



The changing face of IP litigation in India

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- A trilogy of reforms has been altering the litigation landscape in India
- More than 1,000 cases were filed at the Delhi IP Division in its first year
- Supervision of IP Offices is much-needed sunlight in the system

Earlier this year, Goldman Sachs **reported** that India could rise to be the world's second-biggest economy by 2075 from its current fifth spot. This is, of course, conditional on several factors beyond its low dependency ratio in the population (the number of dependents against the total working age). Per Goldman Sachs' report, India's progress in innovation and technology will be an important driver of this growth.

This forecast is not lost within the country. A shift towards increasingly protecting intellectual property was a long time coming as more and more Indians became creators and owners of intellectual property rights (IPRs). According to **a statement** released by the Ministry of Commerce and Industry, for first time in the last decade, the number of patents filed by Indian applicants surpassed the number of applications filed by non-Indians with the Indian Patent Office between January and March 2022.

On the ground, changes that reflect this shift include the introduction and implementation of specialist IP courts in India. The creation of the first IP court in India at the Delhi High Court in 2021 was spurred by the government's surprising move to abolish the Intellectual Property Appellate Tribunal (IPAB). IPAB was the forum for appeals against decisions of Indian IP offices and a venue for IPR invalidation proceedings. With IPAB gone, all matters pending before it were transferred to the High Courts.

While there had been concerns about the pace and other aspects of IPAB, increasing the workload of the already burdened High Courts did not sound like good news on the IP front. That is until the Delhi High Court introduced the trilogy of an exclusive IP Division, the Delhi High Court Intellectual Property Rights Division Rules, 2022 and the High Court of Delhi Rules Governing Patent Suits, 2022.

This trilogy of reforms has been changing the face of IP litigation before the Delhi High Court over the past year. The Delhi High Court has buttressed its contribution to the development of patent jurisprudence, emerging areas and reformed the functioning of IP offices in this period.

What is different about IP Divisions?

The IP Division is a part of a High Court that exclusively or largely deals with IP matters. Such divisions have been established at the Delhi High Court at New Delhi and at the Madras High Court at Chennai so far.

The Delhi High Court introduced an IP Division in 2021 which was converted to an exclusive division for IP matters in 2022 though a non-IP mandate has been assigned to at least one judge of the Division this past year. The number of judges assigned to the IP Division has varied from two to three judges at the Delhi High Court, with its current strength at two judges.

The Madras High Court's IP Division introduced in 2023 has two judges at present, one of whom exclusively handles matters transferred from the disbanded IPAB and other proceedings related to the transferred matters.

Each of the IP Divisions at Delhi and Chennai has its own rules (IP Division rules). The usual codes of procedure and evidence and the Commercial Courts Act continue to govern IP matters before IP Divisions to the extent they are not in conflict with the IP Division rules.

A few features of the IP Division rules are:

The jurisdiction of the IP Divisions extends to disputes for the following subject matter:

- patents, copyrights, trademarks, geographical indications, plant varieties, designs, semiconductor integrated circuit layout-designs, traditional knowledge and related common law rights;
- passing off, unfair competition, disparagement, comparative advertising;
- trade secrets and confidential information;
- tortious actions related to privacy and publicity rights involving intellectual property issues;
- data exclusivity, domain names and other matters relating to data protection involving intellectual property issues;
- Internet violations relating to any of the above; and
- the Madras High Court's IP Division also entertains challenges to orders under section 11 of the Customs Act, 1962 and related notifications.

One court to decide all aspects of an IP dispute

With the introduction of these changes, the Delhi and Madras IP Divisions are 'one stop shops' for just about all facets of an IP dispute (provided they have pecuniary and territorial jurisdiction) since they can decide infringement lawsuits, invalidity proceedings, and appeals challenging orders passed by Indian IP offices.

IP Divisions also use their power to consolidate proceedings for efficient adjudication of related disputes. Where there are multiple proceedings relating to the same or related IP, irrespective of whether these proceedings are between the same parties or not, an IP Division judge may direct consolidation of proceedings, hearings, evidence/common trial and adjudication as appropriate. The judge may also transfer any IP matter pending before a subordinate commercial court to itself.

Tools to cut case duration

The volume of litigation in Indian courts, including IP Divisions, is, to no one's surprise, very high. More than 1,000 cases were filed in the Delhi High Court's IP Division in its first year of inception and about 4,000 matters are currently pending before same court.

The Delhi High Court's IP Division has, at its disposal, several provisions to expedite proceedings. These include:

Written pleadings

In reply, written pleadings may not be filed as a matter of right in appeals and original and miscellaneous petitions before the Delhi High Court's IP Division. Unlike lawsuits where a defendant has a right to file a written reply, in appeals and original and miscellaneous petitions, a judge may decide matters expeditiously if, in the court's assessment, a written reply from a counter party is not required.

