's ineffectiveness can be attributed to the deficiencies in the prompt appointments of chairpersons and technical members. An honest introspection would reveal that this is connected to the decision to headquarter it in Chennai. There are two main challenges with headquartering a forum such as the IPAB in Chennai. The first is a discrepancy in the case load handled by the circuit bench of New Delhi versus the headquarter at Chennai. More patent cases were consistently filed at the Delhi bench but the disposal rate remained

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26 Nalini Sharma, 'Scrapping of the IP Tribunal: The good, the bad, and the ugly' (*India Today*, 12 April 2021) <https://www.indiatoday.in/india/story/scrapping-of-the-ip-tribunal-the-good-the-bad-and-the-ugly-1790112-2021-04-12> accessed 6 June 2021 .

27 Pravin Anand, 'Abolishing IPAB: An Own Goal?' (*Indian Business Law Journal*, 21 April 2021) <https://law.asia/abolishing-ipab-own-goal/> accessed 30 June 2021.

28 Novartis AG v Union of India (2013) 6 SCC 1.

29 Bayer Corporation v Union of India 2013 SCC OnLine IPAB 25.

30 Sassoon Fab International Pvt. Ltd. v Sanjay Garg 2020 SCC OnLine IPAB 170.

31 OA/17/2020/PT/DEL.

below that of Chennai. The second challenge is that headquartering it at Chennai would require the Chairman to reside there. The professional backgrounds and histories of individuals shortlisted for this role usually meant that they would often have engagements or future commitments in the Delhi High Court and Supreme Court, which they would have to abandon by making the shift to Chennai. Ultimately, due to political pressures, the attempts to headquarter it in New Delhi were unsuccessful.

It should also be noted that the rules for appointment to the IPAB clearly carve out a principal share of the responsibility to the Central Government. The point of stating this is not to engage in a 'blame-game' ricochet but to make apparent that the defects are not as inherent to the forum as they seem. Notwithstanding this, the Court in *Mylan Laboratories* stated that, "The legislative intent is of the continuity of IPAB and not its cessation because of a vacancy in its technical membership."[32] This sentiment was shared by the High Court of Madras in the *Shamnad Basheer* case where it found that the IPAB has an eminent role to perform.[33] The court gave consideration to India's attractiveness as an investment destination among other factors. Thus, it should be of no surprise that the abolition of the IPAB without a better alternative brought with it a motley throng of hazards. The most notable of these are: inconsistent jurisprudence; as well as in the proceedings; lack of a technical expert, which thus passes the sole burden of intricate examination to the High Court judges; and, expensive costs of representation (as opposed to the IPAB where patent/trademark agents could appear on behalf of the client).

Although often repeated, factors such as speedy justice, increased docket load and affordability should not be construed as mere

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32 Mylan Laboratories Limited v Union of India 2019 SCC OnLine Del 9070.
33 Shamnad Basheer v Union of India 2015 SCC OnLine Mad 299.

catchphrases but must rather be understood as comprising the very warp and woof of why tribunals were established. The 272nd Law Commission Report of India (2017) clearly spells out that tribunals exist as a remedy to the large number of delays and pendency in the Courts. The fact that despite the tribunal's dysfunctionalities abolishment finds no mention is of great import. In fact, all the suggestions in the aforementioned Report stress reforming the existing tribunals through filling of vacancies, independence in appointments, etc. In the 2021 *Madras Bar Association* case, the Hon'ble Supreme Court recommends the formation of a National Tribunal Commission to supervise the appointment and functioning of the Tribunals, and till the constitution of such a Commission, a separate wing in the Ministry of Finance to deal with its needs.[34] But while stating thus, the court frowns upon the existing situation where executive control is in some form or the other prevalent in the functioning of the tribunals (such as with the IPAB). The same position has been stated even in the 272nd Law Commission Report. As regards the relationship between the functioning of Tribunals and High Courts, the Supreme Court in *Chandra Kumar* categorically stated that Tribunals were only supplemental to the High Courts and not substitutes.[35] It is possible construe this relationship to be reciprocal where High Courts, by their very nature, cannot ordinarily be substitutes for specialized Tribunals either. The reason for this is that "specialist bodies comprising both trained administrators and those with judicial experience would, by virtue of their specialized knowledge, be better equipped to dispense speedy and efficient justice."[36]

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34 Madras Bar Assn. v Union of India (2021) 7 SCC 369.
35 L. Chandra Kumar v Union of India (1997) 3 SCC 261.
36 Ibid at 95.

