

Can Arbitration Fix the Patent System?

PTAB Participants Consider Arbitration In View of Increased Complexity of IPRs

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Patent litigation has now become a much more complex, expensive and timely endeavor—especially at the Patent Trial and Appeal Board (PTAB). Patent litigators must deal with an overly complex Inter Partes Review (IPR) system as a result of the Supreme Court’s *SAS* decision², new amendment process³ and evolution of the BRI standard⁴. A costly and complicated PTAB proceeding and lengthy appellate process make arbitration an appealing option to obtain a patentability ruling in a streamlined manner.

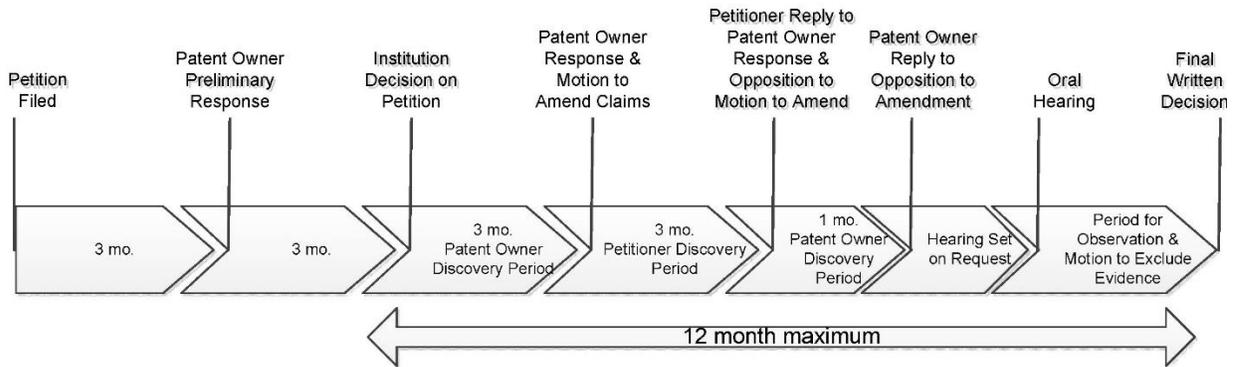
IPR Arbitration as Compared to IPR

Use of an arbitration process fashioned by the parties themselves, may mirror a PTAB IPR. Parties may receive the benefits of a streamlined and condensed IPR Arbitration process and obtain an arbitration award regarding validity of a patent(s) that must be recognized by the USPTO. In some cases a compact IPR Arbitration may be completed within six months.

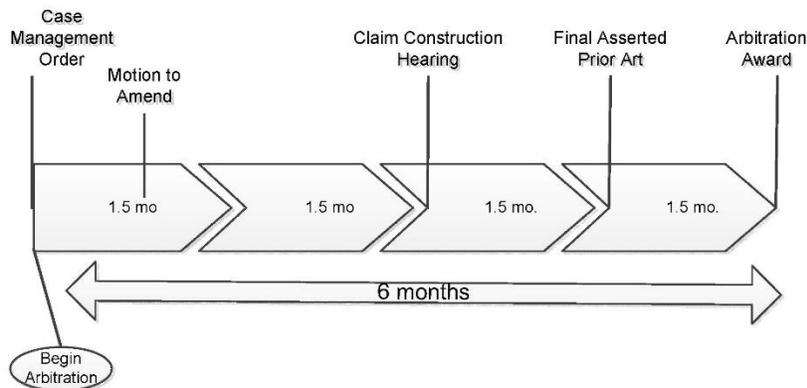
During an arbitral proceeding, a party would be entitled to raise as defenses, any or all of the defenses set out at 35 U.S.C. §282; such as noninfringement, unenforceability, patent or claim invalidity. The award issued by the arbitrators in such a proceeding would be enforceable just as any other arbitration award, as provided in 9 U.S.C. §9 (provided that proper notification of the award has been previously given to the Commissioner of Patents, as required by 35 U.S.C. §294(d).)⁵ An IPR Arbitration lasting only six months would likely incur attorney’s fees of less than \$100,000 per party.⁶ To the contrary, an IPR at the PATB will last 18 months (1 year following institution) plus at least 2 years on appeal and incur attorney’s fees of more than \$350,000 per party.⁷

Below is a timeline of a PTAB IPR process compared to IPR Arbitration, to accomplish a similar validity ruling as at the PTAB.

