Resolving Intellectual Property Disputes Outside of Court: Using ADR to Take Control of Your Case

By Alan W. Kowalchyk

Mr. Kowalchyk is a senior vice president and director at the law firm of Merchant & Gould P.C., in Minneapolis. He practices in the area of intellectual property law, with an emphasis on patent litigation, client counseling and alternative dispute resolution. The views expressed herein are solely those of the author. This article does not necessarily state the views of the firm of Merchant & Gould P.C., or any lawyer or client of the firm.

Intellectual property cases, like most commercial disputes, start out in court but are usually resolved before trial. Given the high cost and protracted nature of IP battles, arbitration and mediation should be seriously considered as options to take control of a dispute when it arises. This article focuses on the key factors to evaluate when deciding whether to arbitrate or mediate an IP dispute.

The vast majority of intellectual property litigation, especially cases involving copyright, patent and trademark infringement claims, takes place in the federal courts. Like most cases that set out upon the litigation path, intellectual property cases are most often settled before trial; the number of cases actually tried in court is small. In 2002, for example, slightly more than 7,400 intellectual property disputes were disposed of by federal district courts. Less than two percent of these cases went through a trial to verdict.
Regardless of when intellectual property lawsuits are settled, the cost of litigating is extremely high. A recent survey published by the American Intellectual Property Law Association reported that a party incurs about $2.6 million in legal fees and costs in an average patent infringement case, which usually involves claims for damages between $1-$25 million.\(^4\) More than half of this sum—about $1.49 million—is incurred up to the completion of discovery. Trademark, copyright and trade secret cases tend to cost somewhat less than patent cases because they are less technical. But even these cases can run into the high six figures or more when potential damages are large (i.e., exceeding $1 million), and there are complex legal issues and a lengthy trial is anticipated.\(^5\)

Not only is litigation expensive, it is a liability on the balance sheet for as long as the lawsuit exists, which can be a decade or more in patent cases that are appealed and then retried.\(^6\) A more practical problem is that litigation continually drains a company’s cash flow. And litigation is so very public.

So, when your client is faced with enforcing, or acquiescing to, an intellectual property right, the question is, “Should you advise the company to step into the ring?” The reason this question should be asked is because there are alternative, less public and less costly ways of resolving many intellectual property disputes. The most common are arbitration and mediation. These are distinctly different alternative dispute resolution (ADR) processes. This article discusses how they differ and when each should be considered.

**Arbitration**

Arbitration is an adjudicative process that, like a trial, has a third party decide the dispute. Thus, arbitration is a form of private judging. Because arbitration is a creature of contract, it has a major advantage over litigation: the parties can select a decision maker with expertise in the type of intellectual property dispute involved. Arbitration also has other advantages over litigation. It is potentially less costly and faster because:

- it is less formal than litigation,
- it allows for less discovery,
- judicial rules of evidence typically do not apply,
- the arbitrator’s award is final, binding and enforceable in court, and
- there are limited appeal rights.

The parties bear the costs of arbitration and the arbitrator’s fees. The latter are generally billed at an hourly rate and can be quite high. However, because arbitration is usually a shorter process than litigation, overall costs are usually lower. You can see right away that arbitration costs less because it cuts down the scope of discovery and limits the right to appeal.

**Commencing Arbitration**

How do parties enter into arbitration? One way is to put an ADR clause providing for arbitration in the transaction documents, such as a patent royalty license. The ADR clause usually states that the parties agree to arbitrate “any and all disputes arising out of or related to this agreement.”

If there is no ADR clause in the relevant documents, the parties can agree to arbitrate “post-dispute.” However, by that time the parties are usually so at odds with each other that they are less likely to agree on anything.

So whenever possible, it is prudent to use a “pre-dispute” arbitration clause in the transaction documents. Having this clause can lower the temperature of the parties’ heated reactions, which can distract them from objective decision making after a dispute arises. The cost of not having such a clause is that if litigation is commenced, the court might require the case to be arbitrated or mediated before a court-appointed neutral under a court-referred ADR program. This obviously takes the decision making about the process out of the parties’ hands. It is much better for the parties to control the process of resolving their intellectual property dispute.

