

Patent Arbitration: It Still Makes Good Sense

By Peter L. Michaelson

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“Reports of my death have been greatly exaggerated.”¹ So it is with patent arbitration.

Dire predictions have recently been made by commentators pondering the future of patent arbitration in light of the new U.S. Patent and Trademark Office (USPTO) post-grant trial proceedings (post-grant review (PGR) and inter partes review (IPR)) implemented by the Leahy-Smith America Invents Act (AIA).² Contrary to those views, patent arbitration is still very much alive, widely used, and, where employed in appropriate situations and structured properly, will likely see increasing use.

This article first considers post-grant proceedings as being complementary to patent arbitration and then discusses how arbitration can be structured to be an effective litigation alternative for resolving patent-related disputes.

Post-Grant Proceedings and Patent Arbitration Are Complementary Processes

Post-grant proceedings, while certainly expeditious and cost-effective, are strictly limited by statute to validity challenges.³ As any experienced patent practitioner appreciates, disputes involving patents extend well beyond validity and present issues lying outside the narrow jurisdiction of the USPTO—but, pursuant to 35 U.S.C. § 294,⁴ well within the realm of arbitration. The purpose and inherent characteristics of these proceedings so fundamentally differentiate them from arbitration that they are not arbitration substitutes and thus not likely to adversely affect the future use of arbitration to any significant extent.

Frequently, alleged infringers settled patent infringement litigation early on just to avoid a prospect of incurring significant legal expenses over a prolonged period even if they were likely to ultimately succeed in their defense. This was particularly true in actions brought by assertion entities where those entities broadly construed the claims at issue to such an extent that they were of rather questionable validity but were willing to settle for less than the litigation costs that the alleged infringer would otherwise incur. Such disputes frequently arose in situations where no arbitration agreement existed between the parties and one or both parties would not agree to arbitrate, thus leaving the parties to litigate their dispute.

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Post-grant proceedings drastically “leveled the playing field” by providing a third party with an administrative opportunity to effectively and efficiently challenge validity in the USPTO of any patent claim(s) by filing a petition to initiate an appropriate proceeding. Such a proceeding is a trial process before the Patent Trial and Appeal Board (PTAB) with a statutory one-year pendency from its date of initiation. It is much faster and less expensive than litigation.⁵ The proceeding itself is public; its results have public effect.⁶

Not surprisingly, post-grant proceedings have proven rather popular. As of August 31, 2014, approximately 1,700 petitions to initiate such proceedings have been cumulatively filed with the PTAB and at an average monthly rate of approximately 50–100 petitions.⁷ Anecdotally, initiating a proceeding, and often just a credible threat of doing so, presented alleged infringers, who have potentially invalidating prior art to rather broadly asserted claims, with an effective “club” to reach early settlements of infringement disputes at markedly less cost than they would otherwise have incurred through litigation and at more favorable terms.

Where patent validity is the dispositive issue in dispute, the relative low cost and quick pendency of a post-grant proceeding make it a rather attractive litigation substitute. However, the likely effects of a public decision of invalidity flowing from such a proceeding, including all potentially adverse consequences, must be recognized, understood, and carefully evaluated in deciding whether to institute it—as those effects may be worse than the ensuing benefits. Hence, a potential challenger must carefully and strategically delineate and evaluate not only the likely legal consequences but also all ensuing business consequences that will likely flow from public invalidation of the patent, and particularly those that might ultimately redound to its own detriment. This includes, e.g., any adverse effect on: (1) *the challenger’s* own position in the marketplace vis-à-vis its own competitors—some of whom may now or later be paying royalties under the patent but for the finding of invalidity; (2) *the challenger’s* business relationship with the patent owner/licensor—which may be compromised or destroyed; and (3) the owner/licensor itself, including likely changes to the owner’s/licensor’s own position in the marketplace. While these considerations may be difficult to quantify, their likely impact may nevertheless prove significant to that alleged infringer’s future business and should not be ignored.

