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Arbitration in Life Sciences Disputes: a View from New York

Life science companies are increasingly turning to international arbitration as a preferred dispute-resolution mechanism due to its confidentiality, comparative cost-effectiveness, and nearly universal enforceability. Evidence illustrates an uptick in arbitrations in the life sciences industry, with the International Chamber of Commerce reporting that health and pharmaceutical disputes have more than doubled between 2015 and 2020.[1] Similarly, the American Arbitration Association saw a 40% increase in the number of life sciences cases filed in 2019.[2]

The increase in life sciences arbitrations reflects the industry's collaborative and globalized nature. Most major pharmaceuticals and biotechnologies are developed and commercialized as a result of collaboration agreements between two or more companies—often from different countries—with distinct spheres of technological, scientific, business, and regulatory expertise. These relationships take the form of joint ventures, licensing agreements, and co-marketing arrangements. Disputes inevitably arise out of such intricate contractual agreements and complex transactions. Arbitration is an effective tool to help life science companies settle commercial disputes, protecting their valuable intellectual property and relationships with their strategic partners while saving both time and money.

Life sciences companies are turning to arbitration because it can offer a dispute-resolution mechanism that better aligns with their business needs. Arbitration can reduce the cost of life sciences disputes and make their outcomes more predictable by offering confidential, efficient proceedings adjudicated by arbitrators who are industry experts. Moreover, arbitration allows parties to consolidate multi-jurisdictional disputes into one proceeding and easily enforce the ensuing award around the world. In the following blog post, we will discuss these and other advantages of arbitrating disputes that arise in the field of life sciences.

Efficient Proceedings

The benefits of arbitration, such as limited disclosure and arbitrator selection, typically allow disputes to be resolved quicker than litigation, in turn making the process more cost effective. Additionally, arbitration awards are enforceable across multi-jurisdictions and, depending on the seat, are nearly impossible to challenge.

Limited Disclosure

Arbitration—especially when compared with U.S. litigation—is known for its limited disclosure phase. While U.S.-style discovery can last years and require parties to produce hundreds of thousands of documents (or terabytes of data) and prepare dozens of witnesses for depositions, disclosure in international arbitration is typically

1 **https://iccwbo.org/publication/icc-dispute-resolution-statistics-2020/**
2 AAA-ICDR, 2019 Annual Report & Financial Statement, 8.

restricted to a limited exchange of relevant and material documents over the course of weeks. Proponents of arbitration typically highlight the cost- and time-saving benefits associated with this limited disclosure. Limited disclosure presents additional key benefits for life sciences disputes that often involve sensitive trade secrets. In addition, disputes arising from collaboration agreements are typically complex and can be vulnerable to expansive discovery. Consider the *Epic Games v. Apple* antitrust dispute. The court inadvertently disclosed unredacted third-party trade secrets during the first day of trial. A cavalcade of motions to seal followed. Such a result is unlikely in international arbitration where there is a presumption of confidentiality (discussed below) and, in any event, simply less discovery. The more restrictive standard thus permits for necessary disclosure while favoring a more targeted and efficient process.

Arbitrator Selection

Another hallmark of arbitration is that the parties select their arbitrators, meaning they can choose adjudicators with relevant expertise and experience. The advantage of this feature in life sciences disputes is self-evident: these disputes often involve complex scientific, technical, and/or regulatory issues that an adjudicator *must* understand to be effective. Parties to litigation are not able to ensure that their judge and jury has the ability to understand the relevant issues. In contrast, when disputing parties choose arbitration, they can select arbitrators with the requisite experience and expertise to approach the dispute from an informed position.

Litigating such disputes before a judge and/or jury comes with two drawbacks. First, parties will incur greater expenses educating the decision-makers through extensive briefing and expert reports. These submissions will often need to explain even the most basic industry and technical concepts that an experienced arbitrator would know. Juries are also prone to emotional appeals and other non-legal considerations. Second, even after extensive briefing, parties cannot guarantee that the decision-makers will come to a solid understanding of the issues in dispute. This increases the risk of a wrong decision. Arbitration rids parties of these burdens by allowing them to present their case before adjudicators with relevant expertise.

