Paris Arbitration Week 2022

Resolving life sciences disputes

Prescription or over-the-counter medicine?
Event highlights

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Contents

Introduction

As part of Paris Arbitration Week 2022, Reed Smith hosted a virtual session on "Resolving life sciences disputes: Prescription or over-the-counter medicine?"

Guest speakers

Ramzi Aboutaam
VP, International Legal Lead for Emerging Markets, Pfizer

Chiann Bao
Arbitration Chambers in Hong Kong, London, New York

Mark Ferguson
Head of Commercial Litigation, Viatris

Iqbal Hussain
General Counsel, Centessa Pharmaceuticals Ltd

Marek Krasula
Director of Arbitration for the ICC in North America

Luis Martinez
Vice President, International Centre for Dispute Resolution

Debolina Partap
Senior Vice President Legal and Group General Counsel, Wockhardt

Reed Smith speakers

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International Arbitration Partner and Chair of the Reed Smith India Business Team, Reed Smith, London

J.P. Duffy
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International Arbitration Partner, Reed Smith, London

Casey Olbrantz
Associate, Reed Smith, New York

Peter Rosher,
Global Chair, Reed Smith International Arbitration Practice

Our speakers presented their views and insights in a two-part session consisting of:

- A keynote speech from **Ramzi Aboutaam** on "Arbitrating cross-border commercial life-sciences disputes"
- A GC roundtable discussion with participants discussing questions such as "Do you agree that life sciences disputes are more than simply commercial disputes?" and "Is it essential for arbitrators in life sciences disputes to have life sciences experience?"
- A mock life sciences-themed emergency arbitration covering topics ranging from evidentiary burden to enforcement issues, complete with live feedback from a "tribunal" composed of arbitrators and institutional representatives.

This document is a brief summary of key points discussed.

Arbitrating cross-border commercial life-sciences disputes

As an in-house counsel working in the bio-pharma sector for 20 years, Ramzi has witnessed first-hand many of the advantages that arbitration can bring.

In the past decade, Pfizer itself has increasingly relied on international arbitration as a dispute resolution mechanism when navigating international contracts. Key considerations for an in-house legal team in determining how disputes should be handled include the following:

1. Ensuring a credible tribunal. The credibility of the institution and the arbitrators is key and can have a direct impact on the ultimate enforcement of any award.
2. The right to be involved in the selection of the arbitral tribunal.
3. Privacy and confidentiality, particularly in the life sciences and health care industry.
4. The ability to seek interim or emergency relief, especially where business or intellectual property (IP) information has been provided to the counterparty.
5. The availability of expedited procedures for straightforward or low-value disputes.

"In the past decade, Pfizer itself has increasingly relied on international arbitration as a dispute resolution mechanism when navigating international contracts."

What are the key advantages of international arbitration?

1. Arbitrator expertise. This is especially important in countries where there is no specialized IP expertise, particularly regarding patents.
2. A neutral venue and tribunal. This is important for companies conducting business in jurisdictions where there is not always a clear separation of powers or an independent judiciary, and where it consequently may be more difficult to obtain a fair hearing.
3. Confidentiality. International arbitration confers a particular advantage here where trade secrets are at issue.
4. Ease of award enforcement, thanks to the widespread application of the New York Convention, currently in force in 169 countries around the world.
5. The flexibility of the arbitration process and the finality of the decision, with no right of appeal.
6. The ability to limit discovery/disclosure.

However, it is important to note that there are some limitations to international arbitration:

1. Compelling third parties. While compelling third parties is not common, it can be difficult to compel a party who is not a signatory to the arbitration clause.
2. Interim relief. If the arbitral process requires assistance from national courts to enforce an interim award made by the tribunal, this can cause delay, and therefore be a disadvantage – particularly if the case involves sensitive information or trade secrets.
3. No right of appeal, which in some cases could be viewed as a disadvantage.

Expert panel discussion

After the keynote speech, the first panel discussed four key propositions relating to the use of international arbitration in the life sciences sector.

Proposition 1:

Is arbitration the best form of dispute resolution for life sciences disputes?

Mark Ferguson (Viatris)

There is no "one size fits all" – every dispute is different. It is however useful to look at some of the defining characteristics of disputes in the life sciences sector to help answer this question.

Typically, disputes in this sector involve underlying subject matters that are complex and industry-specific, for example, regulatory pathways or chemistry around complex molecules. They usually also involve complex areas of law that are often multi-jurisdictional in nature.

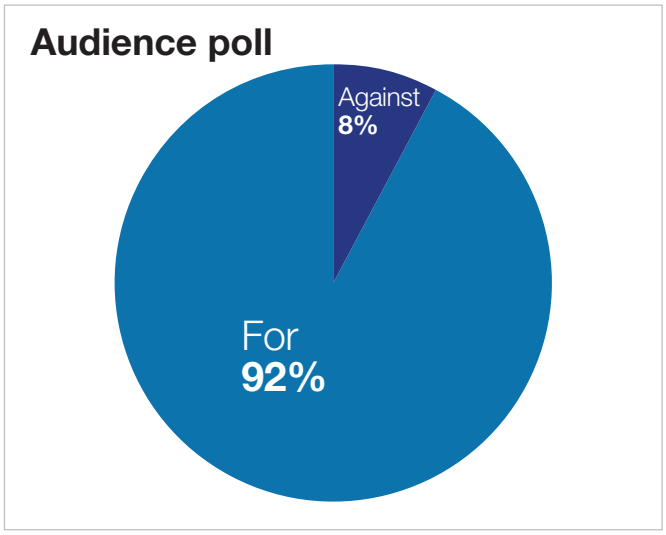
Take the following example: say there is a regulatory or manufacturing issue in a factory in India that results in supply chain issues in numerous jurisdictions across Europe and Australia. In this one example alone, the dispute would involve very complex evidence around supply chains, drug development, and regulatory approval.

Disputes in the life sciences sector can be very high value and involve significant public relations considerations. However, it is also important to note that this is not always the case and there are some low-value disputes at play too. In any event, these disputes need to be dealt with in a cost-efficient manner.

> *"There is no worse feeling than walking into a local court and seeing the judge greet your opposing counsel by their first name. You know you are in for a long day."*

In view of these factors, why would arbitration be the most suitable dispute resolution mechanism?