Where those considerations implicate serious business concerns or critical patent-related issues exist in a dispute that extend beyond validity, patent arbitration, offering private resolution, may well be a much better alternative to litigation than a post-grant proceeding. Nevertheless, where these factors do not exist, such a proceeding may be ideal.

Rather than patent arbitration being displaced by post-grant proceedings—as some commentators have opined—both processes, effectuating different purposes, will likely see increasing use as the number of patent-related disputes continues to rise.

Properly Structuring Patent Arbitration: Fit the Process to the Fuss

Patent litigation uniquely offers various advantages unobtainable through any other resolution mechanism, chief among them: a public forum that, in the context of a finding of patent invalidity or unenforceability, provides a decision binding on all third parties; a public result that may serve as a deterrent

either against future patent infringement by others (if, e.g., a relatively large sum is awarded in damages) or patent enforcement against others (if, e.g., the claims are narrowly constructed so as not to capture allegedly infringing activity of commercial significance); and potentially an award of sanctions under Federal Rule of Civil Procedure 11 and attorneys' fees for instituting meritless litigation. Yet, far more often than not, these advantages are grossly outweighed by the deficiencies inherent in litigation, principally: substantial cost, significant delay, and exhaustive discovery.

In its default mode, patent arbitration closely mirrors litigation with all its principal deficiencies. This concern underlies nearly all complaints about patent arbitration.

Yet, once properly configured, an arbitral process can yield substantial cost and time efficiencies, along with other benefits unavailable through litigation. But, for it to do so, the parties must sufficiently adapt ("fit") the process, radically if necessary, to conform it to the specific characteristics of the dispute ("fuss"). While this should always occur in practice, all too often it does not. Where superfluous, time-consuming, and expensive trial elements are imported into an arbitral process, the ensuing process just wastes valuable resources to the detriment of the parties.

What surprises this author is just how little is known by the practicing bar about the flexibility and advantages of arbitration and how extensive their misconceptions are about the process.

Cost- and Time-Saving Advantages of Patent Arbitration

Arbitration does not follow a one-size-fits-all litigation template strictly mandated by the Federal Rules of Civil Procedure supplemented by local court patent rules. Rather, an arbitral process is remarkably open-ended and relatively informal: a blank canvas on which parties can collectively create the exact process they need and no more. Parties are completely free and have total autonomy, under the rule sets of arbitral institutions, to decide what specific steps they will use and when, and all related aspects, subject only to affording mutual due process. These rule sets, while sufficiently definite and inclusive to define a minimal but essential framework of an arbitral process that can yield a legally binding award, are intentionally very broad and quite malleable to provide parties with sufficient latitude to exquisitely adapt the process to fit the characteristics of their dispute. Such flexibility and party autonomy are entirely absent in litigation.

To aid the practicing bar, professional organizations and arbitral institutions have recently promulgated guidelines and protocols that provide process enhancements designed to streamline all phases of an arbitral proceeding. Parties can incorporate appropriate enhancements into their arbitration provisions during contract formation or can separately agree, post-dispute, on their use.

The Protocols for Expedious, Cost-Effective Commercial Arbitration,⁸ developed by the College of Commercial Arbitrators (CCA), identify four stakeholder groups in arbitration: business users and in-house counsel, outside counsel, arbitrators, and institutions; and delineate various process-enhancing techniques applicable to each group. For example, for outside counsel, the protocols illustratively recommend:

- Memorializing early assessment of a case, including realistic estimates of the time and cost involved in arbitrating the matter at various levels of depth and detail, and reaching a written understanding with the client regarding the specific approach to be taken, including the nature and extent of discovery;
- Selecting arbitrators with proven management ability and setting forth expectations to the arbitrators for an efficient and speedy process;
- Cooperating to the fullest extent with opposing counsel on procedural matters;
- Limiting discovery consistent with the client's goals and cooperating with the tribunal and opposing counsel in finding appropriate ways to do so;
- Considering billing alternatives that incentivize reduced cycle time or net costs of dispute resolution;
- Recognizing and exploiting differences between arbitration and litigation, such as the absence of a jury, limitations on motion practice, and relaxed evidentiary standards that preclude a need for repeated objections as to form and hearsay; and
- Keeping the tribunal informed of any problems and concerns, including discovery, scheduling, and other procedural aspects, as soon as they arise, and empowering and then enlisting the tribunal chair to quickly address and resolve these matters so as to minimally impact the remainder of the process.