PTAB Proceeding



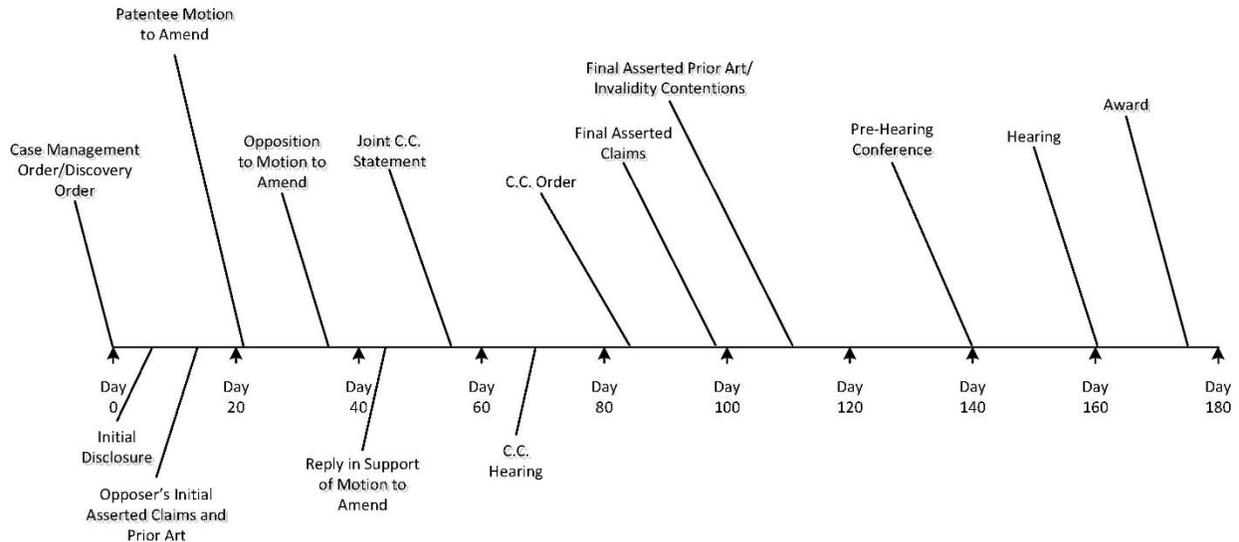
IPRbitration



Using an IPR Arbitration process that mirrors an IPR proceeding at the PTAB, parties can take control of the process and institute measures to save costs and time.⁸ Using arbitrators with significant patent litigation experience, including former PTAB judges, allows for a carefully planned process and thoughtfully crafted award/ruling. All such arbitration awards must be respected and enforced by the USPTO under 35 U.S.C. §294 (with respect to the parties in the arbitration).

Below is a more detailed timeline summary of a proposed IPR Arbitration process:

IPR Arbitration Scheduling Plan



The above timeline depicts a proposed schedule for completing an IPR Arbitration within six months. The process includes opposer's/petitioner's disclosure of asserted prior art and a briefing schedule for patentee's motion to amend and claim construction leading to a claim construction order; all within 90 days of the initiation of the IPR Arbitration. In the final 90 days, the opposer files its final assertion of claims, final asserted prior art and invalidity contentions leading up to the arbitration hearing and award. This compact schedule is open to modification upon agreement of the parties; but could be the default schedule where parties cannot agree.

Arbitration Under A Post-Dispute Submission Agreement

Typically, an arbitration is initiated as a result of an arbitration clause placed in an agreement between the parties.⁹ Such a pre-dispute clause triggers patent arbitration to occur when a dispute arises under a license agreement or joint development agreement. These types of agreements have arbitration clauses that are drafted prior to a dispute. In other words, the dispute can arise many months or years after drafting of the agreement.