A 2021 Queen Mary University survey on international arbitration found that international arbitration is the overwhelmingly preferred choice for resolving cross-border disputes, with 90 percent of 1,200 respondents opting for international arbitration over any other form of dispute resolution.



From a practical perspective, Mark agrees with the 90 percent. While there are many well-known reasons supporting the use of arbitration, the most important in his view are the following:

1. **Complexity.** Arbitration enables us to choose arbitrators and appoint a subject matter expert with knowledge of the key underlying issues and points of law.
2. **Confidentiality.** This is important when dealing with commercially sensitive information.
3. **Time and cost.** Though nuanced across jurisdictions, the flexibility of arbitration can enable parties and tribunals to seek cost efficiencies.
4. **The multi-jurisdictional nature of these disputes.** In Mark's view, this is where international arbitration really adds value.
    a. **A non-local party can avoid the potential bias of local courts.** There is no worse feeling than walking into a local court and seeing the judge greet your opposing counsel by their first name. When that happens, you know you are in for a long day.
    b. **Arbitration offers a route to near-global enforcement in the New York Convention states** – critical for life sciences companies that tend to operate on a global scale.

Debolina Partap (Wockhardt)

The best disputes forum may depend on the jurisdiction in which you are operating.

The quality of arbitration varies across the world and across jurisdictions. For example, in Asia and Africa, there are often local nuances such as territorial requirements for evidence. Many counterparties will not agree to institutional arbitrations and, particularly in less-developed countries in Asia, they may prefer ad hoc arbitrations.

There are many generic pharma companies in these regions that have their own preferences. Wockhardt negotiates with many generic companies that form part of the pharma chain, such as a collaborator, a licensee, a warehouse or others in the supply chain. When transacting with these parties, negotiating larger institutional arbitrations becomes a challenge.

Costs and enforceability are key issues. However, there are other issues at play, such as embargos and sanctions. Life sciences comes under general licensing exceptions, but there are many matters to consider when dealing with developed nations.

In terms of enforceability, if you were doing a huge transaction such as a collaboration agreement or a major licensing deal with another generic or innovation pharma, then you would negotiate an arbitration clause. It is much easier and quicker to negotiate in that context. Overall, weighing up the benefits, Debolina lands 60:40 in favor of arbitration.

"In terms of enforceability, if you were doing a huge transaction such as a collaboration agreement or a major licensing deal with another generic or innovation pharma, then you would negotiate an arbitration clause."

Proposition 2:

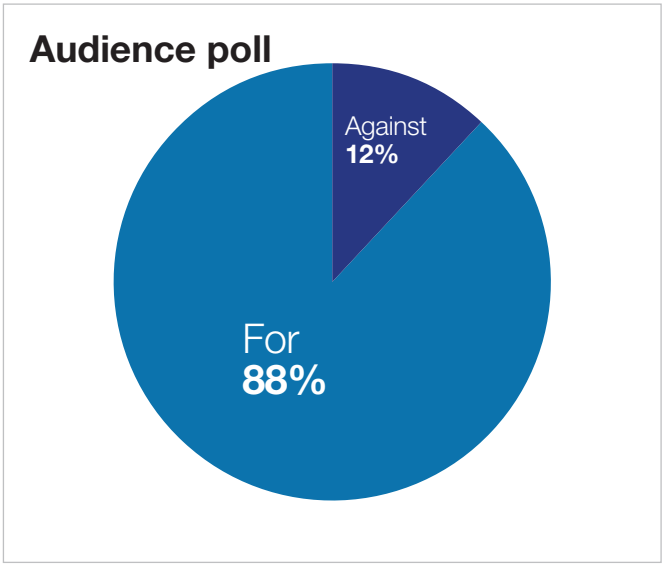
Do you agree that life sciences disputes are more than simply commercial disputes?

Ramzi Aboutaam (Pfizer)

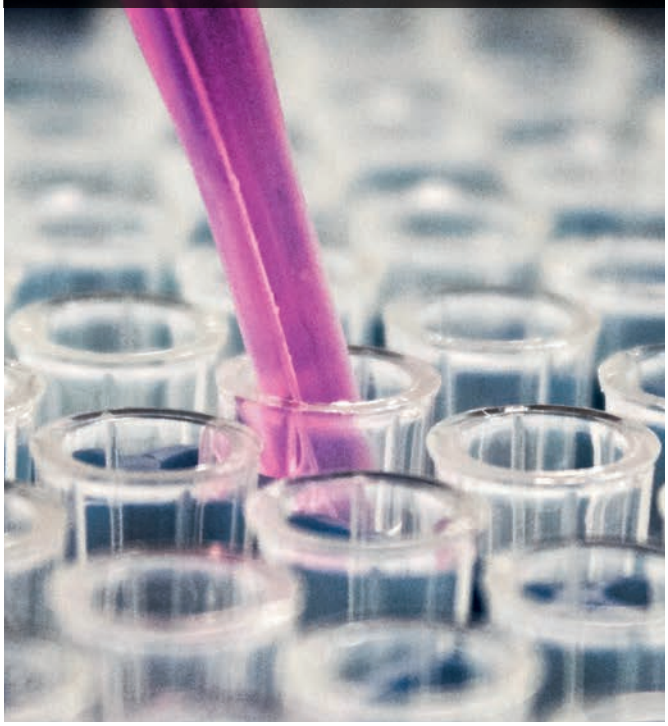
Ramzi generally agreed with Proposition 2. The life sciences industry is highly complex – from discovery and development, to manufacturing and commercialization. As an industry, life sciences touches on the most important aspect of life, which is our health and well-being. The implications of decisions can extend beyond pure commercial considerations.

Take the example of a patent where you do not have the right experts looking at it in a neutral venue. The wrong decision might affect a future scientific discovery and may compromise breakthrough therapies that could come in the future. Ramzi could think of commercial disputes that might affect the access of patients to a certain medicine.

The life sciences industry is global. Fewer and fewer decisions are truly local. A decision you make in one place is going to impact you elsewhere.



"As an industry, life sciences touches on the most important aspect of life, which is our health and well-being. The implication of decisions can extend beyond pure commercial considerations."



Debolina Partap (Wockhardt)

Debolina agreed that life sciences disputes are more than just commercial disputes. For example, in India, disputes regarding basic patentability or institutional patents are not arbitrable. If there is an infringement or challenge before the trademark or patent office, you have to go through that process and follow the relief mechanism specified in the statute.

