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# **THE POTENTIAL OF EARLY NEUTRAL EVALUATION FOR SOLVING INTELLECTUAL PROPERTY CASES**

*Authored By- Mitali Sood & Shivani P.S.*

## **I. INTRODUCTION**

The increase in international transactions worldwide has also increased the likelihood of cross-border intellectual property (IP) disputes. The economic crisis is incentivising parties to seek more efficient and cost-effective alternatives to court action, making Alternative Dispute Resolution (ADR) an increasingly appealing option. Though ADR methods like Early Neutral Evaluation (ENE) are evolving, more information is needed regarding their viability in resolving Intellectual Property disputes. ENE has been utilised effectively for a variety of legal issues, and it may be particularly well adapted to IP disputes.

IP has become a vital discipline worldwide with the development in nearly every industry, and as a result, a fair amount of dispute arises from it too. ADR mechanisms provide aid in delivering prompt justice for the enforcement of intellectual property as opposed to litigation. ENE mechanism was first conceived in the United States District Court for the Northern District of California. Intellectual property disputes are the most frequent civil matters that are settled by ENE in that court.<sup>1</sup>

IP disputes are of technical nature and include complex issues of copyright, patents and trademarks, which require specialised knowledge of the subject matter. It has become a common

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<sup>1</sup> UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF CALIFORNIA *available at* <https://www.cand.uscourts.gov/about/court-programs/alternative-dispute-resolution-adr/adr-annual-reports/> (last visited Nov. 16, 2022).

option for dispute settlement due to ENE's advantageous nature in amicably and consensually resolving IP issues between parties involved. Due to its structure, ENE is highly suitable for IPR cases because of its mediational and non-adversarial tendency, along with the expert's skills and impartiality in enabling the parties to seek a mutually agreeable solution. ENE is an important tool for IP conflict resolution, according to the World Intellectual Property Organization (WIPO), which works to promote both intellectual property rights and ADR. ENE's potential for resolving intellectual property rights conflicts is proven to be reasonable, provided the procedure is applied appropriately in its fundamental essence.

## II. EARLY NEUTRAL EVALUATION - MEANING AND PROCEDURE

Alternative Dispute Resolution is a broad word that covers a variety of out-of-court strategies for resolving disputes between parties. It functions as a modern method of quickly and amicably resolving disputes between parties. ADR has recently gained popularity and is increasingly preferable to conventional court litigation. ADR is especially suitable and viable for resolving intellectual property disputes for several reasons, including speedy and efficient dispute settlement, cost-effectiveness, innovative and interest-oriented results, control over the process and outcome, and confidentiality. ADR is exceptionally beneficial in resolving intellectual property disputes among the parties involved because of its above-mentioned lucrative properties. Early Neutral Evaluation was, in its inception, a trial programme for faster dispute settlement run by the Northern District of California Federal Court in 1985.<sup>2</sup> The Northern District judges' aim to reduce the cost and stress of litigation for clients served as the driving force for the creation of ENE. They thought the best way to accomplish this was to have a third party enter the case early on to bring in some "intellectual discipline, common sense, and more direct communication."<sup>3</sup>

ENE is a confidential process where a neutral third person, also called the 'Neutral' with the expertise of the dispute's subject matter, hears condensed arguments from each side on their claims, defences, and anticipated court outcomes. The neutral then offers a non-binding evaluation of how the case is likely to be resolved or how the disputed issues will likely turn out in court.

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<sup>2</sup> David I. Levine, *Northern District Of California Adopts Early Neutral Evaluation To Expedite Dispute Resolution*, 72 *Judicature* 235 (1989).

<sup>3</sup> David I. Levine, *Early Neutral Evaluation: The Second Phase*, *J. Disp. Resol.* 1 (1989).

An ENE session is intended to occur fairly early in the pretrial phase so that litigants may use it to reduce the gap between litigation transaction costs and case value as well as to build the most narrowly focused and efficient case development strategy. It frequently requires the parties to agree to retain an experienced lawyer or qualified expert to review the evidence and draw a conclusion about the case's overall result or a specific issue, possibly after considering oral or written arguments, submissions, evidence, and testimony.<sup>4</sup> Early Neutral Evaluation is both an advisory and an evaluative form of dispute resolution.