A typical arbitration clause may state:

Commercial (U.S. domestic) - Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association in accordance with its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.¹⁰

Under this standard clause the parties are selecting the Commercial Arbitration Rules administered by the AAA in a vacuum. The clause is selected prior to the occurrence of an actual dispute. For example, since the parties are unaware of the exact nature of the dispute; it is

difficult to predict whether the Commercial Arbitration Rules will be the best set of rules to invoke with respect to the dispute that may arise between the parties. Cryptic arbitration clauses based on a “form” drafted many years prior to a dispute may not be suitable for resolution of a modern dispute.¹¹

Under an IPR Arbitration initiated contemporaneous to the dispute or post-dispute, the parties may enter into a submission agreement or arbitration agreement tailored to the legal nature of the dispute.¹² For example, where a patent infringement suit has been filed in the district court, the parties will likely have had discussions regarding the patent infringement dispute. In such a scenario the parties can enter into a submission agreement/arbitration agreement that is contemporaneous to the dispute in order to institute the IPR Arbitration; with full knowledge of the most ideal arbitration procedures to invoke.

IPR Arbitration is most desirable where the accused infringer is considering filing an IPR at the PTAB and extending the dispute further at the time an initial district court case is filed. Circumstances where the parties are likely well aware of the substantive issues at hand and the potential jurisdictional and procedural issues to be confronted presents the parties a convenient time to negotiate a submission agreement for conducting the IPR Arbitration. A contemporaneous arbitration agreement can be much more customized compared to a general arbitration clause from an agreement entered before the actual dispute arose.¹³ If the parties execute a submission agreement once a dispute has arisen, the parties will also have consensualism.^{14, 15}

The arbitration agreement/submission agreement should cover topics including: 1) number of arbitrators; 2) specific arbitrator subject matter expertise and/or length of experience; 3) locale of the arbitration hearing or specify no in person hearing; 4) state law that will govern; 5) discovery limits; 6) use of Sedona Principles for ESI (Electronically Stored Information); 7) duration of arbitration; 8) remedies available; 9) attorney’s fees; 10) reasoned opinion or just a ruling and remedy; 11) confidentiality; and 12) appellate arbitration process.¹⁶ The parties will be much more informed when negotiating these topics after the dispute has arisen rather than drafting a general arbitration clause many months or years prior to the dispute.¹⁷

Placement of more precise time constraints and consolidation of issues may only be accomplished using a post-dispute submission agreement.¹⁸ A post-dispute submission agreement also provides more certainty as to forum, speedier case management plans, limited damage to business relationships and binding effect.¹⁹ Risk control can be another advantage of a contemporaneous submission agreement. A respondent may wish to have a maximum liability ceiling or the claimant may wish to have a minimum floor for the amount recovered.²⁰

Appropriateness of a Reasoned Opinion and Confidentiality

In domestic commercial cases, arbitrators do not always write a reasoned opinion explaining their award.²¹ To the extent that parties desire such opinions, particularly in large, complex cases, they should specify this requirement in their arbitration agreement. Parties should be aware, however, that a reasoned opinion, if it is later disclosed; can aid third parties in attacking the patent(s) at issue.

For example, the parties should keep in mind the requirement to disclose the arbitration award to the USPTO under the patent rules.²² The parties may wish to plan for the inevitability of the disclosure requirement of the award to the USPTO by restricting the arbitrator's ability to provide reasoning for the arbitration award. A patentee may wish to avoid an award with a reasoned decision to prevent third parties from having a road map for invalidating a patent in a subsequent proceeding. An opposer/petitioner may wish to prevent its competitors from obtaining the fruits of the opposer's labor if it successfully invalidates the patent.

Litigant's control over the content of the arbitration award is a strong benefit of an IPR Arbitration. Parties to an IPR will not have such control over the format of a written ruling of a PTAB judge. The filings in an IPR proceeding are publicly available and can provide a competitor valuable information should they decide to bring a subsequent IPR (if the original opposer/petitioner is unsuccessful).²³ The use of an IPR Arbitration may be especially beneficial in cases where an initial IPR petition is unsuccessful and where parties want to file serial IPRs to supplement with newly located prior art and deny future IPR petitioners from having a roadmap of what worked and did not work in the prior IPR. Parties may be more willing to undertake a less complex IPR Arbitration rather than additional IPRs at the PTAB.²⁴

