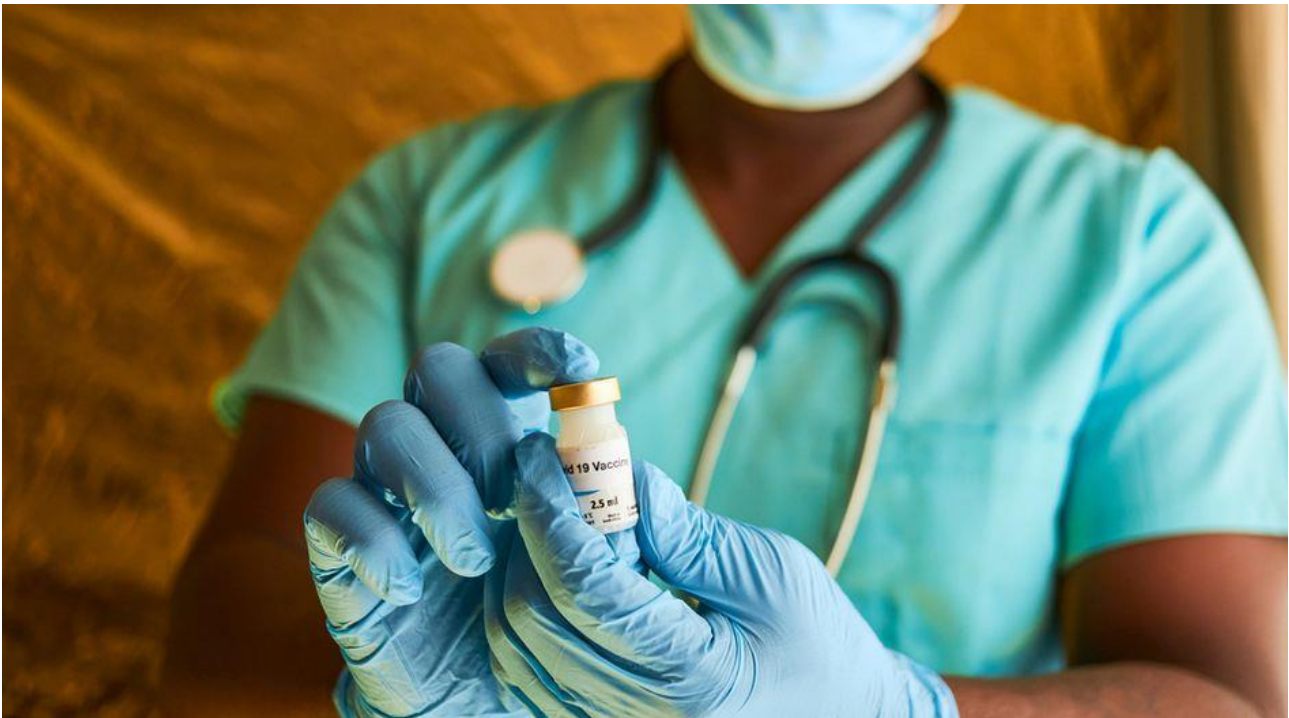


Will the pandemic lead to pharma disputes in Africa?

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Speakers at GAR Connect: Africa discussed pharmaceutical investments on the continent during the covid-19 pandemic, including advice on protecting IP, the types of disputes now emerging and whether international arbitration is well-placed to resolve them.

In a keynote address, Pfizer's vice president for global policy and emerging markets **Angela Wasunna** said the company has now delivered 1.4 billion vaccine doses worldwide, including in lower and middle-income countries in Africa.

That has involved partnerships with states, the global health community and the private sector and encountering issues with temperature-controlled supply chains, service delivery and insufficient workforce capacity.

Speaking on a subsequent panel, Pfizer in-house counsel **Ramzi Aboutaam** said the company has been operating in Africa for over 70 years. When choosing regions to invest in, he said Pfizer will look for a number of factors including “a predictable legal environment and the rule of law... and strong intellectual property environments that protect and promote innovation”.