In certain circumstances, you might need to use an out-of-court settlement because the impact of the issue is not simply commercial. For example, if the dispute concerns a trade secret or patent, then it touches upon research and development or the complexity involved in the creation of a molecule.

Disputes can also affect the reputation, accessibility and affordability of the product. There are laws in India about pricing which protect affordability, but pricing can still affect the public at large. If there is a dispute right at the beginning, then humanity might not get the benefit of a revolutionary molecule.

Question: What about where damages have to be assessed? From your experience, is assessment of damages in the context of a court better in outcome than an arbitration?

Mark Ferguson (Viatris) – The methods used to assess damages represent a fundamental difference between arbitration and the civil courts.

Civil courts are more formalistic. In court, we know what to expect, the process and the likely outcome – 60/70 percent of damages claimed.

In arbitration, you see influence by one of the parties as to how the tribunal can assess damages. That can be dangerous if there is an imbalance in expertise.

Generally, we would favor arbitration because we are comfortable managing damages in arbitration. However, you can see how it could affect smaller parties and access to arbitration.

Proposition 3:

Is it essential for arbitrators in life sciences disputes to have life sciences experience?

Iqbal Hussain (Centessa)

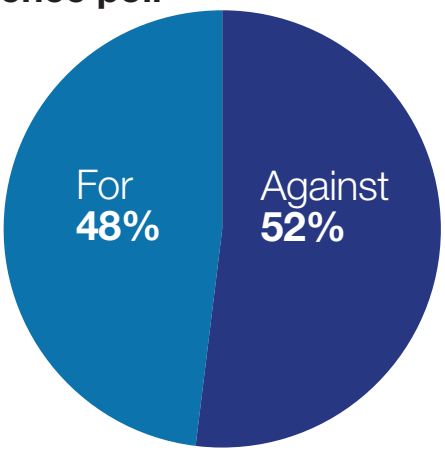
Many of the advantages of arbitration have been discussed. Subject matter expertise is key. It is as important as – if not more so than – the other advantages talked about here.

The life sciences industry is highly complex and regulated. In many industries with a similar profile, such as construction or energy, arbitration is often the most favored form of dispute resolution.

The reason is the level of sophistication in the process. When we draft arbitration clauses, we often define the process and location and the type of experience we want from the arbitrator.

> *"You are working with individuals who already understand the industry and the way it works, such as the nature of the common contractual provisions."*

Audience poll



The experience that specialist arbitrators bring is invaluable and makes it more likely that the result is the right outcome. There are a number of reasons for this:

- You are working with individuals who already understand the industry and the way it works, such as the nature of the common contractual provisions. This means you can have a conversation with the arbitrators that is free-flowing and constructive, and you can assume a level of knowledge going into the process. It also means that you save time that could otherwise be lost in educating. The process becomes a lot more efficient and results in cost savings.
- The parties are more likely to come to a viable outcome that they both accept. Equality of arms is important. This is the reason to spend time at the outset thinking about the number of arbitrators and their experience. If it is a complex arbitration and you have a panel of three arbitrators, then each party will be able to nominate one choice. This process can create a balanced framework.

We can make an analogy with law firms where we use both specialists and generalists. When negotiating complex documents like licensing or co-promotion, we would turn to a specialist firm that can articulate the points better. Arbitration is no different. Having an expert arbitrator decide the dispute provides an advantage over a traditional court system.

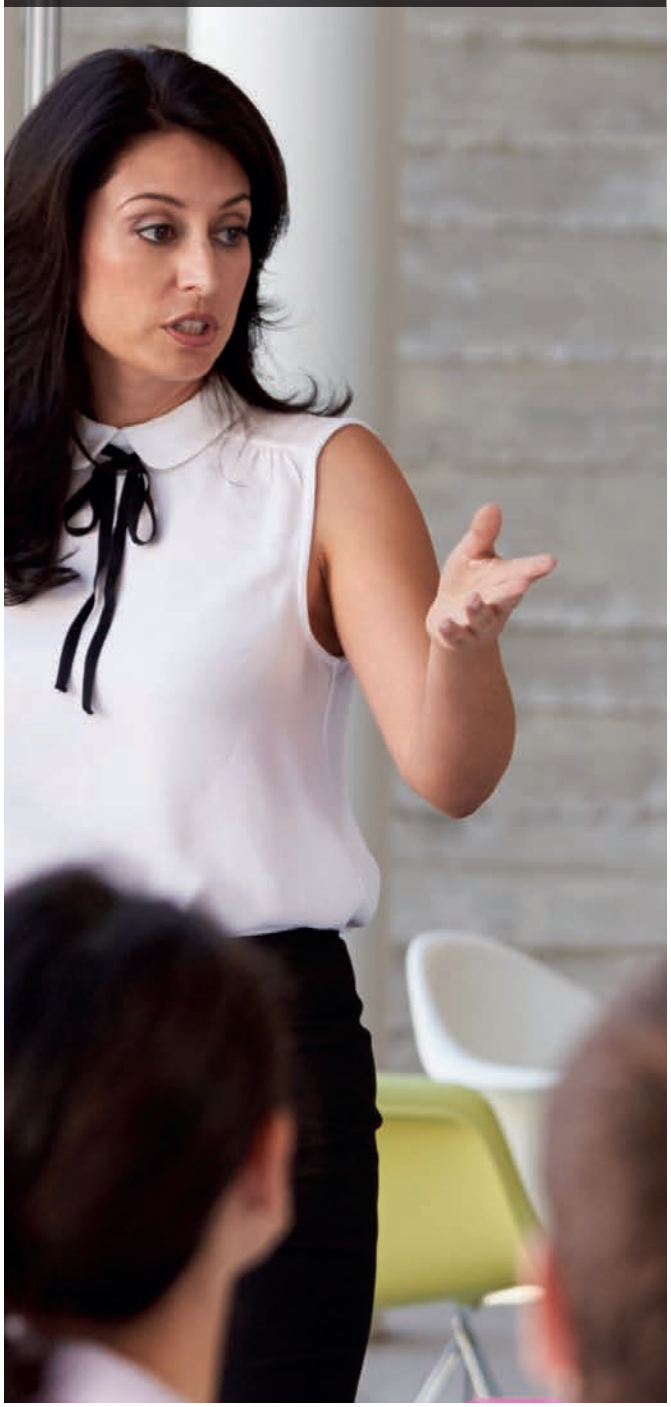
Ramzi Aboutaam (Pfizer)

Ramzi completely agreed. One of the key differentiators between arbitration and national courts is arbitrator expertise. In a highly complex and regulated industry, an arbitrator without expertise may not reach a decision which both parties find fair. The credibility of the process depends on that expertise.