End of Partial Institutions at PTAB

In *SAS Institute v. Iancu*,²⁵ the Supreme Court held that all claims asserted by an IPR petitioner must receive adjudication through the full PTAB process including a final ruling. The Court effectively ended the PTAB's partial institution practice—allowing only part of the claims originally challenged by a petitioner to be adjudicated. Many attorneys have predicted that *SAS* will increase the patent holder's expenses resulting from the requirement to defend all the asserted patent claims.²⁶ Some have even criticized *SAS* as creating a massive amount of needless work.²⁷ The *SAS* ruling may have the practical effect of forcing the PTAB to institute fewer IPRs and potentially causing further backlog. The PTAB may attempt to preempt the inevitable overwork required from all claims being adjudicated in each IPR.

Attorney's fees for appeal to the CAFC will also increase. Between 2012 and 2015, appeals from the USPTO to the Court of Appeals for the Federal Circuit (CAFC) increased four times.²⁸ The CAFC's workload will likely increase further in light of *SAS*. The PTAB can no longer dispose of a subset of challenged claims at the institution phase because all challenged claims must be addressed in the final decision, providing additional appealable issues for the CAFC to decide. About 85% of IPR trials have co-pending district court litigation.²⁹ As a result, petitioners will likely seek all asserted claims adjudicated through IPR making a stay of any co-pending district court action nearly certain and increasing the complexity of IPRs at the PTAB and on appeal.

In August the USPTO announced that as a result of the *SAS* decision, fees for PTAB trials are to increase by roughly 25%.³⁰ So the filing fee for an IPR filed in 2019 is likely to rise to nearly \$20,000 (plus an \$18,750 Post-Institution fee). The USPTO acknowledged that because the PTAB will no longer be able to institute an IPR on less than all claims challenged in a petition, there will be significant additional work for a given instituted IPR.³¹

Small to midsize companies and start-ups who could have mustered the resources to participate in an IPR, pre-SAS, will now likely to be unable to participate fully in an IPR due to the increased filing fees and attorney's fees required to withstand a more involved PTAB proceeding and even lengthier appeal.

Use of Broadest Reasonable Interpretation Standard Under IPR Arbitration

The recent change to the claim construction standard applied by the PTAB during IPRs, will likely create further confusion and unpredictability. Rather than using the usual examination standard during prosecution and, until recently, IPRs of the “broadest reasonable interpretation” (BRI); the new PTAB rules would shift to the “ordinary meaning” of claim terms as applied by the courts, exemplified by *Phillips v. AWH Corp.*³² (*en banc*) and adjusted by *Teva Pharms. USA, Inc. v. Sandoz, Inc.*³³

