

Mediation and Arbitration Opportunities for Biotech/Pharma Disputes Caused by Coronavirus and COVID-19

Colin G. Sandercock



Biotech/Pharma Disputes Relating to COVID-19

- ▶ Most biotech/pharma disputes created by the COVID-19 pandemic will not involve patents; rather, most disputes will involve general business disruption caused by the non-performance of contractual obligations
- ▶ Preserving/accessing capital at a reasonable cost is especially critical for biotechs, which depend on meeting projected timelines to satisfy investors
- ▶ Problems can arise for pharma and biotech companies because such companies:
 - depend heavily on networks of suppliers and vendors, many of whom also are being disrupted by the pandemic; and
 - are susceptible to disruption of general day-to-day R&D resulting from (i) employee absences, and (ii) “shelter-in-place”, “social distancing” and other government orders that reduce the numbers of employees in labs and on-site
- ▶ Disruptions can delay timelines and impair capital access at reasonable cost

Potential Types of Biotech/Pharma Disputes

Reasonable prospects for ADR

- Failures to fully or partially perform contractual obligations
 - ***Applicability of force majeure clauses in existing agreements***
- Applicability of coverage under insurance contracts
- Payment of rents and mortgages if premises are unavailable or have limited availability because of a state/local government order
- Disruption and delays in clinical trials
 - Obligation to continue payments to institutions under CTAs when a trial is suspended
- Employment litigation

Unlikely prospects for ADR

- Activist investor litigation
- Shareholder suits relating to corporate action/inaction due to COVID-19 (including securities filings)

Applicability and Operation of Force Majeure Clauses

- ▶ Generally describe events beyond the reasonable control of one or both parties that can excuse performance of a contractual obligation
 - Generally list natural events such as acts of God, floods, fires, earthquakes, hurricanes, etc., and human events such as acts of war, civil strife, riots, labor strikes, gov't order, etc.
 - Key to applicability may be, e.g., whether performance is hindered by the COVID-19 pandemic or a governmental order
- ▶ Language typically varies significantly from contract to contract
- ▶ Enforcement varies country-to-country, and from state-to-state in the US
 - Force majeure not typically implied under US law or English law, but generally incorporated into the civil codes of civil law jurisdictions
- ▶ General requirements:
 - Event was not reasonably foreseeable, and party's non-performance could not have been avoided through reasonable advance efforts
 - Performance must be impossible; not just merely more burdensome

Potential Disputes Relating to Force Majeure Clauses

- ▶ Was the parties' contractual definition of force majeure satisfied?
 - Does the general or specific language of the force majeure clause apply to the cause of the delay in performance?
 - Is the delay in performance due to COVID-19 or to a gov't order relating to COVID-19?
- ▶ Did the Covid-19 pandemic actually cause a force majeure event?
 - Was performance impossible or merely more difficult?
 - Was the event reasonably foreseeable and avoidable through reasonable measures?
- ▶ Did the non-performing party resume performing as soon as reasonably possible?
- ▶ What are the damages if force majeure does not apply?
- ▶ If force majeure is unavailable, can another doctrine excuse performance?
 - Common law “impossibility” or “frustration” doctrine may excuse performance when an unexpected event (not the fault of either party) fundamentally alters the nature of the rights/obligations such that it would be unfair to hold the parties to their obligations