The report *Techniques for Controlling Time and Costs in Arbitration*, produced by the International Chamber of Commerce (ICC), also specifies a number of process-enhancing techniques. Based on statistics provided by the ICC International Court of Arbitration, the report noted that only 18 percent of the total costs of an ICC arbitration are for administrative fees and arbitrator's fees and expenses⁹—an amount that could be easily recouped through use of appropriate efficiency enhancing techniques.

Specifically, discovery, usually the highest cost driver, can be drastically limited in arbitration. Arbitration rules regarding discovery are very simple, as evident in Rule R-34(a) of the 2013 American Arbitration Association (AAA) Commercial Arbitration Rules: “The parties may offer such evidence as is relevant and material to the dispute and shall produce such evidence as the arbitrator may deem necessary to an understanding and determination of the dispute. Conformity to legal rules of evidence shall not be necessary.”

The arbitrator controls discovery; the parties agree on its extent. Parties can agree to a joint, sharply focused exchange of only those documents on which each intends to rely, nothing more: no interrogatories, no depositions, no other discovery. Should the parties need a greater degree of discovery, including e-discovery, they can choose that instead. The International Institute for Conflict Prevention and Resolution (CPR) recently promulgated a protocol providing multiple levels of increasingly extensive discovery of physical and electronic documents to which parties can mutually agree to use a particular level during arbitration.¹⁰

Efficient, cost-effective modalities can be used to receive witness testimony, such as, e.g., prefiled direct testimony, witness statements, deposition testimony (with limits on their length and number), “hot-tubbing” opposing expert witnesses, and video-linked testimony.

Motion practice provides further opportunities to achieve efficiencies. Arbitrators exercise considerable discretion in deciding if and when to accept motions, as reflected in Rule R-32(b) of the 2013 AAA Commercial Arbitration Rules: “The arbitrator, exercising his or her discretion, shall conduct the proceedings with a view to expediting the resolution of the dispute. . . .”

An arbitrator often prevents the filing of futile motions and eliminates the attendant expense by requiring a requesting party to first justify its motion through a three- to five-page pre-motion letter brief, which includes not only supporting law and facts underlying the motion but also a showing of why the tribunal is more likely than not to grant the motion. Based on the letter briefs of the requestor and responder, the arbitrator then grants the requestor leave to file the motion or not. Certain motions, when interposed early and particularly those that do not implicate extensive discovery, presentation of evidence, or fact-finding, such as to bifurcate or for partial summary judgment, can advantageously eliminate issues from the proceeding or parse threshold issues out for early disposition. These issues include contractual limitations on damages, statutory remedies, statutes of limitations, and claim construction. Through such motions, the remainder of the proceeding can often be simplified, yielding cost savings far greater than the cumulative expense of the motion. Further, granting such a motion at an early stage in a proceeding may: (1) motivate the parties to initiate or reconvene settlement discussions rather than bear the time and expense of pursuing a claim that has suddenly lost its appeal, or (2) enhance the likelihood that later activities will foster settlement.¹¹ The use and timing of such motions is typically discussed with the arbitrator during a preliminary scheduling conference.

Parties can dramatically compress an entire arbitral process by appropriately limiting the available time each side has to present its case at a merits hearing. Knowing this limit at the inception of the proceeding forces counsel to sharply concentrate their efforts from the onset on the core issue(s) in contention, excluding all secondary and tangential issues from discovery, briefing, motions, and the hearing itself. Illustratively, in an arbitration of a large, complex pharmaceutical patent licensing dispute, the parties, in their arbitration agreement, limited each side at the hearing to only two hours to present its arguments and another 30 minutes for rebuttal.¹²

Appellate Procedures and Further Benefits of Patent Arbitration

Further complaints about patent arbitration often center around: a perceived risk due to no appeal on the merits to an errant arbitration award, and concerns that arbitrators tend to compromise and not follow legal norms.