Question – When you are drafting an arbitration clause would you specifically set out that arbitrators must have life sciences experience?

Debolina Partap (Wockhardt) – Whether you draft arbitration clauses to state specifically that the arbitrators must have life sciences experience is a tricky question. It may depend on the type of contract.

"An arbitrator who is well-versed in damages claims and quantification can provide a good, cost-effective solution in a standard commercial dispute."



If we are negotiating a contract based on technology transfer or quality, then we will negotiate contractual terms involving the resolution of disputes by an industry expert. This will be either a mutual appointment or one made by the innovator/sponsor.

Similarly, with clinical trials, we normally prefer an expert resolution mechanism prior to mediation or arbitration.

All such situations are technical and have very high stakes for both counterparties. In these circumstances, we would definitely opt for an industry expert followed by arbitration. We would select an arbitrator who has experience in the subject matter of the contract rather than a generic life sciences expert.

Another example is contracts that deal with specialized markets, such as supply to a very niche API market. The contract draftsperson is supposed to anticipate what would happen in a damages claim. The operation of the market might be very important so you might go for an industry expert when drafting the contractual terms.

For routine contracts, such as supply chain or customer contracts, we might not include a specific provision for an industry expert. These kinds of contracts are more commercial in nature so the arbitrator can follow pre-existing legal principles. Furthermore, we can normally rely on the arbitral institutions to propose an arbitrator who is familiar with the sector. An arbitrator who is well versed in damages claims and quantification can provide a good, cost-effective solution in a standard commercial dispute.

This is a mixed answer and it is not clear-cut. In short, it depends on the situation and the subject matter.

Question: If you were drafting an agreement with another life sciences company, would you be more likely to set out in the arbitration clause that appointed arbitrators must have over a certain number of years' experience?

Mark Ferguson (Viatris) – An interesting point is how the expertise of the arbitrators interacts with expert evidence coming through from the parties.

Without an arbitrator with industry expertise, the process relies heavily on expert evidence. As we know, expert and fact evidence is never independent as it is often challenged by the opposition. An arbitrator with sector expertise is therefore highly beneficial to the efficiency of the arbitration.

Take the example of a case of contractual construction that depends on the interpretation of a commercially reasonable endeavors clause in the context of supply, development or launch obligations. It is crucial that the arbitrator has experience of what that means from a practical standpoint. Without that, you can have a longer or more expensive arbitration.

Proposition 4:

What is around the corner for life sciences and international arbitration?

Ramzi Aboutaam (Pfizer)

Ramzi's proposal would be reform to interim and emergency relief. In high stakes disputes there is no easy answer to the provision of suitable protection. However, life sciences is becoming more complex and investment values are going up. If the mechanism to protect those investments is difficult to operate then it is a limitation on arbitration.

Iqbal Hussain (Centessa)

Costs used to be an advantage, but Iqbal is not sure it is any more. Flexibility around confidentiality is a key factor. There are many arbitration institutions around and parties spend a lot of time working out the best forum to use and then come to a compromise. It would be good if there were a more cohesive system.

Mark Ferguson (Viatris)

Mark sees three key areas for reform in arbitration in the sector:

- Time and cost efficiency.
- Diversity in the selection of arbitrators.
- Due process paranoia.

As an arbitration community, we have made some progress in the first two. We can see that with the LCIA reports coming out every year. Parties are choosing the LCIA because they can use it efficiently and quickly. A big problem going forward is due process paranoia and how we deal with a problem that all the statistics say is not really there.

Debolina Partap (Wockhardt)

Debolina's "maverick" suggestion is that the life sciences sector and institutional arbitrator bodies should also deal with statutory disputes under the arbitration framework. We hear of huge penalties awarded against pharma companies and they may prefer that resolution of those issues takes place outside a public forum.

Emergency arbitration

Overview of emergency arbitration (J.P. Duffy, Reed Smith)

Emergency arbitration has been a common feature of life sciences arbitration in recent years, particularly during the pandemic. J.P. has participated in more emergency arbitrations and sat as an emergency arbitrator more times in the last three years than the previous 10 combined. This is an indication of the trend.

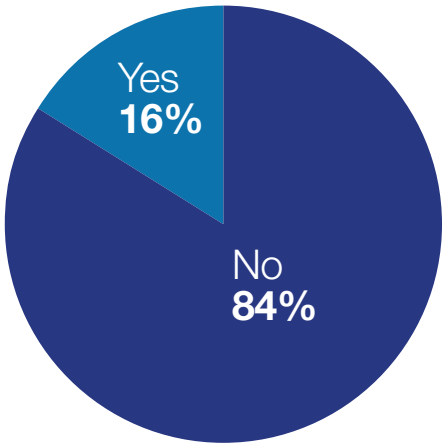
What is emergency arbitration?

Emergency arbitration is a procedure that allows parties to get quick interim or conservatory relief (often in two weeks or less) from a sole emergency arbitrator instead of a national court, in the time before a full merits tribunal is appointed. It is available under most major institutional rules. A brief chronology of the history of emergency arbitrations:

- In 1990 the ICC introduced the pre-arbitral referee procedures. These were optional rules and not widely used.
- In 1999, the AAA introduced optional rules for emergency measures and protection as part of its commercial rules.
- In 2006 the ICDR led the way by introducing the first default emergency rules. That really opened the floodgates to this process. Between 2010 and 2015, eight more institutions adopted default emergency arbitration rules.
- The ICC included default emergency arbitration provisions in its 2012 rules.

Audience poll

Have you been involved in an emergency arbitration?



Perhaps unsurprisingly, a significant number of participants have not been involved in an emergency arbitration.

"Default" here means that emergency arbitrations are part of the institutional rules that parties adopt in their arbitration agreements. Accordingly, they must opt out if they wish to avoid this process.