To illustrate this stance of being supplemental but not substitutes, it would be best to use an example. Consider for instance a case that pertains to the adjudication of Standard Essential Patents where it entails establishment of validity of the patent claim based on the court's interpretation, and establishing infringement, based on a nuanced understanding of the 'standard' viz-a-viz the claims that are being infringed. This, in turn, involves the Evidence Act, Civil Procedure Code, understanding of the Patents Act, orders of the competition commission, etc. Here, the award of an injunction entails a very reasoned and nuanced understanding of the various laws that would go into determining what the rights and liabilities of each party are. Given these circumstances and the stakes involved, in India, this is clearly within the domain of the High Courts and not a Tribunal (such as IPAB). Supposing such a body would have been made competent to pass orders on this matter, it would eventually end up in the High Court. However, something such as opposition matters, or refusals of claims (which are in essence more technical than legal) are best dealt with by specialized courts with a technical expert.

With full consideration of all these factors, the paper will now proceed to examine whether the IPD resolves the issues created by abolishing the IPAB, and the degree of its substitutive function.

THE IPD – SUCCESSFUL REFORMATION WITH ROOM FOR IMPROVEMENT

A. Broad Transition Issues

Any discourse around the IPD must include the proactive step of its existence as a specialized unit for IP dispute resolution almost instantaneously after the dissolution of the IPAB. This enactment under the guidance of IP polymaths Justice Pratibha M. Singh and Justice Sanjiv Narula undoubtedly set out its establishment with a

promising incorporation. Currently governed by two judges on a rotational roster, a perusal of the Delhi High Court Intellectual Property Division Rules, 2022 ('**IPD Rules**') reveals conventional and new practices such as a 'hot tubbing' of contradictory expert opinions, a faster and speedier trial, and a general progressive outlook. [37] However, with over 3000 cases transferred to the IPAB, out of which 500 were patent matters, one cannot ignore the very obvious burden on the Delhi High Court and its ability to not only entertain IP maters but also the loss of three judges to the Court in other areas of law.

Again, when commenting upon whether the IPD resolves these issues, it is important to preface the passage with the understanding that the IPD itself is at a nascent stage, and deserves merit solely based on successfully handling the aftermath of the dissolved IPAB. However, with the conversation surrounding specialized IP adjudication recently reignited by the new Madras High Court IPD (with more such divisions expected), the discourse must extend to whether through these forums said adjudication has been or will be perfected.

The foremost of hazards posed by the abolition of the IPAB was the time factor for the litigants. While a streamlined and specialized court such as the IPAB exercising original and appellate jurisdiction does make this easier, it does not (or rather cannot) do anything to fast-track the cases. On a positive note, the Delhi High Court Intellectual Property Division Annual Report ("Annual Report") notes that with around 3000 cases transferred to the IPD of which more than 500 cases are patent-related, around 30-50 percent were disposed of which fought against the expectancy of delays.[38] In the report, Justice Navin Chawla attributed his impressive disposal numbers to the existence of

[37] Delhi High Court Intellectual Property Rights Division Rules, 2022.
[38] Delhi High Court Intellectual Property Division Annual Report 2022-23.

the special bench dedicated to IP.[39] Furthermore, the report touched upon incoming procedural improvements such as fixing time slots for oral proceedings for brevity and shorter proceedings can only add to this efficacy henceforth.