Private commercial arbitration allows the parties to have that control. Significantly, it allows them to decide on the rules and procedures that
will apply to their arbitration. In most cases, parties agree to have their arbitration proceedings administered by a well-established, neutral arbitration provider, like the American Arbitration Association (AAA), which has well-tested arbitration rules, including specialized rules for patent disputes. But sometimes parties decide to use *ad hoc* arbitration in which the arbitrator administers the proceeding. A notable disadvantage of *ad hoc* arbitration is that the parties are involved in direct dealings with respect to arbitrator compensation. Administered arbitration does not have this disadvantage since the neutral arbitration provider acts as an intermediary with respect to compensation issues.

Arbitration rules tend to be flexible and give great discretion to the arbitrator to manage the proceedings. Even when agreeing to arbitration under AAA rules, parties can adjust the rules to meet their needs. Thus, for example, they can decide to have one arbitrator or a panel of three, or to preclude awards of punitive damages. Parties can also decide other arbitration details, such as the place of the arbitration, the law that will govern the proceedings, and the language of the arbitration. They can also agree that court rules of evidence will apply. However, adherence to judicial evidence rules is not typical of arbitration because parties who agree to arbitrate are using an expeditious alternative to litigation.

Because the arbitration agreement governs the arbitral process, parties need to pay considerable attention to the terms of that agreement to increase the likelihood that the dispute will be resolved without the need for litigation.

**Role of the Arbitrator**

At the onset of the arbitration, the arbitrator schedules a pre-hearing conference at which the arbitration schedule, discovery, and other procedural matters are discussed and decided by the parties and the arbitrator. One procedural matter that invariably comes up is how evidence will be introduced at the hearing on the merits. An arbitrator who is cognizant of the duty under AAA rules to conduct a fair hearing while expediting the resolution of the case might urge the parties to consider having their experts testify together and use witness statements for less important direct testimony. The flexibility of arbitration allows for these alternatives.

In most cases, discovery can be better controlled in arbitration than in litigation. Because court rules allow discovery of “all” relevant evidence, intellectual property lawsuits, especially patent cases, tend to involve wide-ranging discovery, including many depositions. Arbitration rules are usually silent on the matter of depositions. The parties may provide for depositions in their ADR clause, or they can agree during the pre-hearing conference on a modest number of depositions of the most important witnesses. The arbitrator will promptly decide any discovery disputes that arise. Overall, discovery is usually completed much faster in arbitration than in litigation.

In arbitration, parties are advised to focus on the most relevant evidence and avoid introducing repetitive or cumulative evidence.

Patent cases are particularly technical, so a jury trial can take weeks. An arbitration hearing on the merits of a patent case usually takes less time (even though the hearing is unlikely to be completed in one day). Moreover, there is more flexibility in scheduling the arbitration hearing. Furthermore, arbitration hearings are not marred by interruptions of the kind that occur in court when the judge is suddenly called upon to hear an unrelated matter.

At the end of the hearing on the merits, the arbitrator will issue a written award. The award may be accompanied by a written opinion or a brief explanation of the rationale for the award. The parties can ask for a written opinion in their arbitration agreement or at a pre-hearing conference.

**The Issue of Appeal Rights**

Arbitration is a binding process in which one party may “win” all claims and the other “lose.” However, similar to a court proceeding, arbitrators may reach different findings on different claims and counterclaims. So while arbitration is considered to be a “win-lose” process, the outcome really depends on the merits of each claim and counterclaim.

There is no automatic right to appeal an arbitration award. Parties are limited to the grounds set forth in the Federal Arbitration Act, since almost all intellectual property cases involve interstate commerce. Parties can sidestep the lack of appeal rights by agreeing to non-binding arbitration. But that is not common and the costs probably would be quite high if one party rejected the award and proceeded to court, thereby incurring large legal fees that both parties initially hoped to avoid.

**Mediation**

Unlike arbitration, mediation is not an adjudicative process; it is facilitative in nature. Establishing who is right and who is wrong on the issues is not the focus of mediation. Mediation involves the parties in a dialogue concerning the disputed issues. The goal is to seek business solu-
tions acceptable to both sides through negotiation, compromise and creative problem solving. The mediator’s role is to facilitate communication between the parties and help them consider a variety of solutions to all or part of the issues in dispute. These solutions can involve alternative or additional business arrangements, including cross-licensing and joint development of new, improved, or collateral products. There is no limit on the amount of creativity that can be used in crafting potential solutions. The only limit is the parties’ willingness to consider them.