Aboutaam remarked that Pfizer has “relied more on arbitration to resolve pharma disputes over the past decade and, depending on the area of law, there are recognised advantages.”

Key considerations remain having a “credible tribunal” and the right to select arbitrators with subject-matter experience. Other factors include confidentiality, the availability of expedited procedures and interim measures, the ability to limit discovery, finality of awards and having a neutral venue.

Samaa Haridi of Hogan Lovells who moderated the panel discussion observed that pharmaceutical companies have often been reluctant to embrace arbitration, but with the increase in biotechnology dealings and cross-border pharmaceutical disputes on the rise (some covid-19 related), the use of international arbitration is becoming more common in the sector.

JP Duffy of Reed Smith observed that investor state protection remains a “base requirement” for pharmaceutical companies investing in Africa. Although the rate of new bilateral investment treaties in the region has slowly declined following “push back” against ISDS, he said a simultaneous rise in intra-African BITs is a “very good signal.”

In terms of commercial priorities, Duffy said that protecting IP, technology and trade secrets is paramount and that legal protections for these vary significantly between African jurisdictions. The best “risk management tool” for protecting IP is a robust international arbitration clause, he said, as you can have a “true expert resolving the issue,” as well as a confidential process under agreed rules.

When transferring IP and trade secrets or setting up a manufacturing base, Duffy also recommended a strong interim measures provision that outlines additional agreed dispute resolution procedures and their scope. He suggested express consent to emergency arbitration is “very, very valuable” in getting a “quick and robust” solution for any misuse of IP.

Duffy advised that a confidentiality provision is also important in life sciences contracts as the sector is “defined” by collaborations that can last 10 to 20 years, spanning from research and development through to distribution.

Confidential arbitration means that parties to a dispute can “truly air whatever grievance they may have and have it reasonably decided by a commercially-minded arbitrator and then move on,” said Duffy, which helps preserve long-term collaborations. This also “facilitates settlement” in long-term relationships in contrast to a dispute heard in public court proceedings.

Camilla Gambarini of Withers in London said that, based on publicly available documents, it is likely some vaccine disputes will be referred to arbitration. She said contracts between global health partnership Gavi, which co-leads the global COVAX vaccine rollout initiative, and certain countries refer to ad hoc arbitration seated in Geneva under UNCITRAL rules, without the governing law specified and with English law as a secondary reference only if the terms of the contracts are ambiguous or unclear.

However, Gambarini said that there were also indemnification provisions in the contracts in the event of serious adverse effects caused by vaccines – and these did not refer disputes to local courts or to arbitration but to a bespoke “compensation system” to obtain full and final settlement of claims.

On disputes currently emerging, Duffy said he had not seen many Africa-related arbitrations linked to covid-19 filed so far, with such claims possibly taking time to proceed through mandatory mediation and negotiation.

But he said that international collaborations similar to Pfizer’s partnerships with Biovac in Cape Town and with Europharma in Brazil could “very easily spawn disputes” and that he is receiving enquiries regarding disputes over other manufacturing collaborations.

Duffy said there are also customs disputes already emerging linked to the pandemic. Where vaccines and medicines need to pass through national borders, he said the supply chains are “wildly complicated,” and frequently lead to issues that can spawn claims.

While “not imminently fomenting,” he said the possibility for things to go wrong during the vaccine roll-out means that disputes will be come at some point, and he would be “shocked” if the same pattern did not emerge in Africa.

*GAR Connect: Africa took place on Zoom on 14 October and was chaired by **Mohamed Abdel Wahab** of Zulficar & Partners and **Ndanga Kamau** of Ndanga Kamau Law.*

The event was sponsored by DocketNavigator, King & Spalding, Pinsent Masons, Reed Smith, Stewarts and Withers. The African Arbitration Association and the ICC International Court of Arbitration were supporting organisations.