Common features of emergency arbitration:

- Very short deadlines – two weeks or less to complete with quick submissions.
- Always a single emergency arbitrator appointed by the institution.
- Limited or no disclosure.
- Results do not bind the merits tribunal, which is free to revisit the results of the emergency arbitration.
- There is no ex parte relief (save for one set of rules).
- Results do not bind third parties – this is a critical feature of this process.

These features produce some clear advantages for life sciences disputes:

1. **Single forum relief.** Disputes relating to intellectual property or trade secrets are usually multi-jurisdictional and urgent. In an emergency, parties need these issues resolved within a single forum, which emergency arbitration provides.
2. **Emergency arbitrator expertise.** This is critical. Emergency arbitration allows appointment of someone (i.e., the arbitrator) who understands the industry to quickly get their hands around an issue and resolve it in a way that makes commercial sense.
3. **Confidentiality**.
4. **Speed.**
5. **Variety of remedies.** In multi-jurisdictional disputes this is important because in arbitration, a party can obtain similar or identical relief across multiple jurisdictions, sometimes in circumstances where the national law in those jurisdictions may not otherwise allow that relief.
6. **The possibility of global enforcement using the New York Convention.**

Whilst emergency arbitration has clear advantages, there are also some limitations for parties to consider:

1. **No third party relief.** With arbitration, only the parties to the agreement are bound by the results.
2. **No *ex parte* relief**.
3. **Some enforcement challenges.** There are still jurisdictions that view emergency arbitration decisions as interim and therefore unenforceable under the New York Convention. However, as the majority of the 169 current signatory jurisdictions do recognize them as final, odds of enforcement are quite high.

To bring to life the concept of emergency arbitrations, at our event at Paris Arbitration Week, we conducted a mock emergency arbitration, examining some common issues that arise in emergency arbitrations. We did so using four "vignettes" to show the kinds of contested issues that might arise during an emergency arbitration process.

For each vignette, we received short submissions from "counsel" for both the claimant and respondent, with our lawyers and guests playing the roles of these parties. A mock emergency arbitrator then provided observations. In each case, a follow-up panel discussion made additional practical observations.

The full narrative of the mock emergency arbitration is at **Appendix 1**.

Appendix 1:

Mock emergency arbitration

The fact pattern for our mock emergency arbitration was as follows:

- Emergency arbitration claimant "Pharma" entered into an agreement with emergency arbitration respondent "Biotech" to develop and commercialize a malaria vaccine (a world first).
- After seven years of jointly collaborating, they receive approval from the U.S. FDA and EU EMA for vaccine distribution. In practice this allows for global distribution of the vaccine.
- After training and detailing workforces in various global markets, Biotech sends Pharma a letter purporting to terminate the collaboration agreement and saying that Biotech owns all IP to the vaccine and intends to be in exclusive distribution without Pharma.
- Within four days of receiving the letter, Pharma files an emergency arbitration seeking:
  - a declaration that the termination is ineffective; and
  - an injunction seeking to preserve the status quo until a merits tribunal can address Pharma's claim that Biotech's termination is a material breach, and seeking damages.
- As is usual the administrator appoints an emergency arbitrator within 24 hours of receiving the application.
- The arbitrator has convened an emergency preliminary conference with Pharma and Biotech to discuss steps needed to resolve the emergency application.

In each vignette, our "parties" were playing roles, and the positions they were arguing do not necessarily reflect their opinions.

Vignette 1: Jurisdictional issues and unfulfilled conditions precedent

The purpose of this vignette is to show that respondents typically raise jurisdictional objections in the context of an emergency arbitration. These often include questionable objections that need to be resolved quickly to keep the process on track.

Emergency arbitrator (Luiz Martinez, ICDR)

Thank you for joining the preliminary conference today to determine the procedure and timing for resolving Pharma's emergency application. Before we begin scheduling and any merits issues, are there any preliminary issues that either party wishes to raise at this time?

Counsel for the respondent (J.P. Duffy, Reed Smith)

At the outset, Biotech wishes to raise a jurisdictional objection on two separate grounds:

1. This emergency application is premature and improper because the arbitration clause to which the parties agreed requires Pharma to:
   a. formally notify Biotech in writing of any dispute it wishes to raise;
   b. undertake negotiations in good faith for 20 days; and
   c. mediate any remaining disputes for 30 days before Pharma can commence any arbitration.

Pharma has not done any of those things so its emergency application is jurisdictionally deficient or inadmissible.

2. The arbitration clause calls for any disputes to be resolved by three arbitrators, with each party to appoint one and then those two to appoint the chair. Biotech does not consent to have this application heard by a sole arbitrator appointed exclusively by the ICDR.

Counsel for the claimant (Simon Greer, Reed Smith)

Taking each point in turn:

1. There cannot be an obligation to follow all pre-arbitration procedures in this instance. Requiring Pharma to do so would prevent it seeking the emergency relief it needs and the parties have been in discussions about these issues in any event.

2. The fact that the arbitration clause in issue requires the merits to be resolved by three arbitrators is irrelevant. This is because it also calls for disputes to be managed under the ICDR rules, which call for a sole emergency arbitrator to be appointed to hear emergency applications before the merits tribunal is constituted.

Observations of the emergency arbitrator (Luiz Martinez, ICDR)

Some quick context. We are always proud to recall that the ICDR was the first institution to include an opt-out emergency arbitrator mechanism back in 2006. It has really proven to be an important mechanism that it is included in most institutional arbitration rules today.

Prior to that, a party had no alternative but to go to court if they wanted some emergency measure of protection before the appointment of the tribunal. That was inconsistent with their desire to settle their disputes under the arbitral framework and stay out of each other's courts.

The emergency arbitrator mechanism in the ICDR rules encompasses all the necessary powers and authority that an emergency arbitrator needs to handle the process.

There are teeth in the rules in that the arbitrator can issue an interim award or an order and then the subsequent tribunal also has the authority to look at what transpired during the emergency arbitral proceedings. They can actually modify, vacate, leave in place or change the interim order or award, but they will note what transpired and can also note if a party did not comply. This is why we see voluntary compliance in most of our cases.

"The emergency arbitrator mechanism in the ICDR rules encompasses all the necessary powers and authority that an emergency arbitrator needs to handle the process."