However, adjudication based on conventional 6-month roster system which might create challenges for its suitability for the IPD. This proposition is contextualized with rules 31 and 32 of the IPD Rules. The former provides that a court may when deeming necessary seek the assistance of an expert in relation to complex technicalities while the latter institutes a common pool of law researchers with technical qualifications.

B. The Debate Surrounding Judicial Expertise

To an observer, it may appear that the problems arising from the lack of technical experts are remedied by the fact that at least one judge on the roster will have a technical degree (this is a pattern and not a rule), and Rule 32 of the IPD Rules provide for the appointment of 'Legal Researchers' with such qualifications. But the efficacy of this measure may be hindered by the fact that the term 'technical qualifications' is vague. It could mean any number of degrees, such as those in biology, computer science, botany, chemistry, etc., at either a bachelor's or master's level. The content of these degrees is extremely varied, and the aid they render judges in their adjudication depends entirely on the type of matter being heard. Consider hypothetically a judge with a bachelors in biology or physics. This is a valid technical qualification. However, it would still make adjudicating on matters like intricate pharmaceutical patents challenging. This is because such cases can deal with advanced organic chemistry, stereochemistry, and 3D orientation

[39] Justice Navin Chawla, *Experience in the IP Division at the Delhi High Court* (Delhi High Court Intellectual Property Division Annual Report, 2022-2023).

of molecules, which are all essential in understanding the drug-tissue response.

These are ultimately subjects that are seldom collectively dealt with at a bachelor's program. It certainly seems unfair to expect Indian judges to be omniscient and have an expertise that spans every conceivable subject. Although, notably various judges have emphasized not only for the need of but also the efficacy of technical assistance through researchers and experts in navigating this arcane sphere.[40] However, this concept is not unique only to the IPD given the recent announcement by the Chief Justice D.Y. Chandrachud to maintain roster rotation based on domain expertise for the Supreme Court. [41] For the IPD this expertise would not always have to be in the shape of a technical degree that precisely matches the dispute at hand as this may be too restrictive, and highly impractical (at-least for the purpose of discharging judicial functions, and, such barriers to entry would only contribute to vacancies). This is also because while "a" technical degree gives one an advantageous degree of understanding and familiarity with a subject matter, it is clearly not the panacea it appears to be, for the simple reason that:

> "*It is hardly to be supposed that the members of a patent court will be so omniscient as to possess specialized skill in chemistry, in electronics, mechanics and in vast fields of discovery as yet uncharted. The expert (judge) in organic chemistry brings no special light to guide him in the decision of a problem relating to radioactivity*."[42]

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[40] Justice Amit Bansal, *Importance of Technically Qualified Law Researchers and Panel of Experts for IPD Judges* (The Delhi High Court Intellectual Property Annual Report, 2022-2023).

[41] Debayan Roy, 'Supreme Court to introduce new roster system based on domain expertise of judges from July 3' (*Bar and Bench,* 29 June 2023) <https://www.barandbench.com/news/litigation/new-scientifically-based-roster-case-categories-supreme-court-of-india> accessed 1 July 2023.

[42] Simon Rifkind, 'A Special Court for Patent Litigation? The Danger of a Specialized Judiciary' 37 ABAJ (1951).

This is pertinently so when there exists a provision for researchers and a panel of experts that possess the necessary skills. Instead, perhaps judicial 'expertise' could alternatively be construed as a judge's past relationship with those subject matters in Court, which could be an equally appropriate marker of their ability to adjudicate on the same. This is not to imply that a judge's efficacy in adjudication necessarily depends on their past expertise, because that would be incorrect and presumptuous. A zeal and enthusiasm to learn have often been found to be amply sufficient. [43] However, an expertise-based roster system in one form or the other (as presented herein) would undoubtedly increase the probability of efficient adjudication based on the known and controlled variables.