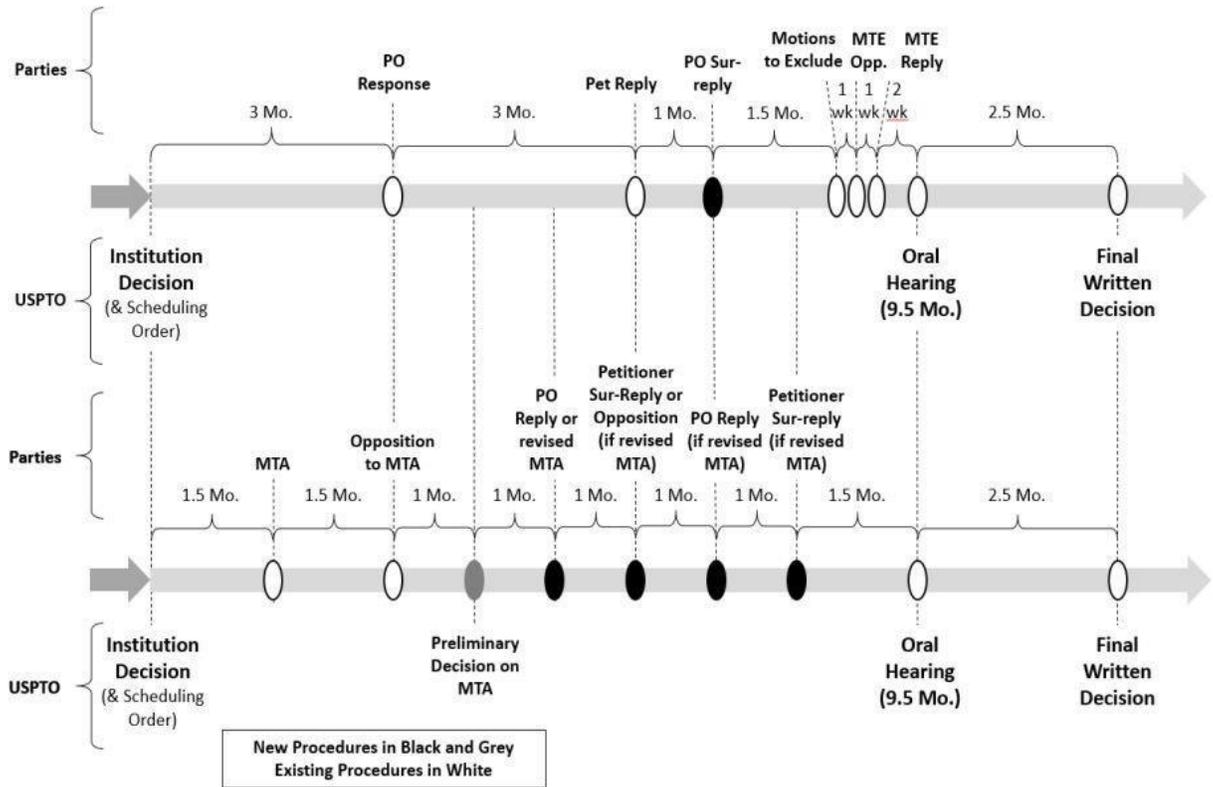
Since the Director's BRI proposal has no retroactive effect, for the cases pending prior to the enactment date of November 13, 2018, there may be controversy over the transition to the new standard.³⁴ However, under IPR Arbitration the parties will be able to decide which standard they prefer to use. Also, in cases where the parties are unable to agree in their Case Management Plan, the proper claim construction standard could be left to the expert opinion of the arbitrator. In some cases the arbitrator may use the *Phillips* standard, unless the patentee has made substantial amendments to the claims—in such a case, the BRI standard could be used.

New Procedures to Amend Claims

With respect to the ability to amend claims during IPR Arbitration, the key issue is whether the invention covered by the claims at issue remains valid in view of the asserted prior art. In other words, are claim amendments available that would retain the validity of the invention at issue? Since an arbitration is only deciding the dispute with respect to the parties involved in the IPR Arbitration (e.g. patentee and accused infringer), it is not as important to provide a public notice function with respect to issuing a new patent with a new set of claims, such as under an IPR. So once the patent owner can show that it is entitled to claims that avoid the prior art, the actual “amendment” of a set of claims can take a “backseat” to concluding the IPR Arbitration. Thus, an arbitrator need only issue an interlocutory order with respect to amendment of the claims at issue under the IPR Arbitration.

Although the USPTO is compelled to recognize an arbitrator's award under 35 USC §294, and amendment of claims could be part of such an award; it is actually not imperative in order to resolve a dispute between a patentee and accused infringer to issue an award that includes new claims. It is sufficient under an IPR Arbitration to simply acknowledge that at least one infringed claim may be drafted to avoid the prior art. With that in mind it is understandable that the process of ruling on a patentees' motion to amend claims can be much abbreviated under an IPR Arbitration compared to a PTAB proceeding.

With the reduced level of complexity for IPR Arbitration in mind, it is useful to contrast the high level of complexity involved in the new procedures for claim amendments being introduced at the PTAB.³⁵ Below is a chart depicting the new PTAB claim amendment procedures.³⁶



The new procedures for claim amendment add at least five more briefs/sur-replies to the already complicated process. While this process may open the door for a patentee to find patentable claims, it assuredly will increase costs and resources needed to litigate at the PTAB. Using a more flexible and streamlined process, such as an IPR Arbitration, will greatly reduce costs for both parties.