Thus, in mediation, the mediator does not decide substantive issues. So in a patent dispute, one should not expect to have a decision by the mediator on such issues as whether the defendant infringed the patent, or whether the patent was valid, or whether the plaintiff actually owned the patent. Similarly, in a trademark case, the mediator will not decide the likelihood of confusion between trademarks, or whether the plaintiff was the first to use the trademark and where. These are difficult issues with large financial consequences and the parties may not be able to agree on them. For this reason some attorneys do not recommend mediation to their clients. However, it can be useful to mediate if only to determine what the disputed issues are and perhaps reduce their number.

In mediation, the parties select a neutral person to serve as the mediator. The mediator has no “coercive” power to force the parties to agree to a settlement. Because the process belongs to the parties, they decide whether to voluntarily agree to settle all or some of the issues in dispute. Usually, the parties meet separately with the mediator in what are called private caucuses. The mediator then shuttles between the parties with settlement proposals and counter-proposals for consideration by the parties.

Intellectual property disputes must be mediated if the ADR clause in the transaction documents requires it. An ADR clause commonly provides that in the event of a dispute, the parties agree to use mediation first, but if they cannot reach an agreement, then they may proceed to arbitration.

If there is no ADR clause in the relevant documents and litigation has been commenced, mediation can still take place because the parties can agree to mediate while the lawsuit is pending. Many courts have court-annexed mediation programs which allow them to direct all or most cases to mediation conducted by a magistrate judge or private individual on the court’s roster of mediators. (Some courts have intellectual property specialists on their rosters.) Generally speaking, in court-annexed mediation, parties do not have the ability to select their preferred mediator. That is a key advantage of private mediation. Parties can work with a mediator they have chosen, who they trust and respect. This is important because for mediation to be successful, the parties must be willing to discuss highly sensitive and often proprietary information with the mediator.

Special Expertise and Co-Mediators

In intellectual property disputes, parties can decide whether or not the mediator should have special technical expertise. In some mediations over the disputed use of intellectual property, teams of mediators are being used. The advantage of having more than one mediator is that there is more expertise at the mediation table. For example, one mediator may have expertise in the field of the disputed technology (such as computer chips). The other may have useful experience in another area, such as consensus-building, or the relevant field of law, whether patent, copyright, or trademark law.

Using co-mediators costs more but it can eliminate the need for the parties to retain experts in a field in which a co-mediator has expertise. Suppose a co-mediator has expertise in preparing patent applications and Patent Office procedures, the parties might feel confident that the nuances of their positions on issues related to these areas would be understood without an expert’s assistance.

In addition, each co-mediator can work with a party. This can strengthen a party’s trust in “his or her mediator.”

Co-mediators will discuss with each other the parties’ positions and any offers and counter-offers that are made to determine how close the parties are to agreement. Then they will work together to try to move the parties forward toward a resolution of the dispute.

Parties who successfully used co-mediators tend to feel that the cost of the additional mediator was minimal compared to what they would have to spend in litigation.

Confidentiality and Trust

To make mediation work, parties must be able to speak candidly to the mediator without fear that confidential information will become public. For this reason, most states have statutes that protect, to one degree or another, the confidentiality of mediation communications (meaning speech and conduct during a mediation, and any documents prepared for the purpose of mediation). This protection usually means that mediation communications are not admissible into evidence in other administrative or judicial proceedings. The im-
The importance of confidentiality is addressed in the Uniform Mediation Act created by the National Conference of Commissioners on Uniform State Laws for states to enact. So far, a few states have enacted the UMA and it is pending in a number of other jurisdictions.  

**Settlement Agreement**

When parties agree to a settlement, the mediator prepares a memorandum of “points of agreement for settlement.” This document sketches out the general terms to which the parties have agreed. The memorandum must be clearly written. It also must be signed by all parties before they leave the mediation in order to form a binding contract enforceable by a court.

Then the attorneys hammer out a more formal agreement. (Be aware that the drafting of this document can itself become the source of contention possibly even causing a breakdown in the settlement.) Many settlement agreements include an ADR clause providing for mediation or arbitration of future disputes, including disputes related to the terms of the settlement agreement itself.

**Similarities and Differences**

Both arbitration and mediation are consensual. Likewise, both are private processes. Parties have a greater degree of control in these processes than in litigation. In mediation, parties control who the mediator is and certain terms, such as the time limit for completion of mediation. (In complex IP cases, it is prudent to consider a time limit for mediation because one party could unduly delay the process and thereby preclude a resolution.) More importantly, the parties control the outcome of mediation because they decide whether to settle or not.