For a balanced perspective, the argument for domain expertise dictating roster rotation must be contrasted with the informed viewpoint Justice Gautam S. Patel presented in the 'National Seminar of IPR Disputes in India'. Here the Justice Patel spoke on the purposive decision to incorporate judges into the IPD regardless of any previous experience or specialization in the field as opposed to marginalising judges as 'only IP judges. Hence the system would function based on a learning curve furthered by knowledge infusion by the counsels and legal researchers alike.[44] Fortunately, this sentiment has exceeded expectations at least till the point of adjusting the backlog from the IPAB. Furthermore, at the foundational level, conceptual clarity through consultations per Rule 32 have been successful particularly in patent matters as mentioned by Justice Amit Bansal in

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43 In this regard one may consider the prolific careers of Justice Hari Shankar, Justice Prabha Sridevan, and Justice Ravindra Bhat amongst many others that have passed pathbreaking judgments without an extensive background in IP Law prior to the same.

44 Vikrant Rana & Priya Adlakha, 'National Seminar on Adjudication of IPR Disputes in India: An Initiative by Delhi HC' (*S.S. Rana & Co.*, 22 February 2022) <https://ssrana.in/articles/national-seminar-adjudication-ipr-disputes-india/> accessed 30 June 2022.

the Annual Report. When it comes to the advancement of IP jurisprudence, the specialized division has been able to keep up with the influx of digitisation in infringement suits and has also commented on future-proofing aspects such as redundant injunctions/blocking orders against copyright infringing websites with multiple mirrors. Although not before the IPD, the judgement in *Ericsson v Intex* is also indicative of how non-specialist judges can navigate complicated spaces such as Standard Essential Patents and FRAND licensing.[45]

C. Reasons for Rethinking the Roster System

Another critique of the existing roster system is that it might happen that by the time the judge has become thoroughly appraised of the facts of the case and has synthesized it into a structure where they can apply the law, the roster changes and they are replaced. If the litigants have not procured an order by this time, then the hearings may have to be restarted for the simple reason that the matters are often so complex as to warrant this detailed briefing. This could additionally be prejudicial to the interests of the plaintiff as their strategy and line of arguments has previously already been revealed in Court.

Dr. Shamnad Basheer in 2016 (before the abolition of the IPAB) offered an extremely nuanced perspective on the considerable merits of having a specialized bench at the High Courts rather than a tribunal.[46] Dr Basheer upon examining history, judicial precedent and politics found that setting up specialized benches was far more desirable due to a more efficient allocation of resources (characterized by fewer investments), a more independent judiciary and curtailed risk of government interference, and seamless integration as these benches fall within the existing court framework. Dr Basheer however qualified

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45 Intex Technologies (India) Ltd. v Telefonaktiebolaget L.M. Ericsson (Publ) (2023) 299 DLT 737 (DB).

46 Basheer (n 23).

his suggestion with the disclaimer that such a scheme would only be successful with longer bench tenures. This would allow the judges to gain the aforementioned experience needed for such a forum to succeed in its goals via the "learning curve" as posited by Justice Gautam Patel.

An additional solution to implement as a best practice, would be to generate transcripts of the hearings similar to the system in the United Kingdom, for the purposes that when the roster changes there is a record of the previous arguments before the sitting judge.

D. Appointment of Court Experts and Legal Researchers

The previously mentioned CAFC and IPHC systems show how a gradual shift from generalized to specified type of intellectual property issues can take different forms and procedures. Despite this, their unique structures have remained consistent in these jurisdictions due to surrounding factors. The IPHC's methodological constitution of professional researchers and non-expert judges can handle the labyrinth of evolving technical patent disputes, given that their appointment criteria for researchers requires comprehensive experience in IP subject matter which influences the adjudicatory perspective. Furthermore, this experience smoothens the possibility of a balanced role of third-party experts. On the other hand, the CAFC in the US, uses recent law graduates as legal researchers, but they assist judges who specialize in patent matters. This upholds a different but equally effective kind of balance with third party experts.