Early Neutral Evaluation is a reasonably adaptable method. The parties can also decide the stages present in the process to be undertaken. The following steps are quite often included in the ENE procedure:

**(a) Appointment of evaluator:** The first and most important procedure is the selection of an evaluator. The designated neutral must have highly specialised knowledge and skill in the area at hand. This improves the efficiency and dependability of the evaluation process. Fairness, impartiality, and the ability to assess conditions and facts are additional requirements that should be followed when choosing a neutral evaluator. The number of evaluators to be part of the proceedings is entirely up to the party's discretion.

**(b) Submission of written statement:** The parties are expected to provide a written statement outlining the facts and issues from their standpoint before the Neutral's review process begins. Before the ENE session, the parties provide their statements of claim and defence to the Neutral and one another. Such statements ought to include a synopsis of the factual and legal grounds on which each party feels it is entitled to a judgement or an award in its favour. This helps the assessor comprehend both sides' points of view. The parties choose the day, date, and location at which the procedures will begin simultaneously.

**(c) Arguments:** Following the evaluator's introductory comments, the parties begin with their arguments in the next phase. They present the matter from their perspective, outlining any pertinent concerns as well as the relief they hope to achieve from the proceedings. This stage is crucial because it informs the parties about the opposing side's viewpoint. Additionally, it resolves any misunderstandings between the parties to the conflict. The evaluator might use it to determine

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<sup>4</sup> Zakiyy, Norman & Hassan, Kamal, *Integrating Early Neutral Evaluation into Mediation of Complex Civil Cases in Malaysia*, VII Journal of Politics and Law, No. 4 138 (2014)

the material issues in the disagreement. The proceedings are entirely confidential and secretive.

*(d) The decision by the Neutral:* The evaluator's judgement is the last phase in the process. The evaluator will offer his assessment of each issue in the dispute before suggesting areas where the parties can talk and reach a settlement. If the parties want to take the dispute to court, the evaluator also discusses the potential outcomes of the case. It should be remembered that the disputants are not required to abide by the judgement and assessment of the Neutral. The opportunity to use ENE commonly arises when the parties to a contract must settle any issues under the contract. The parties may opt to employ ENE as a dispute resolution mechanism in their contract to settle disputes. ENE may be chosen as the process for resolving individual disputes or all disputes arising out of a contract.

### III. INTELLECTUAL PROPERTY RIGHTS

Intellectual property rights are the rights granted to persons over the products of their minds.<sup>5</sup> The WIPO defines Intellectual Property as the — “creations of the mind: inventions, literary and artistic works, and symbols, names, images, and designs used in commerce”.<sup>6</sup> Typically, they usually grant the creator an exclusive right over the use of his/her work for a certain period of time. Intellectual property is generally classified into two main categories of copyright and related rights; and industrial property which consists of either distinctive signs such as trademarks and Geographical Indications, and those properties such as patents, industrial designs and trade secrets that are intended to stimulate innovation, design and creation of technology. Intellectual Property can be possessed, gifted, purchased, or sold. Its intangibility and non-exhaustibility are defining characteristics that set it apart from other forms.<sup>7</sup> They are intangible assets whose value derives from the owner's exclusive use and licensing rights. Due to their economic value, they have become one of the most valuable commodities on the market today.

Intellectual property is an area of law where irreparable harm can occur if disputes are bogged down in lengthy litigation. One issue that pertains with respect to disputes of Intellectual Property at an international level is the myriad conceptual differences in the way the different countries

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<sup>5</sup> WORLD TRADE ORGANIZATION, *What are Intellectual property Rights?* Available at: [https://www.wto.org/english/tratop\\_e/trips\\_e/intell\\_e.htm](https://www.wto.org/english/tratop_e/trips_e/intell_e.htm) (last visited Nov. 16, 2022).

<sup>6</sup> WORLD INTELLECTUAL PROPERTY ORGANISATION, *What is Intellectual Property? (2004)* Available at: <https://tind.wipo.int/record/28588?ln=en> (last visited Nov. 16, 2022).