In arbitration, parties decide which procedures to use; they also decide who the arbitrator is. They also have the ability, through the use of confidentiality agreements, to limit public disclosure of the existence of an arbitration, and what occurs during and as a result of the process. These agreements augment statutory protections. However, bear in mind that § 294 of the federal patent law dictates that an arbitration award relating to a patent is not enforceable until the Patent Office is given notice of the award.  

**Initial Considerations in Process Selection**

The knowledgeable use of litigation alternatives cannot occur unless both parties to the IP dispute understand their business goals. Do they know why they are fighting and what each wants to accomplish? Is the goal a public victory in court? To crush the competition? Maybe what they really want is to put the litigation behind them and get back to business. Maybe they want to control their litigation costs.

Before embarking on a dispute resolution process to enforce intellectual property rights, a plaintiff should assess the different options. In a patent case, a plaintiff should consider the potential returns from litigation, including the available damages and how much product exclusivity will available under the scope of claim coverage provided by the patent.

A defendant should consider the likelihood that it will have to pay damages, the amount of such damages, and whether product changes can be made to minimize or eliminate the dispute. Given the costs, time, and uncertainty of IP litigation, these issues may be better addressed using ADR approaches such as arbitration or mediation.

The competition in high-value technology areas like pharmaceuticals and medical devices is so fierce that in many cases traditional civil litigation is heavily relied on to achieve business goals. It is not rare for these cases to involve 10 or more patents. Unleashing these heavy arsenals of intellectual property on the federal courts will inevitably entangle the parties in a long and costly process with uncertain results. Attorneys should question whether it is necessary for their clients to take this path in every IP dispute. They need only look at the statistical costs of intellectual property litigation to appreciate this point.

Since the Federal Rules of Civil Procedure require courts to consider the potential for settlement in each case, 13 before filing a lawsuit counsel should raise with the client whether mediation or arbitration—or both sequentially—would be a more productive way to achieve the client’s commercial goals. Clients should also be asked to research earlier trademark and patent licenses and litigation settlement agreements with the adversary to determine whether any of them require the use of ADR to resolve future disputes.

In most cases, discovery can be better controlled in arbitration than litigation. Overall, discovery is typically completed much faster in arbitration than in litigation.
arising out of new or related technology.

Some IP cases should clearly go the litigation route. Examples are cases that present novel legal issues and cases where a legal precedent is desired for future enforcement efforts. Sometime court-supervised discovery may be needed to obtain because of the level of detail needed to obtain critical facts regarding the development of an invention. Full discovery and court involvement may be required in some cases when dealing with issues like multiple contributions to an invention, propriety of conduct or the timing of a competing inventor’s efforts.

But many IP cases do not raise novel issues or are not potentially precedent setting. Thus, it is important to make a determination in almost every case as to whether mediation and/or arbitration would be preferable to litigation. Making this determination depends on a number of factors. In some cases, one factor may be so dominant that it determines which form of dispute resolution is best. In other cases, several factors taken together may weigh in favor of one process over another. The factors to be considered are addressed below.

Size and Importance of the Dispute
Many litigators believe that IP disputes involving large amounts of damages, complex legal issues, and extensive expert testimony are not suited for mediation or arbitration. But this is too simplistic. There is no reason to allow the amount of money at stake to rule out arbitration or mediation.

If the financial resources of the aggrieved party are limited, litigation is likely to quickly eat up those resources, leaving this party without a resolution and without funds. In these circumstances, mediation is a sensible alternative and should be considered first.

Many litigators and business executives believe that when a company’s survival is at stake, the dispute should be litigated. However, there is no reason to consider litigation the only possibility in this situation. Both arbitration and mediation allow for confidential treatment of the parties’ financial data, business-planning information and development work—protection not available in litigation, at least once the trial begins. Protective orders typically are effective only during the discovery phase of litigation. This is an important factor to consider when trade secrets or highly competitive businesses are involved in a dispute. Parties may not want to discuss their proprietary information in court in front of competitors who frequently monitor IP trials precisely in order to learn about a competitor’s business. Mediation and arbitration do not take place in public. Thus, ADR should not be ignored just because an IP case is monetarily large, complex, and important.