However, the IPD seems to suffer from the short end of both mechanisms. The roster rotation does not ensure the appointment of an expert judge, and the immediate legal researchers assisting are composed of freshly graduated clerks. Although this deficiency is saved by the independent pool of additional technical legal researchers

not attached to any bench as per Rule 32 of the IPD Rules, their involvement remains hanging on discretion. The recent call for applications for the role of a legal researcher mentions that such researcher must have a minimum of two years-experience in IPR along with either a technical degree 'or' a specialization in any IPR subject matter. Even discounting the reality that two years-experience is in most cases insufficient to equip someone with the required expertise for the case load and variety the IPD encounters, the 'or' factor prefacing the already vague 'technical degree' makes any expert involvement all too optional. It cannot be denied that a longer duration for the roster and specified tenure for the pool of legal researchers with stringent educational qualifications would help this forum better serve its purpose.

Being contended with 'either or' often results in a reality which is 'neither nor'. To this end, we may compare this with the appointment of technical members in the IPAB where although there are a wide range of options, they contain an inherent stringency. To elaborate, a technical member for Patents would need to have had at least 5 years of past experience in the role or have been the controller under the patents act, or has had at least 10 years of experience as a registered patent agent and possess a degree in engineering or technology,[47] experience as a controller general or registered patent agent is far from an exception to a technical qualification, as the appointment of such role requires a technical degree to qualify. Each one of the options provided in some form or the other mandate prior technical experience, which is obvious considering such a rule befits the role. The different options exist not as caveats to the requisite qualifications, but only to ensure that candidates with the required skills are not

[47] Tribunal, Appellate Tribunal and other Authorities (Qualifications, Experience and other Conditions of Service of Members) Rules, 2017.

barred simply by the nature of their previous roles. The purpose of insisting on these skills and background is not to advocate for a technocratic gentry in the judiciary. But it is to point out that the nature of suits in the IPAB (opposition matters, refusal of claims, revocations and cancellations, etc.) necessitated those skills whether or not they were always available. Additionally, given that those suits are now transferred to the IPD, there is no reason that the expertise mandated in the erstwhile body should not be present here as well, in this case, reflected in experts falling under Rules 31 and 32.

In the Annual Report, the need for technical experts as mentioned in Rule 31 is well acknowledged, especially in the arena of patents, however, even after a full year such a panel remains to be constituted. One hypothesis that seeks to answer this, is that the cases thus far have not yet necessitated the constitution of such a panel. But besides being a confounding prospect, it is also worrisome because one may consider for instance (as observed in *Philips v AWH Corp.*) that "The descriptions in patents are not addressed to the public generally, to lawyers, or to judges, but … to those skilled in the art to whom the invention pertains".[48] For this reason, and the simple fact that persons skilled in the art are able to read the claims in the context of the entire patent, and are interpreting the terms and technologies not as a lawyer would but as an engineer, scientist or anyone in the technical fraternity, it would be ideal to constitute such a body with priority. It is well established that decisions of Indian patent courts and the controllers need to follow the principles of natural justice in their adjudication, and must be non-arbitrary, and through the application of mind.[49] Further, one recognizes intuitively that for the standard of *audi alteram partem* to be met the complexity of each litigant's claims and arguments

48 415 F.3d 1303 (Fed. Cir. 2005)

49 See Agriboard LLC v Dy. Controller of Patents (2022/DHC/001206); Gogoro Inc. v Controller of Patents (2022/DHC/003259).

must be gathered in its entirety by the judge. An expert would facilitate this and ideally hasten the trial as a result, with the added benefit that such a reasoned order is less likely to be appealed.[50]

Additionally, the presence of court experts would undoubtedly assist the judge during the "Hot-Tubbing" by party experts, in separating the grain from the chaff (*i.e.*, the conflicting testimony, and fiction from the canonical substance). [51] To borrow perspective, in *Daubert v Merrill* [52] and the *Philips v AWH case, the* U.S District judges were tasked with the job of evaluating the biased technical expert testimony to arrive at a conclusion, but as the illustrious Justice Breyer later observed, this is may be unwise.[53] Judges are trained extensively through years of practice to discharge a judicial function, a role that already carries with it tremendous responsibilities due to the vast and far-reaching effects it has. In addition to this, to task them with making "sophisticated determinations" on highly nuanced scientific matters (during conflicting testimony) when they often do not have the training for the same is a practice we must review.