While IPR Arbitration is intended to mirror the IPR process, the parties are always able to stray from the IPR rules where practicable. One area the parties may consider modification is the twenty-five page limit for a motion to amend and reply.³⁷ Since the petitioner has a burden to prove unpatentability of the amended claims by a preponderance of the evidence, the petitioner and the patentee may desire a page limit greater than twenty-five pages (depending on the number of claims at issue).³⁸

Panel Selection under Arbitration

Under an IPR Arbitration the arbitrator(s) that is selected will preside over the proceeding from start to finish. Since the arbitrator(s) will be selected by the parties after investigating the arbitrator’s background, the parties will be able to discern any bias of the arbitrator. As well, there is strong incentive for the arbitrator to avoid even an appearance of bias; as bias is the main grounds for appeal of an award. Unlike an IPR where the PTAB judge is assigned to the case without party input,³⁹ an IPR Arbitration provides greater flexibility for selection of the adjudicator.

Overall Benefits

In the chart below, the overall benefits and detriments for petitioners and patent owners are explained for IPR Arbitration compared to the IPR process a PTAB:

IPR Arbitration	IPR (PTAB)
a) Maintain a high level of confidentiality via the private arbitration process;	a) Ruling is published along with all supporting evidence. ⁴⁰ Rarely are documents sealed. ⁴¹
b) Save expense by using a streamlined and condensed IPR Arbitration process (can be completed in 6 months);	b) New petition filing fee -\$19,000 new post-institution fee - \$18,750 ⁴² attorney's fees for preparing petition > \$80,000 ⁴³ Duration of PTAB proceeding – 18 months ⁴⁴ Duration of appeal to CAFC > 3 years.
c) Obtain an arbitration award invalidating the patent(s) that must be recognized by the USPTO under 35 USC §294, and district court under the Federal Arbitration Act. ⁴⁵	c) PTAB ruling is recognized at USPTO but may not be given full recognition in district court due to BRI standard not used in district court. ⁴⁶
d) Arbitration could convert to mediation and allow for built-in settlement options (e.g. convert to mediation, prior to obtaining the IPR Arbitration award);	d) PTAB encourages use of ADR but has no ADR services at USPTO. ⁴⁷
e) Settlement does not have to be approved by the PTAB;	e) PTAB must approve settlement and if it occurs close to issuance final hearing and ruling, PTAB may not accept settlement and force parties to continue with PTAB proceeding. ⁴⁸
f) Opposer/petitioner avoids the need to obtain a PTAB institution decision or file a Petition for Institution of an IPR;	f) Must file a petition and receive an institution decision in order to proceed. ⁴⁹
g) Parties may decide to challenge only part of the claims at issue; and	g) Under Supreme Court SAS decision no partial institution and all claims challenged

	must be finally adjudicated through final hearing and ruling. ⁵⁰
h) Relatively no likelihood for an appeal	h) May appeal to CAFC and under SAS all claims must be fully adjudicated through appellate process at CAFC. ⁵¹

Overall Benefits for Petitioners

Traditional petitioners in IPR proceedings may favor an IPR Arbitration because of the reduced cost and duration of the proceeding. If a patentee agrees to enter into a binding arbitration in view of prior art disclosed by the petitioner, there is no need for the institution step of an IPR. Also, a petitioner will likely benefit from the mostly non-appealable nature of the arbitration award. Only in rare cases where arbitrator has acted fraudulently or had an undisclosed conflict of interest can an arbitration award be appealed.

Overall Benefits for Patentees

Traditional patentees in IPR proceedings may favor an IPR Arbitration due to the enhanced settlement opportunities in an arbitration that can be modified to mediation. Patentees will also benefit from the lower cost and expediency of IPR Arbitration. Additionally, patentees may benefit from the limited nature of an arbitration ruling that will not extend to non-party arbitrants. Both parties will benefit from the private nature of arbitration and enhanced confidentiality of the proceeding.

Conclusion

Use of IPR at the PTAB is a good option for well-funded parties who are involved in “bet the company-type” patent litigation. But for situations where a settlement is a likely outcome or the parties are not willing to risk \$250,000 - 500,000 each for an IPR at the PTAB, then an IPR Arbitration is much more efficient for both petitioner and patentee. The discussion regarding use of IPR Arbitration herein, exemplifies the benefit of applying a flexible ADR process to complex IP disputes in general. In addition to helping to resolve disputes at the PTAB, arbitration may be used to resolve other IP disputes in a more streamlined manner using customized ADR processes to provide procedural steps to “fix” parts of the patent system—such as district court litigation.