International Disputes
Intellectual property cases that are international in scope are particularly well-suited for arbitration or mediation. Arbitration is a well-established dispute resolution mechanism for international commercial disputes, and mediation is well known in many Asian countries (where it may be called conciliation). Mediation is also attracting attention in the European Union, where there is now a push to use mediation before another adversarial process.

The reasons for acceptance of ADR in the international business community include, among others, a lack of confidence in national courts; unfamiliarity with foreign laws; concern about costly, long court proceedings; unpredictable and possibly inconsistent outcomes; and difficulties with enforcing judgments obtained in foreign countries. These considerations are especially applicable in international IP disputes, since IP rights are issued on a country-by-country basis. Using international arbitration makes it unnecessary to litigate in multiple affected jurisdictions having unfamiliar procedures, different legal protections for IP rights, and different enforcement mechanisms.

By arbitrating a multinational IP dispute in a single dispute resolution process, the parties can save money and time, and obtain a consistent result.

Need for Technical Expertise
Another factor bearing on how best to resolve
a particular intellectual property dispute is the technical complexity and need for technical expertise. District court judges and juries tend not to be experts in IP and the technologies involved in patent cases. Considerable time is needed to bring them up to speed on such matters as the technical background (i.e., the state of the art before the patented invention); the nomenclature of the technical field; the teachings in prior patents and publications; and the advantages of the patent invention. In arbitration, the parties can select an arbitrator who has the relevant technical IP expertise. It is far easier to educate this type of arbitrator about the case than a district court judge and jury. An experienced patent arbitrator familiar with “claim interpretation” issues will more quickly appreciate the important technical terminology and be able to more efficiently review and decide the case. In addition, an experienced patent arbitrator tends to have more time available than a judge to evaluate the subject matter of the patent and prior patents, publications, and products (i.e., prior art) that bear on whether the patent represents a valid, enforceable advance in the technology.

From the parties’ points of view, knowing that the decision maker understands the technology and the guiding principles of intellectual property law can elevate their confidence in the process and ensure that their positions and technical and scientific arguments were “heard” and considered. This is important because in federal court the judge serves as the “gatekeeper” of what kind of technical and scientific evidence is admissible in evidence. The judge is responsible for determining the relevance and reliability of proposed expert testimony. As a gatekeeper the judge may decide to disallow particular expert evidence that one party considers vital to its case.

Introducing technical and scientific arguments and evidence is usually easier in arbitration. The arbitrators typically do not preclude the introduction of an expert’s point of view based on specific reliability criteria. So if extensive technical expertise is important to the resolution of a case, arbitration should be seriously considered as an alternative to litigation.

Cost and Time Savings
A common reason to consider mediation and arbitration is the saving of time and money. The timesaving usually results from the greater informality and flexibility of these processes over litigation, and the limitations on discovery. The greater flexibility and informality means that arbitrators can promptly decide discovery disputes and procedural motions. The parties also can agree to a deadline for the completion of discovery and the submission of briefs. As for hearings, the parties can agree to forego having a court reporter and a transcript of the hearing. As noted above, they also can agree to streamline testimony by using written witness statements for less important witnesses on direct examination.

As for mediation, the parties can agree to voluntarily exchange pertinent information, and explore viable business resolutions in a less adversarial environment.

Importance of the Parties’ Relationship
Parties with an ongoing business relationship may have a past intellectual property agreement that provides for arbitration of disputes. If they don’t but they want to continue their relationship, mediation is the best choice to resolve the dispute. Mediation is noted for preserving business relationships.

Parties with an ongoing business relationship know about each other’s business and can appreciate each other’s needs and interests. This makes it vital to consider early mediation over litigation and arbitration. However, many technology companies operate in a competitive environment that is not conducive to a “talk first” approach. Yet, mediation can facilitate a company’s ability to interact in that kind of environment by keeping business goals in focus and reducing the hostility that often accompanies litigation.

Provided a party protects its litigation options, there is rarely any downside to mediating a patent or trademark case, regardless of the parties’ past relationship. Whether a product infringes on a patent claim or a trademark for a certain product is confusing and can be very fact-specific. So the best time to mediate may be after the most important facts are uncovered through discovery, since it is at that time that the parties feel they have sufficient information to explore mutually beneficial outcomes.

