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Arbitration

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Which Is Better— Patent Arbitration or Patent Postissuance Proceedings?

Tom Brady, New England Patriots quarterback, seemingly has won his dust-up with the National Football League over the air pressure in footballs. Brady received a four-game suspension after an NFL investigation of “Deflategate,” where Brady was accused of using footballs with lower air pressure than allowed by NFL rules in order to gain an unfair advantage.

Brady, however, did not accept the sacking and, instead, filed for arbitration. He lost, but was still not out. He headed to court, where a judge acknowledged that the arbitration was due the court’s respect and deference. The court, however, still freed Brady because the quarterback was not informed that he could be disciplined for misconduct, and because his lawyers only were allowed to cross-examine one of the two lead NFL investigators and could not dig into the NFL’s investigative files.

However, even as *Sports Illustrated* trades in “Deflategate” for “Elatagate,” Yogi Berra, a sports figure from baseball, taught us that, “It ain’t over ‘til it’s over.” The NFL has appealed, and the case goes on.

What does any of this have to do with intellectual property, and more specifically, patents? The simple answer is: a lot. In the Fall

2014 Corporate Counsel article, “Goodbye Patent Arbitration?” this author advanced the opinion that in the near future, the arbitration of patent disputes may wither away and die because the US Patent and Trademark Office Patent Trial and Appeal Board’s (PTAB) *inter partes* review, postgrant review, and covered business method proceedings may take over the role of arbitration for those who want nonlitigation resolutions of patent disputes.

This “wither and die” conclusion was controversial enough that it was taken to task in the American Bar Association July/August 2015 Landslide article, “Patent Arbitration: It Still Makes Good Sense.” The author, patent arbitrator Peter Michaelson, took a position that the business he is in, arbitrating patent disputes, makes good sense.

So, which is better for deciding patent disputes—patent arbitration or PTAB proceedings? You be the referee. Compare Mr. Michaelson’s concessions and the NFL-Brady arbitration experience with the facts of postgrant proceedings in the PTAB, to decide where patent disputes should be taken.

To start, Mr. Michaelson’s “Good Sense” article admits that “[p]ost-grant proceedings [are] certainly expeditious and cost effective.” Compare, then, the admittedly “expeditious and cost effective” PTAB proceedings with the NFL-Brady arbitration experience, and score one for PTAB proceedings. Two of the three reasons Brady’s judge cited for reversing

the arbitration decision involve matters that always complicate, in time and money, the currently existing arbitration proceedings that practically duplicate litigation.

The two matters are exploratory witness examinations and document discovery. As in the “Goodbye Patent Arbitration?” article, current arbitration includes both of these as typical American Arbitration Association procedures, which are time-consuming and expensive. The procedures and arbitrator predilections lead to extended facts and expert witness depositions and forced exchanges of volumes of documents.

The Michaelson article continues that “[a]necdotally, initiating a [PTAB] proceeding, and often just a credible threat of doing so, present[s]... an effective ‘club’ to reach early settlements of infringement disputes at markedly less cost...” Score two, and maybe three, for the PTAB. The NFL apparently cannot do anything to get Brady into settlement, just as many parties in patent arbitration go the distance in trying their cases.

“Good Sense” goes on: “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... Where... factors [of concerns beyond validity] do not exist, such a proceeding may be ideal.” Scores are piling up for the PTAB! Admittedly, a loser in PTAB proceedings can take an appeal to the US Court of Appeals for the Federal Circuit, but that court, unlike Brady’s judge, will not mouth deference and yet undercut the PTAB. Except for patent claim interpretation, which has been reversed for being overbroad at least once, and unless the case involves interpretation of law, which is considered anew, the Federal Circuit will apply a highly deferential standard of review to PTAB decisions. Michaelson states that the advantages of litigation, as

opposed to arbitration, “are grossly outweighed by the deficiencies” of litigation, but acknowledges that “in its default mode, patent arbitration closely mirrors litigation with all its principal deficiencies.” Runaway scoring for the PTAB! Would that it were true that patent arbitration did not turn out like litigation, as the article asserts it need not.

It is true that it need not. But too often patent arbitration is directed by one side to be just like litigation, because that side has resolved to drive up costs to provoke settlement. That happens even when the patent owner is in a supplier-customer relationship, even when the patent owner is a substantial supplier of other products to the alleged infringer. In many cases, the supplier-customer relationship is not respected and the potential win of a split-the baby, or better, arbitration award, is too much to allow for good sense to rule.

Sometimes even arbitrators themselves make arbitration more like litigation, as they exert themselves to organize their decisionmaking

through requirements of early initial disclosures; discovery, including document disclosure requirements, depositions, claim construction proceedings, summary judgment motions; and pretrial, all before a trial in a distant future. They seem to think that is the way it is done because that is the way arbitration rules suggest it be done, and that was the way of litigation when they were advocates.

Experience over many years teaches us that more likely than not, the dispositive issue of a patent dispute is patent validity—the issue of whether the asserted patent claims are valid at the extremity of scope that the patent owner typically is asserting. The patent’s embodiments of invention often have been left behind and the claim terms broadened almost as to be unrecognizable.

The PTAB with its broadest reasonable interpretation approach to patent scope is ideal for decisions in such situations. Once broad claims are canceled or confirmed, the dispute is over. The alleged infringer moves on either way. Sales can

continue with the relevant patent claims canceled, or if the validity of the challenged claims is upheld, a new product can be introduced and the case of past damages boxed in and settled.

As with all conclusions based on opinions, there will be instances for which the conclusion of this article is wrong. For example, the occasional obstinate infringer of valid patents is admitted. In some situations, post-issuance proceedings may not be available, or the prior art may not be killer prior art. But if the patents at issue are eligible for postissuance proceeding, the PTAB is worthy of consideration as a forum to resolve many, if not most, nonlitigation patent disputes.

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