Managing Disputes in the Life Sciences

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Innovation is fraught with dispute, and the life sciences are no exception. Academics fall out with their industry sponsors and with one another, joint ventures fail, competitors steal trade secrets and infringe patents, and experimental drugs fail after years of research and substantial investment. However, very few disputes are litigated, and far fewer, only about 1–2% of lawsuits filed in the United States, result in a judgment on the merits. In most instances, litigation is a poor option for technology companies. It is inherently slow, expensive, complex, and uncertain even under the best of circumstances. For instance, in patent cases alleging infringement in England and Wales, there is a 41.8% chance an asserted patent will be revoked, and an even smaller chance it will be found valid and infringed. Getting to this unhappy result for claimants usually takes more than a year and costs more than a million dollars.

Company decisionmakers therefore need the skills and tools to effectively manage disputes without resorting to litigation. In this respect, it is critical to understand and appreciate more than the legal merits of a potential case. Future business concerns, national or cultural biases, commercial relationships, as well as the subjective nature of a dispute may be more important considerations.

Considerations for Resolving Disputes

Attorneys and business executives are familiar with litigation as a means of conflict resolution. However, for life sciences companies, outside of very specific circumstances, litigating disputes is generally destructive. It tends to be a protracted and costly endeavor. For example, in the United States, attorney costs in a patent case litigated to first-instance court decisions typically range from $1.5–4 million. Depending on the federal district and whether a jury or bench trial was used, patentee success rates have historically ranged from 33–85%, with a mean time to trial of 2.5 years. Even in 'successful' cases, 80% of district court decisions are appealed and more than half of appeals result in some form of modification to an initial decision. A company's internal costs can be just as draining as external payments to outside counsel, experts, and courts. Managing an expensive commercial litigation may be a substantial burden to an in-house team, tying up thousands of hours of time and other assets, and requiring extensive diligence efforts by company scientists, and depositions or detailed witness statements from company executives. Even where the legal merits of the case seem to clearly favor one party at the outset of litigation, ultimate success is uncertain, and it is difficult to predict what information may come to light by the time of trial. A 2017 study looked at UK patent litigation from 2000 to 2008 and found that once patent validity is challenged, revocation is the most likely outcome. By contrast, in Germany, only 9.2% of patents are ultimately revoked during infringement suits, but the risks are compounded by needing to initiate litigation before two separate courts in each case.

Patent litigation often needs to be conducted in multiple jurisdictions involving counterclaims of infringement or invalidity that can take years and millions of dollars to litigate, with contradictory advice being given in different jurisdictions. Substantive and procedural laws differ greatly between, say, China, which is beginning to eclipse the rest of the world as a jurisdiction for patent litigation, and the United States.

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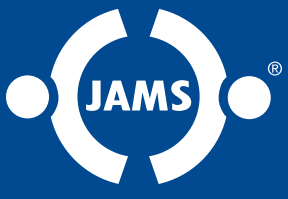

Starting a dispute with litigation can entrench positions and make it less likely that a mutually beneficial settlement can be reached, especially cost-effectively or at a global level. Even winning may be pyrrhic—legal fees may exceed damages, and a respondent may have to file for bankruptcy and be unable to satisfy a judgment. It therefore befits companies to seek new ways of resolving disputes without litigation. In many instances, we have found that attention to basic interpersonal issues can help to resolve otherwise intractable conflicts, even where millions of dollars may be at stake.

Advantages and Disadvantages of Appropriate Dispute Resolution

Appropriate (or alternative) dispute resolution (ADR) has several benefits over litigation. First, ADR tends to be faster than litigation. Second, ADR proceedings are generally confidential. This has the benefit of keeping disputes private, which is often to the reputational benefit of both parties, preventing inadvertent disclosure of trade secret information. Third, ADR can lead to a broader range of outcomes, based on subjective interests rather than legal norms. This can enable business-oriented outcomes that look to the parties' future needs and interests, rather than positions taken regarding past facts and applicable laws, leading to higher satisfaction and compliance by the parties with the outcome.