The Parties’ Expectations
The expectations of the parties about the possible outcomes should always be considered before deciding on the process for resolving a particular dispute. In the case of arbitration, does the party with a grievance arising out of infringement want a third party to decide who is the winner and loser? Does it want a fast or slow resolution? Does it want to get back to business? Does it want to do business with the alleged infringer as a competitor in the market? Are both parties willing to trade the right to appeal for certainty?

Successful mediation requires a commitment
to, and acceptance of, the process at the outset. It would not be productive to agree to mediate and then fail to do so in good faith.

Control Issues
Mediation provides the parties with the greatest amount of control over the resolution of their dispute. The parties control the length of the process, the place of mediation, the information to be considered and the type of mediator. The parties can select a mediator who is “facilitative” or “evaluative.” Commercial parties often prefer an evaluative mediator with relevant subject matter experience because they want to hear how the mediator thinks a court or arbitrator would consider issues and/or claims in the case. The mediator’s views often increase the seriousness with which settlement proposals and counter-proposals are considered. Furthermore, in mediation, parties can agree to business solutions that could not be granted by a court. Regardless of the type of mediator chosen to facilitate resolution of the dispute, or the suggestions the mediator offers for consideration, the parties cannot be forced to agree to a settlement that they do not want.

Arbitration provides the most control over the process. Parties decide what the arbitrator’s qualifications should be and they decide who will serve as the arbitrator. They can select the rules that will apply, the place of arbitration, and the substantive law that will govern. They work with the arbitrator to determine the pre-hearing procedures (including the scope of discovery) and the length of the hearings. During this process the arbitrator will no doubt try to make the process more efficient in order to expedite a fair resolution of the dispute.

Consider the following choices offered to your client in a patent infringement case involving multiple patents and a variety of allegedly infringing products: Would your client prefer to have:

1. a confidential hearing on certain specified dates, held at a convenient place, conducted by an experienced expert in patent law who is familiar with the technology at issue who will issue a decision (reasoned if both sides request it) within 30 days of the close of the hearings? or
2. a public trial held on an as-called basis before a judge who is busy balancing a large dock-et of civil and criminal cases, and decided by a jury of ordinary citizens, most of whom will be completely unfamiliar with the area of law and technology involved?

It is becoming apparent to more and more business organizations that the benefits of ADR are substantial and often outweigh the traditional values of vindication that have led to the explosion of litigation in this country. Litigation makes huge headlines, but rarely satisfies business goals. It depletes cash flow, is a liability on the balance sheet, and offers uncertain results even in the best situations.

Conclusion
Given the high cost and protracted nature of intellectual property litigation, early and careful evaluation of how best to meet business goals involving intellectual property rights is essential. In many cases, mediation and/or arbitration can meet business needs better and more cost effectively than litigation.

ENDNOTES

3. Id., reporting a further breakdown of intellectual property disputes resolved by trial verdict in 2002 with patent cases 3.2%, copyright cases 1.5%, and trademark cases 1.2%. Id. Of the intellectual property cases terminated by trial, 61% were disposed of by jury verdict, with juries deciding 69% of the patent trials, 64% of copyright trials, and 46% of trademark trials. Id. Of the 2002 cases terminated by trial, plaintiffs were winners 59% of the time. Id.
5. Id. at 111-20.
issues extending appeals over 10 years).
9 See AAA Rules R-30(a) & (b).
11 See the website of the National Conference of Commissioners on Uniform State Law.
12 35 U.S.C. § 294(e), providing “The award shall be unenforceable until the notice required by subsection (d) is received by the Director.” Section (d) provides:

When an award is made by an arbitrator, the patentee, his assignee or licensee shall give notice thereof in writing to the Director. There shall be a separate notice prepared for each patent involved in such proceeding. Such notice shall set forth the names and addresses of the parties, the name of the inventor, and the name of the patent owner, shall designate the number of the patent, and shall contain a copy of the award. If an award is modified by a court, the party requesting such modification shall give notice of such modification to the Director. The Director shall, upon receipt of either notice, enter the same in the record of the prosecution of such patent. If the required notice is not filed with the Director, any party to the proceeding may provide such notice to the Director.


17 Id.
18 See Arnold et al., supra n. 15.
20 See Arnold et al., supra n. 15, at 5-6.
21 While the award could be reviewed by a court on the grounds stated in the FAA, bear in mind that most arbitration awards are upheld. See note 10, supra.