Therefore, it is clear that many of the aforementioned benefits that could accrue to India as a result of such a forum weigh heavily on the constitution of the panel per Rule 31. Realistically, it is likely that several eligible candidates for such a panel are associated/employed by companies (that might invariably have pending or prospective intellectual property disputes of their own) thus resulting in a conflict of interest. A solution to this conundrum may be to recognize that Judges are already adept at dealing with potential conflicts of interest, and any vested interest of the court expert would be detected either by

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50 Dolly Wu, 'Patent Litigation: What About Qualification Standards for Court Experts' BCIPTF (2010).

51 Markman v Westview Instruments Inc. 52 F.3d 967, 1025 (Fed. Cir. 1995) (Newman, J.).

52 509 U.S. 579, 590, 597 (1993).

53 Sapna Kumar, 'Judging Patents' 62 Wm. & Mary L. Rev. 871 (2021).

the Judge or inevitably by the opposing counsel. Addressing this is simplified by the fact that the role of the expert is only consultative in nature. [54] The language of both the aforementioned rules prescribes a discretionary power of availing technical assistance as and when needed. This does solve the *demission du juge*, which is an over-dependence on third-party expert contributions, as technical issues existing outside the specialization of a non-expert judge would then excessively be influenced by said opinions. But the aforementioned observations reveal another layer to this argument that due to the complexity of the issue at hand, the deviation of justice could begin at the framing of the questions of law in the first place, which would then restrict the expert within these arbitrary walls. It must be noted here that the gap between ideation into practice in terms of appointing 'technical experts' by the book existed even with the IPAB, the Chairman was a retired Judge assisted by/ seated with a technical member with a single science/field of expertise.

THE ARBITRATION CONUNDRUM

This part of the paper deviates from its sole focus in specialized IP courts to comment on the larger IP ecosystem specifically pertaining to Alternate Dispute Resolution ('**ADR**'). Given its inextricable connection with litigation and jurisprudence formulating the basis of fundamental understanding of aspects such as arbitrability, India's stance must be compared to global trends.

The benefits of resorting to ADR mechanisms such as arbitration and mediation involve an effective pre-escalation route for early problem identification, focus on party interests and autonomy, along with cost-effective and informal make-up as compared to conventional

[54] "The sabbath was made for man, not man for the sabbath: (Mark 2:27) KJV, likewise, the expert is appointed for the judge, not the judge for the expert. The role of an expert is to be a facilitator and not that of a "heavy-weight" in the judicial process.

litigation.[55] An interesting addition to these advantages, which is particularly highlighted in IP disputes, is the engagement of an expert who as the mediator or arbitrator is able to solely or via further appointment formulate an unbinding negotiation or a binding award enforceable by a court.

Upholding this essence of expert guidance aiding the resolution of IP disputes, the WIPO Arbitration and Conciliation Centre promotes said methods of dispute resolution by collaborating with state IP offices in terms of raising awareness, case administration, and their adoption in research and development models.[56] Furthermore, alongside literature postulating the mode of IP courts across jurisdictions highlighting the importance of ADR forums for adjudication, the ICC Commission has observed that the arbitrability of IP matters is not starkly different from others. It is not entirely correct to say that all intellectual property issues can be resolved under these models, as in India due to nebulous jurisprudence.

A significant portion of all IP litigation is tied to breaches in know-how and licensing agreements, naturally, tied to a predetermined contract. In these circumstances, the existence of a valid arbitration agreement containing the scope for dispute resolution including IP matters tends to be treated in a nictitating and uncertain manner whenever the court has the opportunity to go into a detailed yet *prima facie* review of the arbitrability of the matter.[57] This cautious power of review crafted with the softest hands so as to not hinder the powers of the arbitration tribunal is limited in its endorsement to whether the right violated in question pertains to a right *in rem* or a right *in personam*. A right *in rem* when seen in the light of jural correlatives imposes a duty

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55 de Werra (n 5).