Arbitral institutions can assist in identifying experienced arbitrators if the parties cannot do so on their own. Many institutions maintain specific rosters of arbitrators with life sciences expertise. For example, the American Arbitration Association's International Centre for Dispute Resolution maintains a panel of arbitrators "whose practice for a minimum of 10 years has been significantly (typically 50% or more) devoted to Life Sciences (Pharmaceuticals, Biotechnology, Biomedical Technologies, or Medical Devices)."[3]

Confidentiality

Confidentiality is a well-known feature of arbitration that has particular benefits for parties to life sciences disputes. Under most major arbitration rules, commercial arbitration has a presumption of confidentiality unless the parties agree otherwise. This presumption is particularly beneficial in life sciences disputes, which frequently involve sensitive commercial information, including proprietary technical and scientific information, market penetration data, pricing details, information related to regulatory approvals and rejections, royalty rates, and licensing terms. The dissemination of such information could generate bad publicity for a company that damages its brand and undermines the value of proprietary technology. This last point is particularly important in life sciences because, unlike in many other fields, biotechnology and pharmaceutical trade secrets are often impossible to reverse engineer.

The confidential nature of arbitration often leads to a more amicable dispute settlement process that helps preserve valuable relationships. Parties may hesitate to publicize sensitive information about a collaboration

[3] AAA-ICDR, Life Sciences, **https://go.adr.org/aaa-icdr-life-sciences.html?utm_source=website&utm_medium=banner-adr&utm_campaign=website_life-sciences**.

agreement, an impulse that—in the absence of arbitration—could drive them to avoid resolving a dispute altogether and instead abandon the relationship. When parties do bring their dispute before a public forum, they can face pressure not to settle when the market is watching. Conversely, the publicity surrounding a dispute may cause a party to paint its counterparty in an unfavorable light in order to improve its settlement position. Confidentiality helps to remove these incentives and allows parties to limit their dispute to the factual and legal questions at issue. In life sciences, the value of preserving relationships is particularly salient, given the industry's ultra-collaborative nature and the prevalence of relationships involving irreplaceable partners.

Global Enforceability

Life sciences disputes often require resolution in jurisdictions spanning several countries. Arbitration allows parties to consolidate their multi-jurisdictional disputes before a single tribunal and enforce the outcome across multiple jurisdictions.

The need for multi-jurisdictional relief typically arises in two situations, which may exist independently or concurrently: (i) the disputing parties are located in different countries; and (ii) the dispute involves operations in multiple countries. In each scenario, the prevailing party may need to obtain an enforceable judgment against the other party in one or more foreign jurisdictions.

For example, one can imagine a collaboration agreement between a Canadian company that develops a biomedical device and French company that manufactures the device and brings it to market in the European Union. The Canadian company holds the relevant intellectual property and, under a licensing agreement, grants the French company usage of that property for specific purposes. A dispute arises over the French company's decision to manufacture a cheaper alternative and bring it to market in several low-income markets. The Canadian biotechnology company seeks to enjoin the French company from manufacturing and distributing the alternative product.

If the Canadian company chooses domestic litigation, it can pursue one of two paths. First, it could file patent infringement suits against the French company in every jurisdiction in which it manufactures and distributes the alternative product. Beyond this strategy's obvious issues of cost and complexity, it risks yielding inconsistent outcomes across the several jurisdictions. Alternatively, the Canadian company could sue the French company for breach of contract in the jurisdiction whose law governs the collaboration agreement. However, even if the Canadian company prevails, there is no guarantee that it will be able to enforce that judgment in every relevant jurisdiction.

Parties can avoid this predicament by opting for arbitration. International arbitration awards are generally easier to enforce abroad than court judgments due to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the New York Convention. Under the New York Convention, 169 States have agreed to enforce international arbitration agreements and awards in their home courts. This arrangement is exclusive to arbitration, and the equivalent international treaty for the enforcement of court judgments is not yet in force and has attracted few participants. The situation described above is not simply hypothetical. Recent years have seen an increasing number of life sciences international arbitrations that are subject to the New York Convention regime: a **Belgian subsidiary of a U.S. conglomerate defeats claims by a Danish biotech company arising out of a worldwide license to develop a cancer drug**; **a settlement between a U.S. sublicensor and Chinese sublicensee in the midst of an ICC arbitration**; and **a Japanese drugmaker prevails over a U.S. biotech company in relation to a patent dispute with billions of dollars of potential royalties**. Each of these cases illustrates the international nature of life sciences disputes and the importance of having a comprehensive global enforcement strategy.

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Life sciences disputes are complex and sensitive, and life sciences companies are turning to international arbitration to resolve their disputes in a more efficient and less contentious way. The virtues of arbitration for life sciences companies are clear: they can resolve their disputes in private, improve the chances of preserving valuable relationships, lessen the risk of bad or inconsistent judgments, and support the enforcement of any relief obtained against their counterparty. These advantages allow parties to focus on the legal issues in dispute and evade the procedural headaches that often accompany multi-jurisdictional litigation.

Contacts

Feel free to get in touch should you wish to discuss this topic further or if you have any questions.

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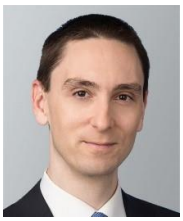

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