Contrary to those perceptions, appellate arbitration proceedings have been in effect for some time. The Federal Arbitration Act (FAA) provides the exclusive grounds for challenging an arbitral award in federal court.¹³ Those grounds are limited to specific procedural infirmities and certain transgressions by the tribunal. Parties cannot contractually provide for federal judicial review of an award.¹⁴ However, arbitral institutions have expanded their rule sets to include an optional appellate procedure, for adoption by all the parties, through which an award can be comprehensively reviewed by a second, i.e., appellate, arbitral tribunal.¹⁵ In essence, the award rendered by a first arbitration panel is not viewed as being final, for purposes of the FAA, while it is under appeal.

Concerns about arbitrators' conformance to legal norms and any perceived tendency to compromise can be readily addressed by selecting experienced lawyers or former judges as arbitrators, choosing counsel sufficiently well-versed in arbitration and imposing contractual standards for award writing in conformity with applicable law.¹⁶

Further, patent litigation suffers from a relatively high historic reversal rate on appeal in the Federal Circuit of claim construction (Markman) rulings often issued very early in a litigation. A substantial amount of time and cost has often been invested prior to and at trial by patent disputants, predicated on a particular construction governing the litigation, only to be subsequently negated on appeal, thus wasting most of the investment. Some commentators estimate the reversal rate in the neighborhood of 50 percent (basically a coin flip), though others lately view the rate lower at approximately 25–30 percent.¹⁷ Recent studies conclude that: (1) Federal Circuit judges remain divided on how to approach the task of claim construction, and (2) reversals of district courts generally resulted from their misapplication of settled principles of claim construction.¹⁸ The finality of an arbitration award under the FAA eliminates all possibilities of such reversals. Moreover, in arbitration, parties can agree to use a predefined construction (one to which they specifically agreed by themselves or that resulted from a prior ruling of a district court or an arbitral tribunal) or, should an appellate process be used, to constrain the appellate tribunal from reviewing the construction adopted by the first panel.

Moreover, arbitration provides further significant benefits that are simply unavailable in litigation, including: avoidance of excessive or emotionally driven jury awards, ability to choose arbitrators with particular qualifications to cope with daunting and specialized issues of law and technology, avoidance of establishing legal precedents, relative confidentiality of the entire process, and privacy of any award.

Further, arbitral institutions have recently supplemented their rule sets to implement emergency and expedited procedures. Emergency arbitrations are highly compressed, extremely efficient proceedings designed to urgently provide interim relief to a requesting party.¹⁹ As of September 15, 2014, the International Centre for Dispute Resolution (ICDR, the international arm of the AAA) has administered 40 emergency arbitrations with an average pendency of just three weeks—starting from the time a request is made to the AAA/ICDR to initiate the procedure to the time an award is rendered.²⁰ Where urgent relief is not required but transaction cost and pendency time are still of primary concern, an expedited arbitration proceeding, similar to emergency arbitration, features deadlines that are significantly relaxed over those in emergency arbitration but still considerably shorter than in a standard arbitration.²¹

International Patent Arbitration

In the international arena, arbitration can be far more advantageous than national litigation. Arbitration provides a neutral forum, predicated on the parties: (1) having selected arbitrators from neutral nationalities or of recognized neutrality who are independent of the parties, their home governments, and national courts; and (2) using substantive law of a chosen jurisdiction together with institutional arbitration rules that ensure requisite neutrality and due process. This eliminates a source of potential bias and provides assurance that the rule of law will be followed. Further, international arbitration circumvents national court delays, which in some jurisdictions can readily exceed five to 10 years.