<sup>7</sup> *Id.*

view such rights. Domestic laws provide their own protection regimes based on their perspectives. Until the Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement) came into force, it was highly difficult to gain uniformity at a pan-national level. Some nations view intellectual property as a tool used by industrialised nations to control less developed nations.<sup>8</sup>

Prior to the enactment of the TRIPS Agreement, the states, at the international level were divergent in their approaches to this field. The domestic laws that protected intellectual property were frequently inconsistent with international norms. The TRIPS Agreement, one of the agreements resulting from the Uruguay Round, was ratified at the ministerial meeting in Marrakesh, Morocco, in April 1994, and entered into force on January 1, 1995, as part of the WTO Agreement.<sup>9</sup> The TRIPS Agreement is regarded as a comprehensive new framework delineating intellectual property protection standards, and it largely addresses intellectual property protection in trade-related industries.<sup>10</sup> The TRIPS Agreement has the distinction of being the first global agreement to cover all forms of intellectual property and to contain a vast array of substantive provisions.<sup>11</sup>

## Features of IPR

**(a) Intangible property:** Intellectual property is distinguished from other categories of property primarily by its intangibility.<sup>12</sup> Intellectual property does not protect the created physical object, but it does protect the conceptual development behind the physical object. Intellectual property, unlike land or a vehicle, has no inherent material existence.

**(b) Rights & duties:** Intellectual property gives birth to both ownership rights and duties. He has the exclusive right to reproduce, duplicate, and market the work. IP defines the use of an asset under the owner's control; it delineates what is "in" and "out" of the owner's IP sphere. The proprietor retains residual rights over untransferred aspects of the right.

**(c) IP is good against the world:** There is no requirement for a prior contract or other legal connection to impose a duty on third parties to respect the right.

**(d) The enactment of a statute:** Under the laws applicable, IPRs are statutory rights. Proposals, technical solutions, or any other information provided in a legal manner and, in some instances,

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<sup>8</sup> Jennifer Mills, *Alternative Dispute Resolution in International Intellectual Property*, Ohio State Journal on Dispute Resolution, Vol 11:1, 229 (1996)

<sup>9</sup> Japan Patent Office, *Introduction to TRIPs Agreement*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> Law Bhoomi, *Intellectual Property Rights: Concept, characteristics and justifications*, Law Bhoomi (2021) available at: [https://lawbhoomi.com/intellectual-property-rights-concept-characteristics-and-justifications/#\\_ftn1](https://lawbhoomi.com/intellectual-property-rights-concept-characteristics-and-justifications/#_ftn1) (last visited Nov. 16, 2022).

subject to registration safeguard the right holder.

**(e) Territoriality:** The territorial scope of intellectual property rules is predominantly regional and only applies where necessary. The international IP laws are not uniform, despite the fact that the TRIPS agreement sets a minimum standard for each country's local legislation.<sup>13</sup>

**(f) Subject to public policy:** They are exposed to the profound incarnation<sup>14</sup> of public policy. IP attempts to preserve and reconcile two competing interests. Customers endeavour to utilise works with little difficulty, but the owners of intellectual property must also be compensated fairly.

## IV. ALTERNATIVE DISPUTES RESOLUTION IN INTELLECTUAL PROPERTY DISPUTES

ADR has become increasingly used for IP disputes over the years as its certain features make it beneficial for use in IP Disputes. The trend of increasing access to ADR in intellectual property disputes now provides for a more efficient and economical resolution of these disputes. Intellectual property issues frequently entail technical knowledge by nature. Intellectual property fields, like patents, can include legal and technological challenges that judges seldom examine, making them uninformed about them. Using ENE with experts who have expertise in the technical area in question will save time and effort and likely result in more fair outcomes.

The nature of international issues lends itself to clashes due to diversity in legal systems and judicial procedures. Additionally, international intellectual property conflicts sometimes include countries with wildly differing views on what constitutes intellectual property and how much protection it should receive.

Determining IP disputes often requires a higher degree of discipline-specific technical knowledge. For instance, concerning patent disputes, questions such as novelty and nonobviousness require knowledge of the relevant field of technology.<sup>15</sup>

The use of ADR in intellectual property disputes also alleviates the burden that Courts face due to the lack of facilities and the sheer number of cases before them.

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> Miriam R. Arfin, *The Benefits of Alternative Dispute Resolution in Intellectual Property Disputes*, 17 *Hastings Comm. & Ent. L.J.* 893 (1995).

