Kluwer Arbitration Blog

# Australian Arbitration Week Recap: The Next New Variant? Arbitration in the Healthcare and Life Sciences Sector

Cara North, Catherine Pagliaro (Corrs Chambers Westgarth) · Wednesday, October 11th, 2023

On 10 October 2023, Corrs Chambers Westgarth hosted a panel discussion on the topic of "*The next new variant? Arbitration in the healthcare and life sciences sector*" as part of Australian Arbitration Week. The panel was moderated by Cara North of Corrs Chambers Westgarth and comprised:

- The Honourable Dr Annabelle Bennett AC SC, retired judge of the Federal Court of Australia, Barrister (in an advisory role), Mediator and Arbitrator, 5 Wentworth Chambers;
- Dr Benny Lo, Barrister, Des Voeux Chambers;
- David Fixler, Partner, Corrs Chambers Westgarth; and
- Margarita (Rita) Kato, Representative of the World Intellectual Property Organization Arbitration and Mediation Center (WIPO Center) Singapore office.

The panel discussed the rapid growth of the life sciences sector and the corresponding increase in related disputes, why the sector is increasingly adopting arbitration as a means of dispute resolution, as well as the unique benefits and procedural challenges associated with arbitrating life sciences disputes.

Five key themes can be taken away from the panel discussion.

### 1. The Scope of the Life Sciences Sector and Its Recent Growth

The sector is one of the most significant and fastest growing segments of the global economy, particularly in the aftermath of the COVID-19 pandemic. It plays a significant role in the functioning of the healthcare system globally.

The rapid growth of the sector is now being accompanied by an increase in related disputes of a wide-ranging and (oftentimes) multi-jurisdictional nature, including:

- pharmaceutical patent disputes;
- disputes arising from research and development (R&D), distribution or licensing agreements, including disputes in respect of royalty payment milestones;
- allegations of misuse of confidential information in the context of collaboration or employment agreements;

- disputes regarding therapeutic claims and advertising or marketing material; and
- competition and consumer law actions, such as Australian Competition and Consumer Commission actions, and product liability cases.

Around 15% of the arbitration and mediation caseload at the WIPO Center relates to life sciences. These disputes are largely international in nature, involve a range of originators from across the world and comprise:

- contractual disputes, including in respect of patents, designs, trademarks and know-how; and
- non-contractual disputes, including in respect of R&D agreements, joint development agreements, options and licensing agreements, and marketing and distribution agreements.

## 2. The Utility of Arbitration for the Resolution of Life Sciences Disputes

The panellists offered comments on why there is a growing trend towards the arbitration of life sciences disputes, as well as why life sciences clients might opt for arbitration as opposed to litigation. The reasons articulated include:

- **Efficiency:** Timing is often critical in life sciences disputes. Arbitration affords parties the flexibility to adopt procedures that promote efficiency, for example, by agreeing to limit the issues to be determined and/or to set a time limit within which the tribunal must render its award. While courts are increasingly adopting case management procedures to promote efficiency, delays remain a significant problem.
- **Expertise:** Parties to an arbitration can select their arbitrator(s) or require the appointment of a tribunal with specific expertise. This is a significant advantage over the resolution of such disputes before courts.
- **Confidentiality:** Given the potential for the disclosure of sensitive and commercially valuable information and the potential for adverse publicity, confidentiality over the existence, subject matter and outcome of the proceedings can be a significant advantage.
- **Remote proceedings:** Since the COVID-19 pandemic, arbitrations are frequently conducted remotely using videoconferencing and other technologies. Conversely, some jurisdictions are reluctant to allow wholly remote court hearings.
- **Ease of resolution across borders:** Life sciences disputes are often multinational in nature. For example, the same parties may have agreements across multiple countries. Arbitration enables parties to agree to resolve their dispute in a single arbitration, rather than participate in parallel court proceedings across several jurisdictions.
- **Ease of enforcement across borders:** As a consequence of the 1958 *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (New York Convention), foreign arbitral awards are more easily recognised and enforced in most jurisdictions around the world. It is also increasingly common for parties to successfully obtain enforcement of emergency arbitration awards.

## 3. Historical Roadblocks to Adopting Arbitration for Some Life Sciences Disputes

In spite of the benefits of arbitration described above, the life sciences sector has historically favoured litigation for the resolution of its disputes. The panellists discussed some of the reasons

for this, including the arbitrability of IP-related disputes and competition law issues.

In particular, it was noted that historically, there was a view in Australia and overseas that most IP disputes were incapable of resolution by arbitration because they involved challenges to rights *in rem*. However, the case of *Larkden Pty Limited v Lloyd Energy Systems Pty Limited* [2011] NSWSC 268 has provided a level of some confidence that certain IP disputes are arbitrable in Australia.

The position in Hong Kong, by contrast, is clearer as a consequence of the Cap. 609 Arbitration Ordinance, which in Part 11A provides, *inter alia*, that IP disputes are capable of settlement by arbitration and an award involving an IP dispute may not be set aside or refused enforcement because it concerns an IP right.

When it comes to competition law issues, it was noted that they can pose a problem for parties wishing to arbitrate. For example, there is a risk that an arbitration award (or a private settlement) is subsequently found to have the effect of substantially lessening competition in contravention of the *Competition and Consumer Act 2010* (Cth). Regrettably, while competition law issues were raised in the *Apple v Samsung litigation*, they were ultimately left undetermined due to the parties' post-hearing settlement.

