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ADR Trends: Using ADR in Intellectual Property and Technology Transactions

by Lee A. Rosengard, Marissa Parker and Brandon Riley

Arbitration is becoming increasingly popular with companies in the intellectual property and technology sectors because of the expediency and substantial cost savings it affords. Because of the complex, international nature of multijurisdictional patents and their licensing agreements, the risks and costs associated with infringement and technology-related disputes are heightened and magnified, making arbitration an attractive option to mitigate some of that risk and cost. Indeed, among technology-related agreements, licenses give rise to disputes with the greatest frequency. Although use of arbitration is increasing and many companies include dispute resolution clauses as a part of their contract negotiations, for technology-related disputes, litigation is still the most common choice of remedy, followed by arbitration.

In the context of patent infringement claims, for example, enforceability and the availability of a binding resolution are key considerations. But while litigation remains central and popular in technology transactions like patent licensing agreements – where traditional remedies such as injunctive relief and damages play a prominent role – reliance on arbitration is still projected to increase in the future because of its ability to quickly resolve claims and sharply limit costs. For instance, recent data indicate that expedited arbitration proceedings cost participants an average of approximately $48,000, while companies reported spending an average of $400,000 on traditional arbitration proceedings. Thus both of these options afford substantial savings when compared with the costs of litigating in a foreign jurisdiction, which was identified as the most costly resolution option, estimated to cost more than $850,000. As a result of these potential savings, the use of ADR procedures – specifically arbitration proceedings – in technology-related disputes will likely increase.

Critics of the arbitration process and its role in dispute resolution, however, point to trends such as rising discovery costs to suggest that parties will be less inclined to use the arbitration process in the future if the procedure continues to mimic litigation. Finding ways to take advantage of arbitration's potential economies of cost and time, therefore, are cited as the most salient concerns by companies engaging in dispute resolution clause negotiations. ■

Stradley Ronon and CPR Co-sponsor Program on ADR Diversity Initiatives and Innovation in Corporate ADR

Stradley Ronon Senior Counsel Ben Picker, DuPont Senior Vice President and General Counsel Thomas Sager, CPR President and CEO Kathleen Bryan, and GlaxoSmithKline Assistant General Counsel Andrew Boczkowski at an April 8 ADR event.

More than 65 clients and friends attended an April 8 luncheon program co-sponsored by Stradley Ronon and CPR: International Institute for Conflict Prevention & Resolution in Stradley Ronon's Philadelphia office. The program panel included Kathleen A. Bryan, CPR's President and Chief Executive Officer; Bennett G. Picker, Stradley Ronon Senior Counsel; Thomas L. Sager, DuPont's Senior Vice President and General Counsel; and Andrew W. Boczkowski, Assistant General Counsel at GlaxoSmithKline.

Panel members first spoke on the necessity of bringing diversity to ADR, pointing to the palpable lack of diverse ADR practitioners serving as neutrals in mediations and arbitrations. Despite acknowledgment by corporations worldwide that diverse groups make better decisions, women and minorities are significantly underrepresented as mediators and arbitrators in disputes involving companies, even among those with diversity mandates for hiring outside law firms. Attendees received copies of a "Diversity Commitment" from the National Task Force on Diversity, asking that organizations affirm their support for diversity not only in their workforces, but also in their providers of goods and services, and that they agree to ask their outside law firms and counterparties to include qualified diverse neutrals among any list of mediators or arbitrators they propose. Several guests also commented on specific initiatives in which they participated that supported minority and women candidates as ADR neutrals.

The discussion then turned to innovative practices in corporate ADR, including in-house training of corporations' lawyers and business leaders on negotiating strategy, early case analysis, drafting of ADR clauses and alternatives to traditional litigation. Panelists remarked that in just one generation, ADR options have become part of almost every discussion at the corporate level about resolving conflict, when 25 years ago commercial (non-labor) mediation was almost unknown. The attendees discussed the emerging trend among corporations to rebrand their litigation sections as dispute resolution departments, and the insistence by corporations that their outside law firms have ADR competence. ■

Stradley At Work

ADR Practice Group Chair Lee Rosengard served on the panel "Planning for Mediation" as part of an American Arbitration Association webcast. The panel focused on what to do leading up to and during a mediation.

Partner Kevin Casey presented "ADR for IP Litigation" at the Pennsylvania Bar Institute's 8th Annual Intellectual Law Institute. Local and national IP practitioners explored trending issues at the interface between intellectual property and alternative dispute resolution law.

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