## V. ADVANTAGES OF ENE IN IPR DISPUTES

(a) **Neutrality:** Neutrality: This "neutral" evaluation differs qualitatively from the client's attorney's understanding of the dispute for several very significant reasons. First, there is no ongoing representation or counsel for the neutral in that issue (e.g., continuing fees). Instead, the neutral quickly completes the specific task without any hope of finding long-term employment. The analysis is completely honest because there is no economic conflict. In order for the parties to be aware of the independent assessment of the merits of their case, the evaluator acts as a neutral third party to determine the strengths and weaknesses of each of the parties and discusses the same with them individually or in caucuses.

(b) **Confidentiality:** The ENE expands the study by including factual and legal evaluations as well, making the whole process much more thorough. An ENE may be regarded as a client communication or work product of an attorney. The procedure is private and neither party may use it against the other. No award or result is submitted. It is decided by the evaluator on the basis of submitted evidence and in any case the decision is not agreed upon by the party, the case is remanded to the court without explanation, unlike in mediation. As a result, even if the neutral isn't the client's lawyer in the dispute, the ENE can still be kept private.

(c) **Multi-Action remedies:** It promotes, with the consent of the parties, multi-action remedies. The ADR process is a multi-step approach to the resolution of disputes with its own procedures. In addition, it provides economic justice, social justice, and an awareness of the interpersonal relationships between parties.

(d) **Speedy solutions:** The ENE procedure's main advantage is that it is reasonably rapid and, if successful, can prevent protracted litigation. A third party's evaluation of the parties' claims has the potential to either restrict the scope of the conflict or help the parties reach an agreement. ENE typically works best early on in a dispute when impartial advice regarding the advantages and disadvantages of a viewpoint may help to facilitate a settlement.<sup>16</sup> However, in other circumstances, ENE may be more fruitful following some discovery to further develop the issues. When a party cannot afford a delay or wants to encourage a continuing, well-suited for intellectual

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<sup>16</sup> *Id.*

property disputes, they can benefit from ENE.

(e) **Simplicity of the process:** ENE also focuses on the procedure of law rather than the interests of the parties, and it is not a process of discussion leading to a negotiated settlement.<sup>17</sup> In contrast to arbitration, the ENE procedure does not involve testimony or an oath, making it distinct and straightforward.

(f) **Party autonomy:** ENE aims at promoting resolution and curtailing the escalation of hostilities and offers resource conservation, secrecy, the control of method selection and adjustment and impartiality. Another prominent reason for choosing ADR is that most ADR systems can either be tailored or adapted to suit the special needs of the participants.

ENE can assist the parties in making informed decisions regarding how to proceed with the case or negotiate a settlement. It provides the parties with a non-binding assessment of the situation conducted by an impartial, knowledgeable, and objective assessor. This evaluation could serve as a wake-up call for one party or both. It's especially advantageous if one of the attorneys is inexperienced and the attorneys' opinions of the case diverge greatly. It can be beneficial when a client requires a second opinion from a legal professional other than their own. Frequently, the client does not believe the attorney's analysis of the case's flaws, or the attorney has painted an overly optimistic image of the case. In any event, the review's findings may assist the parties in making more informed decisions, such as at what juncture or under what conditions to end the litigation.

(h) **Encouragement to Settle:** IP matters are undoubtedly stressful, especially when they involve issues with one's intelligence. If ENE is effective, there may not be a need to continue with the legal process, which could save time, money, and stress. Early neutral evaluation can result in an agreement considerably more quickly than it would take to resolve the issues in a case before a judge, and for these reasons, it is encouraged that disagreements be resolved swiftly and successfully.

(i) **Effectivity:** A neutral third-party evaluator can provide much-needed clarity regarding what

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<sup>17</sup> *Id.*

each party values. By facilitating a greater understanding of each party's priorities, ENE can facilitate an effective agreement.<sup>18</sup>

(j) **Voluntary:** Early Neutral Evaluation is successful in large part because it is voluntary. This process is optional, and its conclusions are not legally binding. This means that neither party is obligated to reach a settlement at the end of ENE if neither is willing to do so. ENE frequently helps the case become clearer. Due to the perspectives gained during ENE, even if a settlement is not achieved, it is still simpler and quicker than the court proceedings.