Fourth, ADR tends to be much less expensive than litigation, at least for complex commercial disputes. Mediation tends to cost from <1% to 4% of the value of a dispute, whereas for arbitration and litigation the costs are considerably higher (from 5% to 27% for arbitration or litigation). Mixing ADR modes allows fewer evidentiary skirmishes as well as less discovery, less delay, and less motion practice versus conventional litigation or arbitration on its own.

Fifth, the parties to ADR have the opportunity to select mediators and arbitrators (or combinations of different neutrals) with relevant expertise in different aspects of life sciences disputes. They may bring together neutral persons who understand the science, relevant law, finance, and industry practices. Judges may have difficulties adjudicating technical challenges, which require a high level of scientific expertise or determining the value or quantum of various claims. This is a particular concern in the life sciences where contracts may be unusually complex, or compensation schemes elaborate.

Sixth, even when these proceedings were ordered by the courts, most mediated cases settle, even when ordered by the courts rather than required by the parties. For instance, WIPO reports that WIPO-based mediation has a settlement rate of 70% and an arbitration settlement rate of 40%. Combining the two provides a likelihood of settlement that is greater than 80%.

Seventh, ADR may help to preserve commercial relationships to a greater extent than litigation, which may be public and contentious. Even in 'business divorce' cases, ADR often permits parties to continue to work together, which is necessary in life sciences, where companies are often merging and entering into new strategic alliances.

Finally, ADR may have particular benefits in the context of international disputes, where the parties wish to select a single, neutral juris- diction to resolve all issues and reduce some of the national or regional risks using a selected group of international experts as arbitrators, or to work as a dispute resolution board. With regard to international disputes, it may be easier to enforce consent awards reached using arbitration and mediation than court awards, as most nations are party to the New York Convention, which allows the enforcement and mutual recognition of arbitration judgments. For this reason, arbitration is often a preferred way of adjudicating international commercial disputes, although in the IP field validity is not arbitrable subject matter in some jurisdictions. Arbitrator awards are generally final and binding on the parties, subject to very limited judicial review for claims such as fraud, denial of due process, or a tribunal exceeding its jurisdiction.

Not all disputes are appropriate for ADR, however. ADR usually requires either that the parties to a dispute both agree to ADR, or that they have a preexisting contractual obligation to pursue ADR. Therefore, it may not be possible to require, for instance, an alleged third-party patent infringer to agree to mediation or arbitration. ADR may not be well suited for dealing with patent-infringing counterfeit goods, where law enforcement may be needed, and where broader and faster measures may be available from customs or administrative tribunals. In addition, for measures such as preliminary injunctions, freezing of bank accounts, and preservation of goods, while most rules give arbitration tribunals such jurisdiction, ultimately parties may need to go to a national court for enforcement.

Finally, in some instances litigation can be used strategically. For instance, a large and well-resourced company may benefit from prolonged and costly litigation with a smaller disruptor. Or, a large IP holder may want public proceedings to get clear jurisprudence

or binding precedents related to enforcing its IP rights. Parties may engage in litigation as a negotiating tactic to apply leverage and derive strategic advantage. In such instances, one party may not agree to opt for ADR.

Concluding Thoughts

Litigation is usually an unsatisfactory means for resolving disputes for fast-moving technologies, or in converging technical domains such as in the life sciences, where there is a greater need for big data and bioinformatics. Long gone are the days when 'deep pocket' patentees were prepared to slog out the same case in multiple jurisdictions. Today, businesses seek efficiency before certainty of outcome, at a reasonable cost and as expeditiously as possible. In this respect, a holistic approach to process design and the choice architecture of conflict-solving using the most appropriate forms of dispute resolution can be invaluable. This can help stakeholders to keep their focus on patients and innovation.

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