56 World Intellectual Property Organisation, *Guide to WIPO Arbitration* (2020).

57 KA Loya, 'Arbitrability of intellectual property disputes: a perspective from India' 14(2) JILP (2015).

on the state to resolve a harm done against a citizen. Since there is a duty owed, a right *in rem* is a right against the public at large. An important factor therein is that the effect of owning an intellectual property right confers in most cases, a negative/exclusionary right to *inter alia* produce, use, and sell the property in question. Therefore, as opposed to private rights, often the Indian courts have labeled trademark, patents and copyrights under this gamut.

A right that holds within itself the implication of a micro-monopoly and its *erga omnes* effect is a subject which only the state has the competence to decide, making the question of its arbitrability a policy decision. The landmark case of *Vidya Drolia* reasonably limits the breadth of arbitrable subject matter by excluding matters related to the inalienable sovereign and public interest functions of the State, and those in need of centralised adjudication.[58] Seeing the standard established in *Drolia*, not only is the classification of arbitrable subject matter not watertight but even the boundary of '*in rem* 'can be unraveled to include rights *in personam* which were subordinate to rights *in rem* (hence, with no *erga omnes* effect) to in fact be arbitrable.[59] A careful deduction can constitute that some matters might fall under this purview, such as basic licensing issues arising from a contract. However, even the exercise of possibly adjusting IP disputes within these crevices is perturbed by the fact that some courts have dealt with the arbitrability of IP cases as a separate limb exclusively as rights *in rem*.

In *Ayyaswamy*, the court observed as *obiter* the bar on the arbitrability of such matters, which was consciously upheld in *Drolia*.[60] Following the latter, the court in *Indian Performing Right Society Ltd. v Entertainment*

58 Vidya Drolia and Ors. v Durga Trading Corporation MANU/SC/0939/2020.
59 Ibid.
60 Ayyasamy v Paramasivam MANU/SC/1179/2016.

Network concluded after a thorough evaluation of precedents scoping out the ambit of *'in rem* 'that rights such as copyright would fall under this purview and not be arbitrable.[61] Cases such as *Lifestyle Equities v Seatoman* have attempted to mine the right *in personam* subordinate to the right *in rem,* by compartmentalising the contractual counterparts of these rights from the state granted ones such as licensing, as opposed to validity of a patent.[62] Moreover, courts have also attempted to divert attention towards a conclusive adjudication of the matter by promoting *favor arbitrandum*, which is an approach consisting of a presumption in favour of the arbitrability of disputes.

However, there needs to be some clarity on and consonance between the aforementioned judgements. This is because there is no accounting for the possibility where in a licensing agreement dispute, the defendant might take up the issue of invalidating the IP right in order to separate themselves from the inference of infringement. An interesting departure from these jigsawed disagreements was an approach taken by the court in *Hero Electricals,* where the matter was referred to arbitration eventually.[63] Here, the IP element was ignored in part of its connected contractual obligations, tiptoeing the arbitrability requirement under Sections 8 and 11, given the context for the contract required limited reference to IP law.[64] But such a method does not, or better yet, *should not* act as a precedent for the treatment of IP disputes in such a manner. Reducing them to contractual obligations and performance neither solves the *in rem* and *in personam* conundrum nor acts as a ready stencil for every kind of such dispute.

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61 Indian Performing Right Society Ltd. v Entertainment Network (India) Ltd. 2016 SCC OnLine Bom 5893.

62 Lifestyle Equities CV v Q.D. Seatoman Designs Pvt. Ltd. and Ors. 2017(72) PTC 441(Mad).

63 Hero Electric Vehicles Private Limited and Ors. v Electro E-mobility Private Limited and Ors. MANU/DE/0379/2020.

64 Arbitration and Conciliation Act 1996, ss 8 and 11.

Not only does it move away from the anticipation of the inevitable – a conclusive judgement – but the same also decisively points out that the ADR system in place does not make up a certain and reliable dispute resolution framework for IP issues in India. The Annual Report addresses this uncertainty but poses commercial suits as better alternatives to arbitration in non-contractual IPR suits at the very least such as for licensing and franchising.