Most importantly, arbitration awards are internationally enforceable by convention. As of September 25, 2014, 152 countries have ratified the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). Through Article III of the Convention, an arbitral award, conforming to the formal requirements of the Convention, issued in any one member country is entitled to reciprocal enforcement, as binding, in any other member country to the same extent as a domestic arbitration award. Article V of the Convention sets forth narrow grounds on which recognition and enforcement of foreign awards may be refused by a national court. In stark contrast, judicial awards are only enforceable in other countries through comity, which renders cross-border enforcement subject to wide discretion of the enforcing court with the outcome thus being subject to considerable uncertainty and risk.

Furthermore, international patent litigation often involves parallel judicial proceedings simultaneously occurring in multiple national courts. Such an approach is extraordinarily costly and very risky. National courts often have differing views that lead to inconsistent results. The patent owner may prevail on its lawsuit or just one or more of its contentions in some forums, but not in others. In contrast, at considerably less cost and time, a single arbitration before a single tribunal chosen by the parties and using substantive law of a jurisdiction specifically chosen by the parties can often address the entire dispute with a single award given effect, through the New York Convention, across many, if not all, jurisdictions at issue.²²

Fully Realizing the Advantages of Patent Arbitration

In 2014, Professor Thomas Stipanowich conducted a survey, through the Straus Institute for Dispute Resolution at Pepperdine University School of Law, of approximately 140 fellows of the CCA, all of whom were highly experienced commercial arbitrators, regarding their practices in promoting settlement through arbitration. The resulting insights—though not surprising at all for those, like this author, who regularly sit as arbitrators—shatter many arbitral myths widely held by counsel. These insights include: 83 percent of surveyed arbitrators believed they played a beneficial role in settling a case prior to its merits hearing; less than 1 percent refuse to rule on motions for summary judgment; 70 percent say they “readily” rule on dispositive motions and 80 percent of those motions may have prompted informal settlement of the entire case; 91 percent work with counsel to limit discovery and 94 percent encourage the parties to limit the scope of discovery; 75 percent generally “receive virtually all non-privileged evidence and discourage traditional objections (hearsay, foundation, etc.)”; and 87 percent always try to follow the applicable law in rendering an award. Also, experienced arbitrators proactively manage their cases in various ways, with the great majority requiring parties to submit a core collection of joint exhibits for the merits hearing, limiting duplicative testimony, and telling counsel when a point has been understood so “they can move on.” Approximately 65 percent of the surveyed arbitrators believed that excessive, inappropriate, or mismanaged motion practice contributed to inefficiencies, excess cost, and time.²³

Yet, in spite of a wide array of available process enhancements, patent disputants still routinely settle for a default “litigation-like” arbitral process. Why?

Generally because they either inadvertently or intentionally gave no forethought, either at contractual formation or after a dispute arises, to using process-enhancing techniques or were unable or just did not attempt to reach agreement on their use.²⁴ This typically results from: (1) inexperience or just ignorance of the parties and their counsel regarding arbitration; (2) outside counsels' marked tendency, owing to their own core competencies and focused career experiences in nonarbitral settings, to resolve every adversarial dispute through litigation or litigation-like proceedings regardless of its suitability; or (3) a counsel's or party's prior experience with arbitration that was so poor as to profoundly prejudice that individual or his or her organization against using arbitration at all, regardless of its benefits. Consequently, patent disputants effectively deny themselves the substantial time and cost efficiencies that arbitration can readily provide and that would ultimately boost their bottom line.