This is usually seen in appeals challenging IPO orders where an error in the order is apparent. The Madras High Court's approach has been different in this regard since a written reply is usually permitted in this forum. The Madras High Court has struck its own balance between procedural compliance and speed where parties may agree to opt out of filing any pleadings by

consent.

Right to file evidence

In appeals and original petitions, such as cancellation proceedings, before the IP Division, the right to file evidence has been limited. Evidence in appeals and original petitions can be filed only where it is directed by the court. The practice in the Madras IP Division is different – the laws of procedure and evidence apply without exception in this regard.

Summary adjudication

The summary adjudication procedure, introduced by the Commercial Courts Act in 2015, can now be invoked before the Delhi High Court's IP Division without a written request from a party. This procedure can be invoked for pre-trial adjudication of a claim or a part of a claim or a question on which a claim depends. This oft-used provision has aided in quick disposal of matters.

Timeslots for oral hearings

The Delhi High Court's IP Division is empowered to fix specific timeslots for oral arguments. This practice is not widely adopted but will greatly aid in making proceedings quicker once implemented.

Recording evidence by video conferencing and trial outside the court's premises

Courts in India have permitted witnesses to participate in trials by video conference for years now. Both the Delhi and Madras IP Divisions can allow trials in the presence of court commissioners even outside the court's premises. This should help in avoiding logistical bottlenecks that delayed trials.

1. Experts and hot tubbing:

An IP Division judge may seek an expert's assistance whose opinion will be persuasive. The court may also permit simultaneous examination of experts. Per the Delhi High Court (Original Side) Rules, "*Hot-tubbing' is a technique in which expert witnesses give evidence simultaneously in each other's presence and in front of the Judge, who puts the same question to each expert witnesses. It is a co-operative endeavour to identify key issues of a dispute and where possible evolve a common resolution for all of them...a structured discussion allows the experts to give their opinions without the constraints of the adversarial process and in a setting which enables them to respond directly to each other...*"

2. Litigation hold notice:

To preserve pre-litigation evidence, the Delhi IP Division rules have introduced litigation hold notices. The recipient of this notice is bound to preserve all documentary (tangible and electronic materials) relating to the subject matter of the proposed proceedings.

About the High Court of Delhi Rules Governing Patent Suits, 2022

In 2022, the Delhi High Court introduced rules for patent suits. Besides providing guidelines for pleadings in patent suits, these rules reiterated the availability of interim relief in patent infringement lawsuits in India.

Specifically, rule 5 explains the types of interim orders, including orders directing monetary payments, available at the first hearing of a patent lawsuit.

"(i) At the first hearing, the patentee may seek an interim injunction as also appointment of a Local Commissioner for inspection, etc.. If appointment of a Local Commissioner is being prayed for, the specific premises where the product is being manufactured or the process is being implemented, be ascertained and mentioned in the application.

(ii) In addition to any interim orders that the Court may pass at the first hearing, inspection of the manufacturing facilities may also be directed.

(iii) In order to assist the Local Commissioner, technical experts from both sides may be permitted to be present at the time of execution of the commission. The Local Commissioner shall address any issues of confidentiality, if raised by either party, at the time of execution of the commission by filing the said confidential information before the Court in a sealed cover for further orders.

(iv) If the Defendant is on caveat, upon receiving notice of two working days, the Defendant shall be ready with any documents it wishes to rely upon to oppose the grant of any interim relief, on the first hearing.

(v) Upon infringement being prima facie established, the court may pass directions for monetary payments instead of an injunction, in exceptional situations, and on such terms and conditions as the Court may deem fit.

(vi) In case of grant of an interim injunction, the Court may direct the Plaintiff to give a cross undertaking of costs or security, in case it loses at trial or if the patent is held to be invalid, on such terms as it deems fit."

In fact, the court of appeals for the IP Division at Delhi (called the IP Appellate Division) **recently clarified** that apart from interim orders, a court in India may, in appropriate cases, grant pro-tem protection to balance equities. A court may pass such an order without a detailed exploration of merits and prior to a decision on interim injunction.

The Delhi High Court's first year

The Delhi High Court's IP Division has disposed of about 45% of all patent appeals that it had received from IPAB and about 68% of original patent petitions transferred to it from IPAB.

The following statistics from the Delhi High Court IP Division's **annual report for 2022-23** give a snapshot of the year it has been:

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 - More than 1000 cases filed in the IPD of the Delhi in its first year of inception
 - 750+ cases involving IPR disputes were disposed of
 - More than 500 Commercial suits disposed of in one year
 - More than 100 patent appeals filed
 - More than 50% of Trademark Appeals disposed of
 - Overall pendency of 4000+ IPR cases in the IPD
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- 2,000+ Commercial IPR suits pending before the Delhi High Court

The Delhi High Court is a marquee forum for complex IP litigation in India, especially standard essential patents (SEP) litigation. There are **about 19 ongoing SEP [RM1] [AN2]** lawsuits before the IP Division in Delhi which often serves as battleground for SEP holders against Chinese implementers.