"The emergency arbitrator mechanism at article 7 of the ICDR rules clearly states that the emergency arbitrator has the authority to rule on its jurisdiction, including issues of arbitrability and can resolve any issues relating to the application of the emergency arbitrator article."

In the vignette, we have two jurisdictional objections. First we have the objection that the emergency arbitration is premature and improper because the parties have not satisfied conditions precedent in terms of negotiating and mediating prior to the arbitration. We have seen these types of objections before.

It is important to recognize that the emergency arbitrator mechanism at article 7 of the ICDR rules clearly states that the emergency arbitrator has the authority to rule on its jurisdiction, including issues of arbitrability and can resolve any issues relating to the application of the emergency arbitrator article. So, it really has the full kompetenz-kompetenz to rule and decide on these jurisdictional objections.

These kinds of conditions precedent objections turn on the facts of the case, the arbitration agreement, the *lex arbitri*, and the governing law. In this case, an emergency arbitrator could decide that the obligation to hold a mediation and negotiate was not satisfied. If this were the conclusion, it could present a limitation to the parties proceeding to arbitration at this stage.

However, the emergency arbitrator could also decide to proceed. This is more typical of many cases involving conditions precedent. They could find that they do not want to deprive the parties of interim relief and maintain the status quo. As a side note, under the ICDR rules, mediation can take place concurrently so the parties could proceed on a dual track.

With regard to the other jurisdictional objection relating to the number of arbitrators, we obviously respect the arbitration agreement. This calls for the application of the ICDR rules. These rules include potential access to an emergency arbitrator. Article 7 of the rules clearly states that the ICDR shall appoint a single arbitrator. As the rules do provide for a sole arbitrator and the parties did not opt out – there is no problem and the parties will still have their three arbitrators to hear the case on the merits.

Takeaways

- Resolution of objections concerning jurisdiction and conditions precedent can be challenging and complex for both counsel and the tribunal.
- These objections arise across institutions and the outcome may vary depending on the nature of the case.
- Parties can avoid this issue by anticipating it in the arbitration agreement. They can include language to say that initiating emergency arbitration does not preclude either party from pursuing mediation or negotiation or any other kind of pre-arbitral steps.
- Other objections relate to issues such as whether the scope of relief falls within the jurisdiction of the arbitrator and issues with non-signatories.
- By opting into the ICDR rules you are giving the institution authority to appoint a single arbitrator.
- We can draw some guidance from other ancillary procedures within a body of rules. The decisions that an emergency arbitrator must make will need to be on a prima facie standard. Accordingly, there could be some pragmatic flexibility around the interpretation of preconditions.

Vignette 2 – Standard of assessment

The purpose of this vignette is to show that the standard for granting emergency relief is usually only generally stated in various rules. In our vignette, we use the illustration of the ICC rules, but this is the case across most institutional rules. The standard of assessment is often a threshold issue that arises between the parties.

Emergency arbitrator (Marek Krasula, ICC)

Having heard Biotech's jurisdictional challenges, I would now like to address another threshold issue, namely, the standard by which I must assess Pharma's emergency application.

Counsel for the claimant (Casey Olbrantz, Reed Smith)

We have two submissions on this point:

1. The contract provides that a party shall be entitled to injunctive relief where the other party is in material breach. Biotech is clearly in material breach.

2. Under the ICC rules, the claimant need only show that it needs urgent relief and that such relief cannot await the constitution of the arbitral tribunal.

Counsel for the respondent (Simon Greer, Reed Smith)

1. Under the governing law of the contract, the mere fact that the contract says the non-breaching party can obtain interim relief is insufficient. This is especially the case because the law of the seat does not allow arbitrators to award injunctive relief.

2. It is wrong to suggest that the only requirements for emergency relief under the ICC rules are urgency and harm. It is well accepted at this point that to obtain emergency relief applicants must show a likelihood of success on the merits of establishing irreparable harm and the balance of equities favors the applicant, which is also a requirement under the governing law of the contract.

Observations of the emergency arbitrator (Marek Krasula – ICC)

Sometimes parties will reach agreement on this issue but sometimes not. As the emergency arbitrator, it is good for you to prompt the parties to ventilate the issue so you do not get to the end of the process and realize you are missing important information as to the applicable standard given the rules are quite general.

The ICC rules do not really articulate any applicable standard. This is in line with other institutional rules which generally indicate that the interim measure must be urgent, necessary or appropriate in light of the circumstances. The absence of a prescriptive standard is a consequence of a choice made in the rules to leave the standard to the emergency arbitrator to give them flexibility in each case. However, that choice does not mean that the process is unpredictable at the end.

Article 29 of the ICC rules says that a party may request an application for emergency measures when it needs urgent interim or conservatory measures that cannot await the constitution of the tribunal. Normally arbitrators will approach this in steps:

- First, they will assess the issue on a prima facie basis to see whether this is something that cannot await the constitution of the tribunal. Therefore, the first issue is simply whether this can await the constitution of the tribunal, normally one or two weeks.

- If not, then they move to the substantive test of emergency. The law of the seat or contract would be obvious candidates from which to derive the standard. In fact, most arbitrators apply neither and instead turn to the substantive requirements of interim measures in interim arbitration practice. Many of them will rely on Gary Born's book and the standards that have become common in the context of interim measures. As one emergency arbitrator put it, provisional relief is not a matter of substantive law; it is actually a matter of procedural law, so applying the substantive law of the contract would not make sense. Many would argue that the use of these criteria is better because they are more predictable to users. They are well known and have already been used in different contexts.

- How is urgency approached? In our case there might be other factors coming into play. Has the applicant contributed to the urgency? Can it demonstrate that the relief avoids imminent or irreparable harm? Other criteria that you will see come into play include the likelihood of success on the merits, the risk of aggravation of the dispute, proportionality and the balance of equities. This is not a laundry list. The arbitrator assesses each element in light of the particular circumstances of the case. This does not exclude the possibility of the arbitrator using the standard of the seat, but it is less common.

- If you are the arbitrator or the parties, consider having a discussion during the case management conference so you know where you are heading and possibly save time if everyone agrees as to the applicable standard. If so, the arbitrator can then get on with applying that standard to the facts.