However, most UNCITRAL countries have extensive frameworks for IP dispute resolution, which is representative of the growing judicial faith in ADR.[65] Notwithstanding Mediation and Early Neutral Evaluation, India's departure from international conformity, which sets out yet another opportunity for technical expert engagement with the dispute matter, is indicative of the IPD in its entirety as the sole option for dispute resolution. Lastly, the variability of judgements with regard to this issue itself highlights the incongruence regarding the intricacies of IP at large and the inability of the High Courts and Supreme Court to efficiently employ the breadth of the law past nit-picking existing jurisprudence.

CONCLUSION

In the final analysis, there is an insufficient corpus of information regarding the IPD at present (such as reports and academic literature) owing to its nascency. To that extent, this paper has thus far comprehensively analysed India's journey towards specialized IP courts by undertaking a comparative analysis of other jurisdictions, examining its own stint with the IPAB, and finally tracing the transition to the present IPD. The demand for such a forum in the Indian

[65] Dario Vicente, 'Arbitrability of intellectual property disputes: A comparative survey' 31(1) Arbitration International (2015) <https://www.researchgate.net/publication_Arbitrability_of_intellectual_property_disputes_A_comparative_survey> accessed 12 December 2022.

experience is specifically underscored in this paper by considering the "Indian context".

Streamlining of multiple cases into a common trial (as in *Octave Apparels*[66]), hearing concurrent evidence via Hot-tubbing, and creating in-house research units with technical expertise in the form of 'Legal Researchers' and a Panel of Experts shows the novelty and promise of the forum. However, to best achieve the goals and the promise extensively explored herein, the possibility of moving to an expertise-based roster system (as introduced in the Supreme Court of India) within the liberal contours suggested in this paper may be explored. Additionally, it could be desirable to make technical qualifications for the legal researchers mandatory instead of optional, and constitute a panel of experts (or what the IPD Report terms the "National Panel of Scientific Advisors") on priority. The benefits accruing from this have been explored under the heading 'Appointment of Court Experts and Legal Researchers'. In addition, a longer tenure and less frequent roster changes would benefit not only the litigants but also the sitting judges as it would allow the "learning curve" effect mentioned by Justice Patel to culminate in fruition.

As regards arbitration, for the benefit of the reader it is summarized that the jurisprudence as it stands today are conclusive to the extent that contractual rights are arbitrable (even when arising from a statutory right), whereas standalone statutory rights are not. *Hero Electric,* and *Golden Tobie* make clear that non-contractual rights arising from a statute are not-arbitrable, conversely, contractual rights arising from a statute are arbitrable (being subordinate rights in personam arising from the rights in rem). [67] This naturally precludes infringement

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66 Octave Apparels v Nirmal Kumar trading as Apricot Fashion Alloy & Anr. [C.O. (Comm.IPD-TM) 352/2022].

67 Golden Tobie Private Limited v Golden Tobacco Limited, 2021 SCC OnLine Del 3029.

matters that typically arise due to the absence of a contract. The court in *Hero Electric* identifies such suits (albeit in the context of trademarks) as "normal" infringement suits that are non-arbitrable, and finds that infringement where the rights emanate from a contract are arbitrable. But given that such awards are final and cannot be challenged except under a limited scope, one wonders whether given the sophistication of the subject it would be desirable to arbitrate it. The commercial courts (within their pecuniary limit) already act as a fast-tracked forum with strict timelines for pleadings, case management hearing and the 6-month deadline for closure of arguments, and judgement within 90 days of the arguments. This coupled with the inherent security (by virtue of the judicial expertise and tailored infrastructure) of the IPD (and the possibility of appeal to it) makes the IPD ultimately reign as the forum of choice.