## VI. WHAT ENE OFFERS WHICH OTHER ADR METHODS DO NOT?

Early neutral evaluation is one of the many ADR mechanisms present today. But what differentiates it from other forms of ADR is that it is particularly suited for technical issues.

ENE is often compared to mediation due to the similarity in the procedure, but they differ a lot. In a mediation proceeding, a neutral and objective mediator helps to facilitate a dispute resolution by finding common ground between the parties, reaching a settlement and avoiding litigation.<sup>19</sup> In addition, the mediator is not required to have expertise in the subject matter, and neither is the mediator expected to give advice or adjudicate. ENE provides parties with expert knowledge and experience in their disputed subject matter. ENE provides opportunities for the parties to explore their needs and interests without the threat of court. ENE differs from mediation because it is overtly evaluative in character and typically calls for subject-matter expertise. ENE is, therefore, beneficial in resolving IP conflicts.

Another ADR process is called "Expert Determination," in which one or more experts are asked to render a decision on a technical, scientific, or business-related problem between the parties. It differs from ENE in that, unless the parties agree otherwise, the expert's judgement is binding on all parties. For conflicts involving technical issues, such as the estimation of intellectual property assets, the interpretation of patent claims, and the scope of licensee rights, expert determination is appropriate. Early neutral evaluation can be thought of as a type of expert determination intended

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<sup>18</sup> *Id.*

<sup>19</sup> Madeline Kimei, *Early Neutral Evaluation (ENE) and Its Importance for the Civil Justice System in Tanzania*. SSRM, (2020)

to ease early-stage negotiations between the parties. The expert will evaluate the parties' dispute during this process in order to determine the probable resolution and associated costs should the matter go to court.<sup>20</sup> The parties may be encouraged to continue negotiations to resolve the disagreement by the neutral's non-binding assessment of their case.

## VII. HOW TO INTRODUCE ENE IN INDIA?

ENE is still a very new form of ADR procedure which is primarily unutilised in India. To tap into the potential of ENE, especially in regard to IP disputes, the following are beneficial:

### (a) Court Mandate

A successful ENE program can only be provided through a partnership between the judiciary and the neutral evaluators. ENE programs should be court-mandated or advised in certain types of cases which are more technical in nature. This setup would arguably help in lending credibility to the program, and further making the judiciary responsible will ensure that the evaluators are appropriately trained and accredited. Independent and experienced coordinators and neutrals with knowledge of ENE processes are to be hired to run the program. Judiciary should also maintain a standard of quality check for the Neutrals and impose minimum qualification requirements on them.

### (b) World Intellectual Property Organisation

WIPO was founded in 1967 as a special United Nation body with the mission of fostering global intellectual property protection and creativity.<sup>21</sup> The WIPO Arbitration and Mediation Center was established by WIPO in 1994. It acts as a neutral, international dispute resolution provider, providing parties with affordable and cost-effective ADR options to settle their intellectual property issues outside of courts. ENE is offered as an ADR mechanism by WIPO. For private parties with IP disputes, the WIPO Arbitration and Mediation Centre provides a mechanism for arbitration, mediation, conciliation, expert determination and early neutral evaluation. The Centre runs various arbitration and mediation proceedings by employing competent evaluators/neutrals from around the world. The WIPO Arbitration and Mediation Center is an essential institution for

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<sup>20</sup> *Id.*

<sup>21</sup> WORLD INTELLECTUAL PROPERTY ORGANISATION *available at* <https://www.wipo.int/portal/en/index.html> (last visited Nov. 16, 2022).

promoting ENE in India.

## VIII. SCOPE OF ENE IN IPR:

The suitability of ENE in Copyright, patent and trademark disputes is as follows:

**(a) Copyright and ENE:** The question of whether a copyright has been violated is usually at the focal point of a copyright dispute. A key issue in such a dispute is usually the question of whether the infringer has unlawfully —copied or derived his own work from a work protected by copyright and involves weighing the evidence of the infringing party's access to the original work and the degree of substantial similarity between the particular expressions of the original work and the infringing party's work. The scope and complexity of copyright cases are typically pretty limited and they are not technically complex. Rarely do these situations necessitate in-depth investigation or documentation. Since similarity is determined from the viewpoint of the "ordinary observer," no specialised knowledge is necessary or suitable for making decisions in these kinds of situations.<sup>22</sup> As a result, these cases frequently lend themselves to ENE resolution, though not necessarily more or less so than the majority of the comparatively simple commercial disputes. Despite the fact that they involve more complex subject matter, ENE may also be able to tackle conflicts involving the copying or appropriation of computer software as well as other extremely technical problems.<sup>23</sup> ENE becomes a more intriguing method of settlement as parties recognize the advantages of using a neutral assessor with a highly technical background and capacity to comprehend the issue at hand. Additionally, ENE gives the parties the chance to substantially improve the safeguarding of confidential information such as trade secrets and other sensitive data during the actual proceeding. As opposed to a trial, ENE allows the parties to decide for themselves how much of such information shall or shall not be made public.<sup>24</sup> This could potentially be considered an important feature in situations concerning computer software, for instance, where upholding confidentiality is often of the highest priority.

**(b) Patent and ENE:** Patent law serves mainly for steering the legal system for technology. Since patent disputes entail a comprehension of technical expertise relevant to the dispute at hand, the main challenge the Courts, particularly the Indian Courts, encounter is with regard to expediting the trial of the dispute in a cost-effective and timely manner. The specifics of temporary restraining

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<sup>22</sup> Adithya Joseph, *Alternative Dispute Mechanism in the Intellectual property Regime*, Manupatra (March 11, 2010)

<sup>23</sup> *Supra* note 4

<sup>24</sup> *Id.*

orders and the appeals relating to such orders have been the focal point of every argument in the realm of patent law. A large number of countries have supported the use of arbitration as a model for resolving patent disputes. Neutrals in patent cases are frequently well-known law professionals who have also worked with the disputed technology.<sup>25</sup> For an effective administration of justice, closer ENE integration as a dispute resolution tool in patent infringement lawsuits may be the way to go. A resolution can be aided by a third party's objective evaluation of the claims made by the parties, which prompts them to reconsider their positions and modify their settlement offers. When they cannot afford to wait, parties can profit from ENE, and this procedure is well suited for use in patent litigation.<sup>26</sup> Today's patent disputes mostly involve biotechnology, pharmaceuticals, computer hardware, and software.<sup>27</sup> The ability to choose a neutral evaluator with training adequate to comprehend the subject matter at issue can prove to be a significant advantage.<sup>28</sup> The potential to substantially limit the litigation's time, effort, intrusion, and cost may be valued by both parties. The image of patent litigation as being expensive is well-founded, and ENE enables parties to understand the advantages and disadvantages of their case and to cut down on unnecessary expenses without substantially depleting their budgets.

**(c) Trademark and ENE:** A trademark is usually provided for ten years, and any legal disputes concerning it are decided by an inter-partes adjudication process. After investing an immense sum of money on everything from trademark research and development to registration, prolonged litigation may prevent the rightful parties from using their trademarks correctly and to their greatest advantage.<sup>29</sup> Given this situation, Early Neutral Evaluation can undoubtedly offer the court a suitable course of action. This demonstrates the importance of ENE in balancing the interests of all stakeholders. In terms of time and money conserved as well as the capacity to develop a solution that best serves the interests of the parties, evaluating the advantages and disadvantages of the parties' positions in the lawsuit has significant benefits. It additionally serves to prevent the parties from adopting a "seek and destroy" strategy that is only focused on conflict, which might quickly undermine any chance of future collaboration. Even though trademark disagreements rarely involve intricate scientific or technological issues, it is still essential to have a thorough grasp of intricate legal requirements, consumer opinions and surveys, and market data. As a result, disputing parties may opt to use ENE to resolve their dispute. Before the majority of

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<sup>25</sup> Norman Balmer, *Alternative Dispute Resolution in Patent Controversies*, 6 RISK 145 (1995)

<sup>26</sup> *Id.*

<sup>27</sup> *Supra* note 2

<sup>28</sup> *Id.*

<sup>29</sup> Krishna Bhattacharya, *Effectiveness of Mediation in Trademark Disputes*, IMW Post (June 26, 2020)

these disputes are taken to court, ENE offers a number of distinct advantages that merit considering. The solution to disadvantages posed by trademark litigation is ENE which helps bring a private settlement, a closed-door negotiation, allowing the parties to negotiate to have full knowledge of their weakness, strengths and the ulterior motive or object to come up with amicable settlements and even innovative solutions to the problems at hand. The participants' confidentiality and privacy is safeguarded using this technique.