Takeaways

- The applicable standard is a threshold issue that parties often raise early on. An interesting practice point is that sometimes parties say that they agree on the standard but when the arbitrator reads written submissions, it is like "ships passing in the night."
- From the ICDR's perspective, we see less and less focus on the likelihood of success. The trend is to focus on other aspects such as the urgency and what injury or prejudice the party will suffer.
- An emergency arbitrator might be very reluctant to say much about the merits. The decision is interim in any event. Further, the emergency arbitrator might not want to determine issues in a way that is prejudicial to one party when they really know very little about the case on the merits.
- The emergency arbitrator does not want to cast the die for the arbitrator or tribunal that will ultimately determine the same issue.
- At the ICDR, we review orders before they are sent to the parties. We ask emergency arbitrators to avoid taking any position on the merits of the case. Sometimes this creeps into the order. When we bring it to their attention, they will generally delete it or change the language. The same approach is applied at the ICC.

"The absence of a prescriptive standard is a consequence of a choice made in the rules to leave the standard to the emergency arbitrator to give them flexibility in each case. However, that choice does not mean that the process is unpredictable at the end."

Vignette 3 – Scheduling

The purpose of this vignette is to show the differences in evidentiary expectation that can arise between the parties in an emergency arbitration. Parties may have completely divergent views on how much evidence is necessary. The critical determining factor is that the tribunal is severely limited time-wise as to how much evidence the parties can introduce

Emergency arbitrator (Chiann Bao, Arbitration Chambers)

Under the ICC rules, we have 14 days to resolve the application. If we are to have a hearing, I would like that to occur no longer than 10 days from now. I would like to hear first from Biotech, please.

Counsel for the respondent (J.P. Duffy, Reed Smith)

This is a factually complex dispute and we have had less than 24 hours' notice of this emergency application. As a minimum, we will need a week to respond and we anticipate submitting at least five witness statements. We may also want to submit expert evidence.

As the respondent, we also expect to have the last word on written submissions and we will need at least three days for rejoinder, particularly as Pharma did not give us any advance warning of the issues through negotiation or mediation. Lastly, we expect to cross-examine all of Pharma's witnesses at the hearing and we will clearly need written submissions as well.

Counsel for the claimant (Simon Greer, Reed Smith)

As our emergency application makes clear, this straightforward contractual dispute requires nothing more than interpreting the contract. Therefore, we see no reason why Biotech cannot respond in three days or less. As the applicant, we also expect to have the last word on written submissions. We propose to do that four days after Biotech's response. Lastly, witness testimony is improper under these circumstances. We see no reason for cross-examination or a hearing, as the whole matter can be resolved on the basis of the parties' written submissions.

Observations of the emergency arbitrator (Chiann Bao, Arbitration Chambers)

Here the parties have extreme views on the expectations for this emergency arbitration. The process should take 14 days. Even the best counsel will struggle with the kind of expectations the respondent has advanced.

As an emergency arbitrator, you have to look at how realistic it is to receive that number of submissions within a timeframe of 14 days, while also considering the time you need to write the order or award.

You should create a decision tree or a framework upfront to address the process.

This should be organized by the day, or even by the hour, so that the parties have an expectation of a 24-hour cycle throughout the period of 14 days whilst the emergency arbitration is afoot.

As an emergency arbitrator, this is one of the more important things you have to do to ensure you satisfy due process factors and that you get the information you need to make a decision. Sometimes you have to be bold about maintaining focus on the limited scope of your jurisdiction. This means that you may limit submissions. A practical tip is to make sure you pay a lot of attention to the procedural framework within the first 48 hours and start writing your award from day one.

"Parties may have completely divergent views on how much evidence is necessary."

Takeaways

- A significant difference in evidentiary expectation can arise between the parties in this context.
- Under the ICC rules, an order must be made within 15 days and for all sets of rules it is typically expected that things will be wrapped up within a month. That has a practical impact on how much evidence you can introduce, and how often submissions will occur and in what order.
- The order of submissions can be very contentious – who has the last word?
- The emergency arbitration award will need to be reviewed before it is released. How long that takes depends on the practice of the particular institution.
- Another challenge is keeping in mind that one party (the applicant) has had more time to think about things. That is often a disadvantage for the respondent.
- During the process, there is very little sympathy for people sleeping or eating, particularly if you are the applicant, and that takes on a new life when you are talking about people in different time zones.
- The ICDR experience is that emergency arbitrations are intense. When we reach out to an emergency arbitrator, we normally say that in the next two to three weeks they will need to dedicate a substantial proportion of their time to the case.
- Sometimes it is a matter of the emergency arbitrator walking the high wire and seeing if there is too much information before them. If one party is seeking to provide extensive witness testimony or items that could delay the process, the arbitrator will have to make a decision as to whether they can leave that information aside and complete their mandate on a limited basis and under an accelerated schedule.
- Under the ICC Emergency Arbitrator rules the arbitrator has a wide discretion and it is a careful balancing act. The rules say that the arbitrator must act impartially and fairly and at the same time ensure each party has a reasonable opportunity to put forward its case. As for the procedural timetable, it is up to the tribunal to figure that out within two days. Some will not bother with a case management conference and they will send something out which they think is appropriate for the matter and ask the parties to proceed on that basis.
- Arbitrators need to factor in at least two to three days to write the award. There is some rigidity to the process because the arbitrator needs to complete the task, but not at the expense of quality. Having read many awards in draft form, I think they live up to the parties' expectations. It is a very tough five to 17 days, but most parties walk away being very pleased.

Vignette 4 – Form of relief

The purpose of this vignette is to illustrate the importance of outcome and what the parties can do about it. Emergency arbitration has a built-in enforcement incentive in that if you do not comply, you will ultimately be before a merits tribunal that may not look on that favorably. However, there are instances where a party may not voluntarily comply. Parties have to think about that from the outset. As our vignette illustrates, because of conditions under the New York Convention, the finality of the award is something that is very important.

Emergency arbitrator (Marek Krasula, ICC)

Before we conclude the preliminary hearing, I would like to address the form of relief that the parties believe is appropriate.