With all that arbitration offers, it seems axiomatic that, when a dispute arises which requires a third party fact finder to resolve it, counsel would eagerly devise an arbitral process that efficiently does so. Yet, few do. Professor Frank Sander, then with Harvard Law School, recognized this fallacy by stating in 2007: "The theoretical advantages of arbitration over court adjudication are manifold. . . . These theoretical advantages [however] are not always fully realized."²⁵ Nevertheless, when arbitration is used to resolve intellectual property disputes,²⁶ its resulting savings over litigation have proven to be considerable: according to a 2013 World Intellectual Property Organization (WIPO) survey, more than 60 percent in time and up to 55 percent in costs.²⁷

Conclusion

Parties who seek private resolution can readily exploit the inherent flexibility of arbitration—as now evident—to tailor an arbitral process to closely mimic a post-grant proceeding, with its inherent time and cost efficiencies and even including an appellate process, and with a crucial additional advantage not afforded by the USPTO: the complete freedom to choose their arbitrator(s). A properly configured arbitral process can be a very effective substitute for a post-grant proceeding, though a post-grant proceeding, while being a viable litigation alternative in certain instances, is not a realistic substitute for arbitration.

Yet the full advantages and efficiencies of arbitration will not arise merely because parties chose to arbitrate a patent-related dispute or even just a validity challenge in a post-grant proceeding look-alike; the parties and their counsel must thoroughly, thoughtfully, but deliberately "fit the process to the fuss." They need the motivation to do it, and the will to get it done. Once accomplished, they may be astonished at the extent and breadth of the efficiencies they achieve—realizing that arbitrating patent disputes still makes good sense as a truly effective alternative to litigation and very likely always will.

Endnotes

1. Common misquotation of "The report of my death was an exaggeration," in a letter written by Mark Twain and which appeared in *Mark Twain Amused*, N.Y. J., June 2, 1897.

2. See, e.g., Charles W. Shifley, *Goodbye Patent Arbitration?*, CORP. COUNS. (Oct. 13, 2014), <http://www.corpcounsel.com/id=1202672879326/Goodbye-Patent-Arbitration?slreturn=20150314000849>.

3. For IPR and PGR, see 35 U.S.C. §§ 311(b) and 321(b), respectively.

4. “A contract involving a patent or any right under a patent may contain a provision requiring arbitration of any dispute relating to patent validity or infringement arising under the contract.” 35 U.S.C. § 294(a).
5. See 35 U.S.C. §§ 316(a)(11) and 326(a)(11) for IPR and PGR, respectively, both of which provide the USPTO with discretion to grant, on due cause shown, extensions up to six months.
6. See 35 U.S.C. §§ 318(a)–(b) and 328(a)–(b), respectively, for the public effect of IPR and PGR decisions; and 35 U.S.C. §§ 316(a)(1) and 326(a)(1), which provide exceptions in IPR and PGR proceedings, respectively, for materials filed under seal.
7. See *AIA Statistics*, USPTO, http://www.uspto.gov/aia_implementation/statistics.jsp (last modified Dec. 14, 2014).
8. COLL. OF COMMERCIAL ARBITRATORS, *PROTOCOLS FOR EXPEDITIOUS, COST-EFFECTIVE COMMERCIAL ARBITRATION* (Stipanowich et al. eds., 2010), available at <http://www.thecca.net/cca-protocols-expeditious-cost-effective-commercial-arbitration>; see also THE COLLEGE OF COMMERCIAL ARBITRATORS *GUIDE TO BEST PRACTICES IN COMMERCIAL ARBITRATION* (James M. Gaitis et al. eds., 3d ed., 2013).
9. INT’L CHAMBER OF COMMERCE (ICC) COMM’N ON ARBITRATION, PUB. NO. 843, *TECHNIQUES FOR CONTROLLING TIME AND COSTS IN ARBITRATION* (2007); see also ICC COMM’N ON ARBITRATION & ADR, PUB. NO. 861-1, *TECHNIQUES FOR CONTROLLING TIME AND COSTS IN ARBITRATION* (2014).
10. INT’L INST. FOR CONFLICT PREVENTION & RESOLUTION (CPR), *CPR PROTOCOL ON DISCLOSURE OF DOCUMENTS AND PRESENTATION OF WITNESSES IN COMMERCIAL ARBITRATION* (2009), available at [http://www.cpradr.org/Portals/o/Resources/ADR Tools/Clauses & Rules/CPR Protocol on Disclosure of Documents and Witnesses.pdf](http://www.cpradr.org/Portals/o/Resources/ADR%20Tools/Clauses%20&%20Rules/CPR%20Protocol%20on%20Disclosure%20of%20Documents%20and%20Witnesses.pdf).
11. Thomas J. Stipanowich & Zachary P. Ulrich, *Commercial Arbitration and Settlement: Empirical Insights into the Roles Arbitrators Play*, 6 PENN ST. Y.B. ARB. & MEDIATION 1, 7, 24, 29 (2014).
12. Peter L. Michaelson, *Demystifying Commercial Arbitration: It’s Much Better than You Think!*, 216 N.J. L.J. 541 (May 26, 2014).
13. The grounds are: “(1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption in the arbitrators, or either of them; (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.” 9 U.S.C. § 10(a).
14. *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396 (2008).
15. See AAA OPTIONAL APPELLATE ARBITRATION RULES (2013); CPR ARBITRATION APPEAL PROCEDURE (2007); JAMS OPTIONAL ARBITRATION APPEAL PROCEDURE (2003).
16. Thomas J. Stipanowich & J. Ryan Lamare, *Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration and Conflict Management in Fortune 1000 Corporations*, 19 HARV. NEGOT. L. REV. 1, 64 (2014).
17. Thomas W. Krause & Heather F. Auyang, *What Reversals and Close Cases Reveal about Claim Construction: The Sequel*, 13 J. MARSHAL REV. INTELL. PROP. L. 525, 530 (2014).
18. Jason Rantanen, *Studying the Mongrel: Why Teva v. Sandoz Won’t Solve Claim Construction*, PATENTLY-O (July 15, 2014), <http://patentlyo.com/patent/2014/07/studying-mongrel-construction.html>.
19. See, e.g., AAA COMMERCIAL ARBITRATION RULES R. R-38.

