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Resolving IP Disputes Through Arbitration

Intellectual property (IP) disputes may take several forms, including infringement of IP rights, misappropriation of business goodwill and reputation, industrial espionage such as stealing a competitor's trade secret, unfair competition such as counterfeiting and false advertising, or breach of an agreement to use IP, among many others. Traditionally, IP disputes have been brought before a court. But in recent years, alternative dispute resolution (ADR) has emerged as an increasingly attractive option for resolving such disputes, as parties may wish to avoid court litigation.

Arbitration is a form of ADR that provides a private and confidential procedure to resolve disputes involving IP. Parties may choose arbitration in advance through contractual arrangements or may decide after a dispute arises that arbitration should be pursued as an alternative to conventional litigation. Courts of many countries, including the Central Intellectual Property and International Court of Thailand, offer court-sponsored, nonbinding arbitration as a method of decreasing their caseloads. The arbitration proceedings may include fact-finding, document exchange, briefing and testimony of witnesses, etc. Arbitration awards or the arbitrator's decisions are legally binding on the parties to the dispute and are subject to judicial review only in extremely limited circumstances.

Arbitration has several advantages over court litigation:

- ▶ **Confidentiality.** The privacy of arbitration is attractive to parties who may not want to reveal the proceedings to the public. Arbitration sessions are not open, and the arbitrator's decisions are not released to anyone except the parties.
- ▶ **Structure.** The parties generally agree to arbitration and

are free to further agree to specialized rules and to choose arbitrators with experiences, skills, and expertise suitable for the matter.

- ▶ **Procedures.** Unlike the one-size-fits-all procedural rules in court litigation that are applicable to all cases, in arbitration the parties will choose actions that best serve their interests, including the applicable law, rules and procedures, and the place and language of the proceedings.

- ▶ **Specialized expertise.** The parties may select a panel of arbitrators who possess a particular expertise suitable to resolve the complicated and technical nature of disputes involving IP. In complex technology disputes, for example, the selected arbitrators could have deeper understanding about the technology involved than a judge without a scientific or technical background.

- ▶ **Efficiency.** As a result of the parties' autonomy, arbitration typically provides a faster and more efficient decision-making process than court litigation. In many cases, arbitration has proven to be cheaper than court litigation.

- ▶ **Relationships.** Arbitration proceedings are conducted in a friendlier manner than typical litigation, usually in private setting. Rules of evidence and procedure as selected by the parties from the arbitration rules are generally relaxed, which makes the process more business-like and less hostile than court litigation. The ADR process allows the conflicting parties to restore their working business relationship.

- ▶ **Enforceability.** The enforceability of arbitration awards is recognized by national statutes. Treaties like the United Nations Convention for the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the New York Convention) provides for the common recognition of arbitral awards. Since grounds for appeal are very limited in contrast to court litigation, arbitration decisions are often viewed as easier to enforce than judicial decisions.

Unless the parties to the dispute aim to establish a public legal precedent rather than an award, arbitration and other forms of ADR can provide an effective means to deal with possible future conflicts. Practitioners, judges, legislators, and academics should pay more attention to the potential value of arbitration and should present arbitration to the parties as an alternative means to the court litigation for resolving IP disputes. 🐼