Counsel for the claimant (J.P. Duffy, Reed Smith)

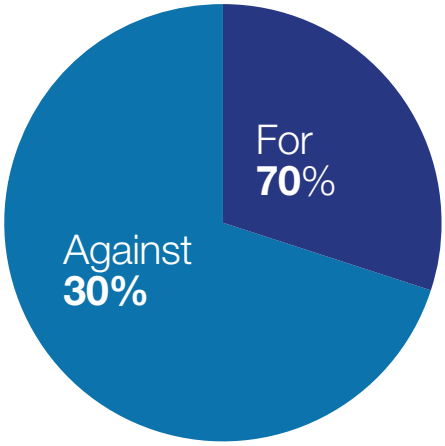
We have requested a final emergency award. We have requested that because we anticipate Biotech will ignore the award we receive and we will therefore have to enforce it concurrently in numerous jurisdictions around the globe. While many jurisdictions, such as Singapore, Hong Kong and the United States, will readily enforce the award as a matter of statute or practice, others will be problematic if the award is anything less than a final emergency award.

Counsel for the respondent (Simon Greer, Reed Smith)

Biotech will abide by any jurisdictional outcome. For the reasons already raised there can be only one. We oppose the emergency arbitration being deemed a final award. We demand instead that the emergency arbitrator issue an order or interim emergency award. As the emergency arbitrator knows, your determination is only preliminary and can be revisited by the ultimate merits tribunal. Allowing anything more than a procedural or interim award so that Pharma can globally harass us is not only improper but will also evidence clear bias against us.

Final poll

Are you likely to use emergency arbitration in the future?



Observations of the emergency arbitrator (Marek Krasula, ICC)

Each institution has approached this differently. Some give discretion to the arbitrator to call the decision an order or a final award. Others like the ICC say it is an order. This has created issues in some jurisdictions. If the decision lacks finality, it may not be recognized and enforced in some jurisdictions.

Nomenclature is often not the only answer because there are jurisdictions that apply substance over form. What tends to raise enforceability issues is the finality aspect. This is less of a problem where jurisdictions have enacted legislation providing for the enforcement of emergency arbitration decisions. For example, statutes in Singapore, New Zealand and Hong Kong expressly provide for enforcement. Other countries have incorporated the UNCITRAL model law, which tends to favor the enforceability of emergency arbitrator decisions.

In the United States, there is a body of case law saying that, generally, emergency arbitrator decisions will be enforced as arbitral awards. However, this is not uniform and there have been cases where district courts have disagreed.

Overall, the tendency is toward voluntary compliance. No party wants to be seen as disregarding early on the award of an emergency arbitrator. There may be costs consequences. The ICC rules do say that the merits tribunal may allocate costs based on the compliance or non-compliance of the parties with any interim order made before the tribunal has been constituted.

Ultimately, the emergency arbitrator process is a self-contained and efficient tool that benefits from a high level of compliance. When we looked at the first 80 cases, 23 orders were rendered. Only five were not complied with. Two of these related to costs. Only three required some enforcement action.

That all said, parties do need to be careful about jurisdiction. If they know there is a risk that one party may be running away with IP, confidential documents or trade secrets and there is a risk that an emergency arbitration order may not be enforced, parties always have the option under the ICC rules (and other institutional rules) to pursue action in domestic courts. If enforcement is going to be problematic, sometimes the safest choice is to seek interim relief from a national court.

"Emergency arbitration has a built-in enforcement incentive in that if you do not comply, you will ultimately be before a merits tribunal that may not look on that favorably."

Takeaways

- A key advantage of the emergency arbitration process and what makes it efficacious is that you do have a high level of voluntary compliance and that avoids the risk of multiple concurrent court proceedings going at different speeds, subject to different resolutions and outcomes, different languages and practical requirements. You get a one-stop shop for an outcome.
- There is a limited amount that institutions can do to improve enforceability. However, one thing states can do is mimic New Zealand, Singapore and Hong Kong by expressly addressing the enforceability of the emergency arbitration order. That may require states to amend or enact legislation.
- We are seeing a trend toward greater willingness by national courts to enforce emergency arbitration awards. For example, in the United States, the courts are determining that these awards are final for the issues they decide. Additionally, jurisdictions like India seem to recognize that if it is what the parties agreed to, then they should be bound by that agreement. Nevertheless, there are jurisdictions that seem to focus on the finality aspect. The current position is that in England, an emergency arbitration decision needs to be a final award in order to be enforceable.
- The ICDR rules provide the option of either an order or an interim award. If the issue would likely affect enforcement, we would expect that to be discussed with the parties early on at a preparatory conference. For this reason, you need to know where you are going to be seeking enforcement and if there are limitations with the process.
- Expertise is critical. It is a huge advantage when you have such tight deadlines if you can present your case to someone who understands the industry and does not need to be educated about basic things. It really gives a massive advantage to the process and brings a lot more party satisfaction than in court where you may be before a generalist judge with limited life sciences or commercial experience.

Appendix 2:

Notes on ICC and ICDR emergency arbitration

Emergency arbitrations in an ICDR context – Luis Martinez, ICDR

Emergency arbitrations under the ICDR have been overwhelmingly successful. For example, in 2020, the ICDR had:

- 118 applications resolved
- 53 cases where emergency relief was granted partially or in full
- 29 cases where emergency relief was denied (usually because the tribunal did not want to advance a decision on the merits)
- 17 cases where application was withdrawn

Overall, there was voluntarily compliance because parties know that the merits tribunal will know the outcome of the emergency arbitration.

The emergency arbitration mechanism is here to stay. The process is doing well and has become the norm in international arbitration. The complexity of these cases continues to increase exponentially in certain industries like life sciences. Parties will benefit from an emergency arbitrator with expertise in the field – when you consider the accelerated timescales involved, a generalist judge would struggle. This is another reason why emergency arbitrations are so popular. The expertise of the emergency arbitrator really matters.

ICC task force's report on the first 80 emergency arbitrations – Marek Krasula, ICC

In 2019 an ICC task force published a report on the first 80 emergency arbitrator applications under the ICC rules. This included a review of how the cases were structured which revealed that:

- Most of the orders were rendered within the 15-day time limit, the rest within 16–19 days (though sometimes longer, with the permission of the president of the court).
- In most cases there were no case management conferences. The case moved forward on the basis of the established procedural timetable.
- Rounds of submissions were tight, involving application, response, reply and rejoinder.
- Unsurprisingly there were also hearings in most cases, something that is now easier as hearings can happen virtually.
- Parties are using witness statements and expert evidence in emergency arbitrations. In these first 80 cases, the ICC saw 18 cases with witness statements and three with expert testimony.

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