## 4. Procedural Issues that Arise in the Arbitration of Life Sciences Disputes

*First*, it was noted that timing can be critical in the context of life sciences disputes. Against that background, reference was made to the fact that arbitrations under the WIPO Arbitration Rules are typically resolved within 18 months to two years. Parties requiring a shorter time scale can request an expedited arbitration under the WIPO Expedited Arbitration Rules. In terms of WIPO's appointment procedure, it was explained that the WIPO List of Neutrals is an open-ended vetted list of more than 2,000 mediators, arbitrators and experts from which parties at the WIPO Center can draw upon. Members of the WIPO List of Neutrals come from more than 90 jurisdictions and have specialised knowledge across a variety of competencies. WIPO also has an open-ended List of Experts Specialized in Life Sciences.

*Second*, the panellists considered the impact of the composition of an arbitral tribunal on the practice and procedure of arbitration. Theoretically, there are procedural differences across common law and civil law jurisdictions, for example in respect of the use of expert witnesses. However the arbitration community is known for its collegiality and there are practical benefits to be gained from appointing a tribunal with a mix of common law and civil law training.

*Third*, it was observed that one of the critical issues that often comes up in IP, particularly IP disputes in the life sciences sector, is the need for urgent interim relief. Against that background, it was noted that under the UNCITRAL Model Law, the rules of many arbitral institutions and the laws of many jurisdictions, disputing parties can appoint an emergency arbitrator where urgent relief is needed. However, before doing so, parties should be mindful of ensuring that any award rendered by an emergency arbitrator is enforceable in their target jurisdiction.

## 5. Submission Agreements

It was noted that according to the *Guide to WIPO Arbitration* (WIPO Guide), while most WIPO arbitration cases are based on prior contract clauses, the WIPO Center has observed an increase in the number of cases referred to WIPO arbitration through submission agreements, including for disputes that were pending before courts. The WIPO Guide reports that 35% of all WIPO alternative dispute resolution cases are referred to arbitration under a submission agreement. WIPO has made available a recommended submission agreement for use by parties.

**Concluding Remarks**

The obvious conclusion from the panel's discussion was that arbitration is uniquely placed to offer parties a wide array of important advantages for the resolution of life sciences disputes. Parties should be mindful of potential pitfalls, such as the arbitrability of IP-related disputes and the enforceability of emergency arbitrator awards. Nevertheless, the speed of arbitration, the greater control the parties can exercise over the proceedings, the confidentiality and the ability to choose an arbitrator with requisite expertise are just some of the reasons why we should expect to see continued growth in the number of life sciences disputes being resolved by arbitration.

***More coverage from Australian Arbitration Week is available here.***

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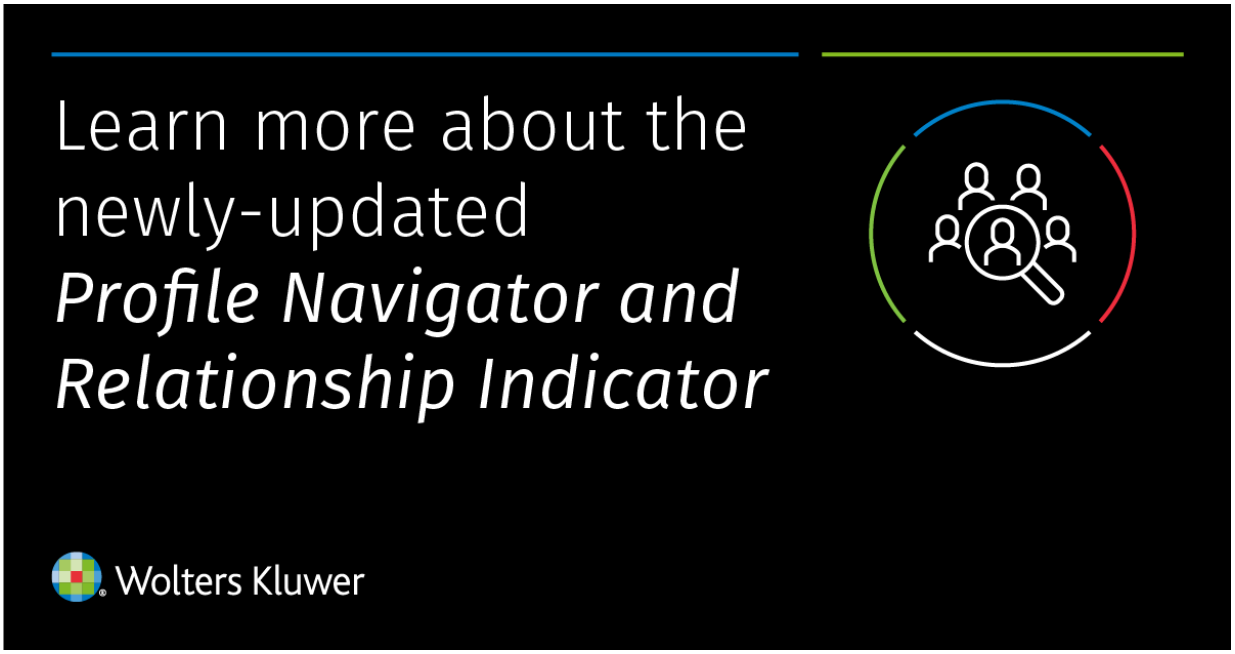


This entry was posted on Wednesday, October 11th, 2023 at 8:21 am and is filed under Arbitrability, Australia, Australian Arbitration Week, Competition Law, Intellectual Property, Intellectual Property Rights, science, WIPO
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