¹ David Newman is chair of the IP Group at Gould & Ratner LLP in Chicago, Chair of the ADR Committee of the ABA IP section, a registered patent attorney, author of Patent Neutral: Expanding the Use of ADR for Settlement of Patent Disputes at the PTAB and developer of ROSE Arbitration that offers arbitration services at www.RoseArb.com.

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- ² *SAS Institute Inc. v. Iancu*, 584 U.S. ___, No. 16-969, April 24, 2018
- ³ Request for Comments on Motion To Amend Practice and Procedures in Trial Proceedings Under the America Invents Act Before the Patent Trial and Appeal Board; 83 FR 54319; <https://www.federalregister.gov/documents/2018/10/29/2018-23187/request-for-comments-on-motion-to-amend-practice-and-procedures-in-trial-proceedings-under-the>
- ⁴ Changes to the Claim Construction Standard for Interpreting Claims in Trial Proceedings Before the Patent Trial and Appeal Board; 83 FR 21221, May 9, 2018, 2018-09821
- ⁵ § 18:2.The Arbitrability of Intellectual Property Disputes Within the United States, 1 Alternative Dispute Resolution Practice Guide § 18:2
- ⁶ “Some disputes may be resolve by licensing, for total arbitration fees under \$25,000 per party.” www.RoseArb.com website (last visited 8/8/18). Attorney’s fees are likely to be less than \$50,000 for a 6 month arbitration.
- ⁷ 2015 Report of the Economic Survey, American Intellectual Property Association; \$100,000 median cost through filing of IPR petition in 2017. Median cost for PTAB hearing \$250,000 in 2017. M. Nayak, Bloomberg Law/BNA, August 10, 2017.
- ⁸ Model Case Management Order Presented for Arbitration that includes content for PTAB IPR. See www.RoseArb.com
- ⁹ See <https://www.jamsadr.com/clauses/#Standard> (last visited Oct. 2, 2018).
- ¹⁰ See American Arbitration Association website: <https://www.adr.org/Clauses> (last visited August 22, 2018)
- ¹¹ J. Gaitas, *Leading Practitioners’ Guide to International Oil & Gas Arbitration*, JurisNet, LLC, 2015 (“J. Gaitas”) pg. 880.
- ¹² See Existing Disputes: WIPO Arbitration Submission Agreement, <http://www.wipo.int/amc/en/clauses/arbitration/>(last visited Oct. 2, 2018).
- ¹³ See, J. Gaitas pg. 876, *supra*.
- ¹⁴ § 18:2.The arbitrability of intellectual property disputes within the United States, 1 Alternative Dispute Resolution Practice Guide § 18:2
- ¹⁵ Aceris Law LLC, *Arbitration Proceedings without an Arbitration Clause* (Nov. 29, 2017), <https://www.acerislaw.com/arbitration-proceedings-without-arbitration-clause/>.
- ¹⁶ *Id.* at 879
- ¹⁷ Anne Louise St. Martin & J. Derek Mason, *Arbitration of Patent Disputes in the United States*, 52 *LES Japan News* 92 (2011).
- ¹⁸ “Products of the Mind” Require Special Handling: Arbitration Surpasses Litigation for Intellectual Property Disputes, American Arbitration Association, https://www.adr.org/sites/default/files/document_repository/AAA192_Intellectual_Property_Disputes.pdf (last visited Aug. 24, 2018).
- ¹⁹ Kenneth R. Adamo, *Overview of International Arbitration in the Intellectual Property Context*, 2 *Global Bus. L. Rev.* 7 (2011) *available at* <http://engagedscholarship.csuohio.edu/gblr/vol2/iss1/4>.
- ²⁰ 44 *Am. Jur. Trials* 507 (Originally published in 1992)
- ²¹ *D. Olson v. Harland Clarke Corp.* 2017 WL 541913 (9th Cir. 2017) <https://missouri.app.box.com/s/m5c5uxnzburt3wcs8lu9ote5ol4zvkl1q> (last visited October 2, 2018)
- ²² 35 U.S.C §294
- ²³ 35 U.S.C. §294(d)

