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Life Sciences Cos. Should Look Past Litigation During COVID

By **Conna Weiner** (April 20, 2020, 5:55 PM EDT)


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Disputes between business partners have always been particularly disruptive for life sciences companies.

Long-term, complex relationships with multiple research, development and commercialization partners; global supply chains; lengthy times to market involving massive investment and risk; and other features have always made litigation and lengthy, litigation-lite arbitrations problematic.

The COVID-19 crisis has made dispute resolution alternatives even more important than ever; they may be the only practical options if parties cannot reach a resolution themselves. Courts may not be a viable alternative for resolving problems during much of 2020, given the COVID-19-related closures and postponements.

And life sciences companies suddenly have a greatly expanded list of existential threats or opportunities — clinical trials being put on hold, the common commercially reasonable efforts required in collaborations becoming even more difficult to assess than usual and the difficulty of accessing government funding under the Public Readiness and Emergency Preparedness Act — as well as the usual problems facing businesses.

In short, it behooves life sciences counsel to take another look at streamlined arbitration and, even more important, early mediation before a litigation or arbitration is commenced, so that their clients can get back to business in this new world as cost-effectively and efficiently as possible. Viable remote options for both processes exist although they are not by any means a perfect substitute.

Streamlined arbitration — critical in an international setting to achieve an enforceable result under the New York Convention — can include adopting an arbitration mindset focused on an efficient process, setting short timelines, limiting discovery to what is essential, picking a project-management-minded (preferably sole) arbitrator with significant life sciences experience, adopting expedited procedures promulgated by many providers, using witness statements and using a high-low range for damages. Arbitration is also particularly well suited to videoconferencing.

On the other hand, mediation before litigation or arbitration can be much quicker than even a well-run arbitration and, critically for these times, provide for flexible remedies. Mediation allows parties to get help from a knowledgeable neutral with structuring flexible, business-focused solutions for their disputes.

Litigation and arbitration result in enforcement of a contract or not; judges and arbitrators are not empowered to explore with the parties a middle ground or creative solution that reflects the circumstances. And the circumstances we are facing today require creativity.

In addition, the very act of filing a formal litigation or arbitration can exacerbate conflict and harden positions, making it that much more difficult to focus on a business-friendly settlement once the litigation or arbitration machine has been engaged.

The Early-Mediation Caveat

Successfully mediating before litigation or arbitration requires special techniques and a change in the way advocates think about the typical mediation, which often focuses on a single in-person session and careful selection of the mediator.

A flexible process guided by a neutral mediator involving extensive preparation, such as fact-gathering, voluntary document exchange and even interviewing of internal functional and scientific experts in the dispute, as well as requiring lawyers to put aside the litigation mindset and share facts and legal arguments with an adversary, is critical.

Having the parties agree on a relevant binder set of core documents, such as all of the collaboration agreements and correspondence, clinical trial protocols and regulatory exchanges, can be very helpful. Multiple sessions and follow-up can create a framework for having productive discussions and defining success.

It is also important for appropriate business clients to play major roles — particularly chief financial officers, alliance managers, project leads, tech ops managers in manufacturing and supply disputes, risk managers and other executive and functional leaders — which keeps discussions feeling like solution-oriented business negotiations and provides for immediate access to necessary technical and financial expertise.

Furthermore, as with many prelitigation business disputes, it may be smart to enlist a mediator with a life sciences business and transactional background, as well as litigation experience, because discussions will often proceed on two tracks: litigation risk and business problem solving or restructuring.

Selecting a mediator with previous global inside counsel experience in the field, which always includes a significant dose of project management designed to meet the needs of many stakeholders from different cultures and a focus on practical, creative and speedy business resolutions, will also be very helpful.

Finally, videoconferencing services such as Zoom provide good platforms and offer the ability to set up breakout rooms for private caucuses. Ample preparation as part of a robust mediation process will enhance the potential success of remote mediation.

Even if parties decide to wait until they can get together in person, an investment in a robust preparation guided by an objective, business savvy mediator can tee up a dispute for efficient in-person mediation or arbitration — and just might resolve it, or some of the key issues, without a remote video or in-person all-hands-on-deck meeting in a world where businesses have numerous complex and competing priorities.

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