## IX. INDIA'S APPROACH TO ENE FOR RESOLVING IP DISPUTES

In the case of *Bawa Masala Co. v. Bawa Masala Co. Pvt. Ltd. and Anr.*, where the main issues had already been resolved through alternative conflict resolution procedures, the Delhi High Court issued orders for the adoption of early neutral evaluation.<sup>30</sup> This case also demonstrates the trend towards using ENE measures to settle IP conflicts that Indian courts have begun to exhibit.<sup>31</sup> Section 89 of the Indian Code of Civil Procedure, which states that a court may submit a case for mediation, conciliation, or other forms of dispute resolution if it finds elements of a settlement, can be used to interpret ENE.<sup>32</sup> However, the Indian court hasn't used ENE as much as an ADR technique since 2007.

## X. DRAWBACKS OF INCORPORATING ENE IN IPR DISPUTES

Adopting ENE in IPR has some disadvantages, such as the following:

- (a) **Estimation:** Estimating the chances of success is also problematic because at the time the agreement is signed, validity and scope have seldom been the subjects of comprehensive study or evidentiary development and until a specific disagreement's specifics are known, the neutral's evaluation of the conflict may be seen as being outside the domain of meaningful prediction
- (b) **One-sided:** In the sense that ENE may prove to be potentially one-sided because if the assessment is favorable to one party, that party may become more adamant in maintaining its

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<sup>30</sup> *Bawa Masala Company v. Bawa Masala Co. Pvt Ltd*, (2007) AIR (Del) 284 Para 2,3

<sup>31</sup> *Id.*

<sup>32</sup> The Code of Civil Procedure, 1908 (Act No. 5 of 1908) S.89.

position and obstructing or increasing its demands during settlement talks.

**(c) Hindrance on dispute related to issues of fact:** When it is possible that the evaluator won't hear all of the factual witness testimony that would be heard at a trial, it might be detrimental to situations having significant, complicated factual disagreements. If sophisticated technical or factual inquiries cannot be reduced to a single problem, they may be too brief and casual to be addressed.

**(d) Exclusion of judge:** The judge conducting the assessment might not be permitted to participate in later proceedings if ENE is carried out by the court unless all parties agree. ENE can thus be used strategically to bar a particular judge from hearing the case.

**(e) Non-binding:** Because the neutral's assessment is not legally enforceable and parties are free to disregard an opinion they disagree with, there is a risk that the disagreements between the parties will become more polarised and that more time and money will be wasted if one or both parties decide not to be bound by the decision.

**f)** If the impartial evaluator does not offer an accurate or realistic assessment of the issue, ENE might worsen the dispute.

## XI. CONCLUSION AND WAY FORWARD

Now that ADR as a whole has become a popular form of dispute resolution, ENE is gaining traction in use by parties throughout the world as well as being recommended by legal authorities. By offering clients a chance for reconciliation, neutral evaluation may help depersonalise a problem, removing a sometimes significant barrier to fruitful settlement negotiations. It can also help to moderate exaggerated hopes of the parties for the result. The objective and unbiased evaluation of the independent evaluator serves as a "reality check" for the parties and their attorneys, ending pointless disputes or radically enlarging their expectations. It brings earnest and practical proposals (or denial of claims) to the negotiating table that might ultimately lead to a quick settlement.<sup>33</sup>

Despite its various benefits, ENE remains an underutilised and unknown form of alternative dispute resolution. To promote ENE, especially in the field of IP disputes, the pro-activeness of Indian Courts would be very beneficial. Institutional resources like WIPO Arbitration and

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<sup>33</sup> Brazil & Wayne D, *Early Neutral Evaluation or Mediation - When Might ENE Delivery More Value*, 69 *Judicature* 279 (2007).

Mediation Center provide suitable assistance to individuals interested in ENE as a way to resolve disputes. Providing expressed validity to ENE under Section 89 of CPC would also help in its promotion.

ENE is being used in many developed nations, such as the United States, England and Singapore, to solve complex cases. The gist of this research is that although Early Neutral Evaluation may not act as the final resolution, it is a means to an end for justice. And therefore, the utilisation of Early Neutral Evaluation would be widely beneficial in the field of intellectual property rights.