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- ²⁴ See, *General Plastic Industrial Co. v. Canon Kabushiki Kaisha*, No. IPR2016-01357, slip op. 16–18 (Paper 19) (P.T.A.B., Sept. 6, 2017) (Decision to deny institution when the board considers a follow-on/serial petition to be harassment.)
- ²⁵ *SAS Institute Inc. v. Iancu*, 584 U.S. ___, No. 16-969, April 24, 2018.
- ²⁶ IPWatchdog, April 25, 2018.
- ²⁷ *Id.*
- ²⁸ J. Rantanen, Federal Circuit Now Receiving More Appeals Arising from the PTO than the District Courts, March 2, 2016, PatentlyO; <https://patentlyo.com/patent/2016/03/receiving-appeals-district.html> (last visited Oct. 4, 2018)
- ²⁹ D. Ruschke, S. Boalick, Patent Public Advisory Committee Quarterly Meeting, PTAB Update, United States Patent and Trademark Office, November 9, 2017, pg. 8.
- ³⁰ Notification of Proposed USPTO Fee Increase, Patent Public Advisory Committee, August 8, 2018
https://www.uspto.gov/sites/default/files/documents/Letter_from_the_Director_to_PPAC.pdf (last visited Oct. 2, 2018).
- ³¹ *Id.*
- ³² 415 F.3d 1303 (Fed. Cir. 2005).
- ³³ 135 S.Ct. 831 (2015).
- ³⁴ 83 FR 21221, *supra*; S. McKeown, What a Phillips Construction Could Mean for PTAB Appeals, Ropes & Gray, Sept. 26, 2018 <https://www.patentspostgrant.com/phillips-mean-ptab-appeals/#more-13430> (last visited Oct. 2, 2018)
- ³⁵ Request for Comments on Motion To Amend Practice and Procedures in Trial Proceedings Under the America Invents Act Before the Patent Trial and Appeal Board; 83 FR 54319; <https://www.federalregister.gov/documents/2018/10/29/2018-23187/request-for-comments-on-motion-to-amend-practice-and-procedures-in-trial-proceedings-under-the>
- ³⁶ Reproduced from Federal Register notice, *supra*.
- ³⁷ *Aqua Products v. Matal*, 872 F.3d 1290 (Fed. Cir. 2017).
- ³⁸ *Id.*
- ³⁹ See, Revisions to standard operating procedures: paneling and precedential decisions, USPTO, Sept. 21, 2018, <https://www.uspto.gov/patents-application-process/patent-trial-and-appeal-board/procedures/revisions-standard-operating> (last visited Oct. 2, 2018).
- ⁴⁰ See, e.g., *Cisco Systems, Inc. v. SSLServices LLC*, IPR2015-0175, Paper 27 at 3 (PTAB June 6, 2016)(Information relied on by PTAB in final written decision will become public regardless of whether a party moves to expunge).
- ⁴¹ *Id.* (“Good cause” must be shown to prove need for confidential treatment).
- ⁴² Notification of Proposed USPTO Fee Increase, Patent Public Advisory Committee, August 8, 2018
https://www.uspto.gov/sites/default/files/documents/Letter_from_the_Director_to_PPAC.pdf (last visited Oct. 2, 2018).
- ⁴³ 2015 Report of the Economic Survey, American Intellectual Property Association
- ⁴⁴ 35 U.S.C. §316(a)(11)(Following 6 month institution review, the statute requires completion of IPR trial within one year of institution.)
- ⁴⁵ 9 U.S.C. §13
- ⁴⁶ See, e.g., *In re NTP*, 654 F.3d 1268, 1274 (Fed. Cir. 2011); *In re Baxter Intern., Inc.*, 678 F.3d 1357, 1365 (Fed. Cir. 2012).

⁴⁷ See, Notice Concerning Alternative Dispute Resolution (ADR), sent upon filing of Petition and recognizing the services of CPR Institute for Dispute Resolution, American Intellectual Property Law Association, American Arbitration Association, World Intellectual Property Organization and American Bar Association.

⁴⁸ 35 U.S.C. §317(b)

⁴⁹ 35 U.S.C. §311

⁵⁰ *SAS Institute Inc. v. Iancu*, 584 U.S. ___, No. 16-969, April 24, 2018.

⁵¹ *Id.*