20. ICDR Young & Int'l (Y&I), Webinar: A Guide to the New ICDR Procedures (Sept. 23, 2014).
21. See, e.g., AAA COMMERCIAL ARBITRATION RULES R. E-1 to 10; Peter Michaelson, *When Speed and Cost Matter: Emergency and Expedited Arbitration*, 218 N.J. L.J. 50 (Oct. 27, 2014).
22. In some countries, as a matter of public policy, certain IP issues, such as patent validity, either may not be arbitrable at all or of limited arbitrability. Thus, an award exceeding those bounds may not be wholly or partially enforceable there. See Kenneth R. Adamo, *Overview of International Arbitration in the Intellectual Property Context*, 2 GLOBAL BUS. L. REV. 7 (2011).
23. Thomas J. Stipanowich & Zachary P. Ulrich, *Arbitration in Evolution: Current Practices and Perspectives of Experienced Commercial Arbitrators*, AM. REV. INT'L ARB. (forthcoming 2015), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2519196; see also Liz Kramer, *New Survey Dispels Common Myths about Arbitration*, ARB. NATION (Nov. 20, 2014), <http://arbitrationnation.com/new-survey-dispels-common-myths-about-arbitration/>.
24. Stipanowich & Lamare, *supra* note 16, at 68.
25. CHARTERED INST. OF ARBITRATORS (CIARB), CIARB COSTS OF INTERNATIONAL ARBITRATION SURVEY 2011, at ii (2011), available at <https://www.international-arbitration-attorney.com/wp-content/uploads/CIArb-costs-of-International-Arbitration-Survey-2011.pdf>.
26. Lisa Shuchman, *Tech Sector Coming Around to IP Arbitration*, CORP. COUNS. (Dec. 10, 2014).
27. WIPO ARBITRATION & MEDIATION CTR., RESULTS OF THE WIPO ARBITRATION AND MEDIATION CENTER INTERNATIONAL SURVEY ON DISPUTE RESOLUTION IN TECHNOLOGY TRANSACTIONS 30–33 (2013), available at <http://www.wipo.int/export/sites/www/amc/en/docs/surveyresults.pdf>.