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LIFE SCIENCES DISPUTES: IS INTERNATIONAL ARBITRATION THE FUTURE?

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The growth of the life sciences sector has been accompanied by a corresponding growth in related disputes, which are increasingly resolved by way of international arbitration. This insight explains why international arbitration is particularly well suited for the resolution of these disputes.

The life sciences and broader healthcare sectors have experienced impressive and continuing growth in recent years. A 2018 study published by Deloitte estimates that global healthcare spending will reach US $8.7 trillion by 2020 - representing a US $1.7 trillion increase from Deloitte's 2015 projection - and that worldwide pharmaceutical and medical technology R&D investment alone will reach a combined US $214.5 billion by 2022. M&A activity in the sector is expected to increase.

The projects at the heart of the life sciences industry tend to be highly collaborative, technical, complex, high-risk and long-term endeavours. These projects are executed across multiple stages and jurisdictions, can involve numerous private and public sector stakeholders, and relate to highly-sensitive and regulated data, often requiring a large number of contractual arrangements to govern disparate sets of commercial relationships.

Although the parties may begin such relationships with a common understanding of the desired outcome, they provide fertile ground for disputes to arise if and when expectations of multiple parties underpinning long-term agreements diverge over time. For example, joint development, promotion and marketing arrangements will typically require the parties to use their "best" or "commercially reasonable" endeavours in their performance of an agreement. As applicable defined terms can be drafted using loose or vague concepts coupled with the fact that parties often view these types of obligation subjectively, disagreements can easily arise as to whether one party is properly performing its side of

the bargain. Given the potentially substantial revenues involved, the stakes are high and legal action can follow.

The growing use of international arbitration in life sciences

The continued expansion of the life sciences industry has been mirrored by an increase in related sector disputes. A notable feature of these has been the increased reliance by sector participants on international arbitration as their preferred means of dispute resolution, reflecting the increasingly cross-border nature of the industry.

A 2013 survey published by the World Intellectual Property Organisation (WIPO) indicates that 15% of its arbitration cases arose from the life sciences sector. Statistics published by other arbitral institutions tell a similar story. The International Chamber of Commerce (ICC) recorded an annual average of 30 life sciences-related arbitrations being commenced between 2011 and 2015; the London Court of International Arbitration (LCIA) recently confirmed that life sciences disputes were its sixth most common type of dispute by industry sector; and the American Arbitration Association (AAA) saw its life sciences disputes caseload double from 2009 to 2013.

Precise figures are difficult to come by as most international arbitration disputes are confidential and even their existence may never become public knowledge. Nonetheless, anecdotal commentary from international arbitration practitioners also confirms the steady growth in the number of arbitrations arising in the life sciences sector, particularly in relation to licence and R&D agreements and following on from M&A and joint venture activity.

This trend is likely to continue as international arbitration is particularly well-suited to resolving disagreements in the sector for the reasons described below.

Why choose international arbitration?

Enforceability and Finality of Arbitration Award

The successful party in an international arbitration will receive an award in its favour that is final, binding and enforceable against the other party.

Arbitration awards are not appealable other than on very limited procedural grounds, reducing the scope for proceedings to be extended through lengthy appeals processes, as

can happen in court litigation in many systems.

Critically for businesses working and contracting across borders, arbitration awards are generally more easy to enforce around the world than court judgments, due to the existence of treaties such as the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Under the New York Convention, the 157 signatory states have agreed to enforce in their territory arbitration awards issued by Tribunals based in another signatory state, thus providing a powerful and uniform system for the mutual worldwide enforcement of awards.

Confidentiality

The protection of valuable confidential intellectual property and trade secrets is a paramount concern in the life sciences industry. Unlike court litigation - which generally will take place in public - in international arbitration parties can (and normally do) agree to keep their proceedings confidential.

Expertise of arbitrators

Given the subject matter, life sciences can be highly technical, and involve complex intellectual property and regulatory aspects. Unlike in the traditional court system, where the expertise of the court in a relevant subject matter cannot be guaranteed, parties to arbitration proceedings can select their arbitrators. The ability to pick an arbitrator with the necessary legal, technical and industry specific proficiencies is a major advantage, giving greater certainty of an effective and predictable outcome. Certain arbitral institutions - such as the US-based International Centre for Dispute Resolution (ICDR) - now maintain lists of arbitrators with specific life sciences experience, reflecting the growing prevalence of international arbitration as a means to resolve disputes in the sector.

Neutrality

A further advantage of arbitration over court litigation is that parties will typically agree to arbitrate their disputes in a neutral venue, thus avoiding any concerns about the reliability of the national courts that would otherwise have jurisdiction to hear any dispute. For life sciences businesses expanding into emerging markets, keeping disputes out of local courts can be an important consideration.

Bespoke procedure

Parties to arbitration have considerable flexibility and control over the precise scope of their dispute and the procedure involved. Unlike in court systems (which often have restrictive procedural rules that dictate how proceedings are dealt with) arbitration allows parties to tailor their procedure to the specific requirements of their dispute (e.g. in relation to document production, duration of proceedings and fast-track processes, language of proceedings).

Drafting an effective arbitration agreement

Arbitration is a consensual process resulting from a contractual agreement, either entered into as part of the original transaction from which a subsequent dispute arises, or - less common - after the dispute has already arisen. Therefore, in order for parties to be able to refer their dispute to arbitration they will need to agree an effective arbitration agreement. The main arbitral institutions all provide model arbitration clauses which are a useful starting point, but are often adapted to provide for the specific needs of the parties and of their transaction.

Key points to be agreed when preparing an arbitration clause include:

- The "seat" of arbitration and arbitral rules (and governing law) to be used;
- The language to be used in proceedings;
- The number of arbitrators, by reference to factors such as the cost and/or complexity of a potential dispute, and any selection requirements;
- Any specific procedural requirements for the dispute (e.g. confidentiality, in relation to document production, fast-track procedures);
- If the transaction involves multiple parties and/or suites of related contracts, advance consent to the consolidation of related disputes or the joinder of all necessary parties; and
- Any tiered/escalating procedures, for example, requiring the parties to negotiate or mediate prior to referring their dispute to arbitration.

In many cases a simple arbitration agreement will serve the necessary purpose of enabling an arbitration to be commenced in the event of a dispute. However, it is always sensible to seek specialist advice when drafting an arbitration agreement - in particular where a transaction is complex or involves multiple parties and contracts - in order to avoid the potential pitfalls that arise if a mistake is made.

A poorly drafted arbitration agreement can (at best) result in delay in getting an arbitration commenced, or (at worst) be completely defective such that it is impossible to commence arbitration at all, thus forcing the parties to rely on whatever national court has jurisdiction to resolve their dispute and defeating the whole purpose of the arbitration agreement. By contrast, a well drafted clause will be fully enforceable, tailored to suit the characteristics of the transaction, and - ultimately - will increase the prospects of a speedy and cost-efficient resolution of any disputes that may arise.

Related Life Sciences, Health & Care, International Arbitration, Dispute Resolution, ThinkHouse

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