Mediation, an unsung hero

Per the **Delhi High Court IP Division's annual report for 2022-23**, “statistics show that in the Delhi High Court Mediation and Conciliation Centre around 80% to 85% of referred cases are settled.” As regards IP disputes referred to the Delhi High Court Mediation and Conciliation Centre, data from 2006-2023 **shows** that over 73% of IP disputes referred were settled.

The **Commercial Courts (Pre-institution Mediation and Settlement) Rules, 2018** have mandated mediation in matters where urgent relief is not contemplated before litigation can be instituted.

The Delhi High Court's IP Division continues to use mediation effectively in pending matters by referring disputes where the parties consent to mediation at the Delhi High Court Mediation and Conciliation Centre. This Centre has a panel of senior and trained mediators whose expertise is available at nil to minimal cost. The competence of the institution is demonstrated by its high settlement rate in IP disputes. That said, the success rate within IP disputes may be higher in trademark matters than other areas of IP, especially since the number of trademark disputes referred to mediation are likely to be much higher than, eg, patent disputes.

What more could be done?

While these changes may not be a magic bullet to resolve all manner of problems and often competing interests in the IP space, they have noticeably favourably altered the day-to-day business of protecting and enforcing IP in India.

The Delhi High Court's IP Appellate Division **recently acknowledged** that “*Trial and final arguments take time in India*” and “... *the judge-population ratio is extremely poor in this country and expeditious disposal of patent suits cannot be expected at the cost of other suits*”. While interim protection such as interim injunctions and security deposits are available in India, the time taken by courts to pass interim orders varies greatly. The time from final hearing in a lawsuit till a judgment is passed is considerable and can sometimes render the exercise an academic one.

This is of course a consequence of factors such as those identified by the IP Appellate Division. Besides improving the judge-population ratio to the extent feasible, the use of technology in courts, strict implementation of fixed time slots for hearings and curtailing the length of written pleadings (eg, by permitting annexes and schedules to pleadings) could add to the speed of proceedings.

A recent example of effective use of technology in courts was in a **patent dispute** between Communication Components Antena Inc. and Rosenberger Hochfrequenztechnik GMBH & Co. Kg before the Delhi High Court's IP Division. The judge, with the consent of the parties, permitted live transcription of evidence recorded before the court and prescribed time limits on the cross examination of each witness. Given the high costs of services such as live transcription, extending such tools at scale will be a challenge though this pilot project is a very promising start.

Another area that may need further attention will be mediations. A recent legislation called The Mediation Act 2023 has been **passed** in India, though it is yet to be notified. Key changes that will be introduced by this act include:

1. A mediated settlement agreement will be enforceable as a court judgment or decree.
2. This act gives statutory recognition to institutional mediation in India. Mediation can be conducted by the following mediation service providers in India:
 - a body or an organisation that provides for the conduct of mediation under this Act and the rules and regulations made thereunder and is recognised by the Mediation Council; or
 - an Authority constituted under the Legal Services Authorities Act; or
 - a court-annexed mediation centre; or
 - any other body as may be notified by the Central Government.

The procedure followed by most mediation centres in India is usually that the parties meet for a limited period at each session and then continue to do so for several months. Introducing day-to-day mediation sessions where parties meet with the objective of solving their identified differences as the norm rather than the exception may further increase the success of mediation in IP disputes.

Extending the model of the IP Divisions at New Delhi and Chennai to other parts of the country that witness moderate to high volume of IP litigation, such as the High Courts of Bombay, Ahmedabad and Kolkata, will bring parity in protection and enforcement of IP across the country. This should boost India's ambition to grow its economy manifold on the strength of innovation and technology.

The exclusivity of the IP Divisions is critical to their efficiency. Given the volume of litigation pending before the Delhi High Court, it is perhaps justifiable to assign limited non-IP mandates to the IP Division. However, diluting this feature is likely to compromise the promise of the IP Divisions.

Overall, the first year of the Delhi High Court's exclusive IP Division has led to a sea change in disposal numbers. Further, the IP Divisions' supervision of IP Offices is the sunlight that was much needed to reform the functioning of these offices.

The impact of the IP Division will be even better assessed in a few years' time – the hope remains that momentum will be maintained and similar courts will soon be rolled out in other parts of the country.

Documents

[Mediation Act 2023](#)



[Communication Components Antena Inc v Rosenberger Hochfrequenztechnik Judgment High Court of Delhi July 2023](#)



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