In Vivo
Pharma intelligence | informa

Contract Disputes Trends In Medtech

New Trends In Dispute Management To Save Time And Money

In Vivo
Pharma intelligence | informa

Contract Disputes Trends In Medtech

New Trends In Dispute Management To Save Time And Money

▶ By Dorothee Schramm

DISPUTES OVER MEDTECH CONTRACTS ARE DISRUPTIVE and costly. Dorothee Schramm, a partner at Sidley Austin who specializes in international commercial disputes, provides tips on how to save time and money in managing contract conflicts.

• • •

Medtech companies operating in today's environment inevitably conclude international supply and distribution contracts, licensing and collaboration agreements. Earlier this year, we gave tips on how to protect your international business deal against three common contract failures through smart drafting and choosing the right dispute resolution clause. This article provides tips on how to best manage contract disputes in order to save time and money while increasing your chances to succeed.

How To Save Time And Money At The Time Of Contracting

Time is money, especially in medtech, and the most pressing question in case of a dispute is how long it will take to actually receive what you are entitled to, be it payment, delivery of parts or something else. This is driven by how long it takes to get a final settlement or decision resolving the dispute and, subsequently, compliance by your contract partner with the settlement or decision. At the time of contracting you can already draft your dispute resolution clause to maximize your chances of enforcing your rights expeditiously.

You should consider structured negotiation and/or mediation as the first step to resolve a dispute, with clear time limits and procedures for each step defined in your contract. Mediation can be quick (often one or two days after 2 months of preparation) and saves not only the legal costs of litigation or arbitration but also the additional costs of your management time. These internal costs can be significant, and you will not be reimbursed for them.

If the dispute cannot be resolved by agreement, your clause needs to provide either for court litigation or arbitration. As explained in our last contribution, depending on the country, arbitration is typically quicker than court litigation, due to the layers of appeal in court litigation. In addition, the duration of litigation is unpredictable, while in arbitration the full procedural timetable is normally agreed on at the outset, which will facilitate your planning.

The total cost of a dispute will mostly be driven by your legal cost, which in turn depends on the scope and complexity of the dispute, the efficiency of the cooperation between in-house and external counsel, and the length and intensity of the proceedings. When choosing between court litigation and arbitration, you should keep in mind that in court litigation the prevailing party will typically not be reimbursed for a significant part of its legal cost in most jurisdictions (or will not be reimbursed at all in some jurisdictions), which is often different in international arbitration.

Fast-Track Arbitration – Blessing Or Pitfall?

A new trend in international arbitration is fast-track proceedings, which many arbitral institutions have introduced to meet the need for a speedy decision. For example, under the WIPO Expedited Arbitration Rules and the ICDR International Dispute Resolution Procedures of the AAA, you can expect to receive an award within approximately 4-5 months, but these expedited procedures apply only if agreed to by the parties (WIPO and ICDR) or in cases that do not exceed $250,000 (ICDR).

Under the ICC Rules and the Swiss Rules, you can expect an award within approximately 6 months from when the arbitrator receives the case file. These procedures apply if agreed to by the parties or in cases worth below approximately $1m (Swiss Rules), respectively $2m (ICC Rules). A careful comparison of the different institutions is worthwhile. Indeed, some institutions do not offer any expedited proceedings (e.g. the LCIA), while others provide for features that may come as a surprise (e.g. a sole arbitrator is appointed in ICC expedited proceedings even if the arbitration clause calls for three arbitrators).

Furthermore, not every case is suitable for fast-track arbitration. If you want to go fast, you will have to accept limitations on written submissions, and there may be no or very limited hearings and/or document production. You will also have less time to prepare your submissions, which can place a significant burden on your company. For example, if your case requires witness evidence or an expert report, the degree of availability required from your witnesses and experts can be a stumbling block. (Just imagine having only two or three weeks to prepare a full statement of defense with evidence and witness statements of senior managers who are involved in intense business travel at that time.) You may have even more difficulty meeting a tight schedule if key employees have left the company or if important documents are in the hands of third parties (e.g. due to a spin-off), which is not easy to predict at the time of signing the contract. If you want to fully present your case despite the time pressure, the expedited procedure will be faster, but often will not be cheaper than a "normal" procedure, as it will typically require more intense in-house management and a larger external counsel team to manage the different work streams in a short period of time.

As a rule of thumb, fast-track arbitration is typically not suitable for complex disputes that require experts or detailed witness statements. This may be difficult to predict at the time of contracting, so you may want to be cautious about firmly agreeing to fast track arbitration from the outset.

How To Save Time And Money When A Dispute Arises

When a dispute arises, the best way to save time and money is to manage the dispute proactively and promptly. This gives you a better chance to resolve it amicably, and will save costs further down the line even if you cannot find a reasonable commercial solution with your contract partner.

Proper dispute management entails all the steps that you must immediately take to protect your position and increase your chances of success in the event that you cannot reach a settlement. This includes all necessary steps to assert your rights under the contract and the applicable law, to mitigate any damage, and to create a paper trail and fill any gaps in the evidence.

To save time and money and to increase your chances of success, it is crucial to secure all evidence early on, in particular documents and witnesses. You should put in place a well-organized document management system to make sure that the relevant documents are collected and stored in one place so that others can later find what is needed. Regarding witnesses, bear in mind that it usually takes time until a dispute goes to arbitration or litigation. During that time, people forget details, and some might leave the company. Therefore, you should identify and question the relevant individuals within your company while their memories are fresh, and get their statements in writing, for example in a memo. The relevant individuals will be, for example, the person who negotiated the contract (if questions of contract interpretation arise), the technical personnel responsible for the part of your device that is in dispute, or the procurement specialist who is unable to find alternative supplies and mitigate the losses caused by your supplier's default.

One cost saver is a strong partnership with your external counsel, which entails not only a smart division of tasks to use available resources efficiently, but also to agree on an effective staffing plan. The size of the external counsel team will depend on the complexity of your dispute, but it is generally preferable to have a small, hands-on team, as additional lawyers add additional cost.

Early Case Assessment As An Ultimate Cost Saver

A recent trend to save costs is to engage external counsel for an early case assessment (ECA). This might sound counterintuitive, and indeed clients traditionally did not often request an ECA because they wanted to avoid this up-front cost. However, more and more companies have changed course, and many external counsel now offer ECAs on a fixed fee basis.

ECAs increase your chances of a positive outcome, which is the ultimate goal and probably the main reason to spend money on a dispute. Good outside counsel is able not only to identify weaknesses in your case that can still be fixed (e.g. missing notices to be sent to the other side), but is also able to develop a consistent case theory and strategy that will hold water from the beginning to the end of the case, which is crucial for winning. Counsel's strategic advice can also be important for your negotiation and escalation strategy. In addition, experienced arbitration counsel are trained in interviewing witnesses and their preparation of written statements privileges them from any later disclosure. Beyond those advantages, an ECA helps focus the case on the essential issues, which is ultimately a big cost saver. It will also lead to more realistic budgeting, and enable better alternative fee options, as explained below.

An important tip for saving money when working with external counsel is to share all relevant documents early in the process and in an organized manner, preferably in chronological order, while pointing out the key documents. This, again, may seem counterintuitive, but in the end will prove to be worthwhile. Indeed, some companies send counsel only a few documents at the beginning, and then gradually will send more as the dispute develops. The thinking behind this is typically to save money, but this approach often leads to higher costs, because counsel usually spends more time trying to figure out the events, identifying and requesting more documents, and up-dating the analysis based on new documents. In the worst case, counsel may need to change the case theory after it has already filed a letter or a submission if it receives documents with new information, which is expensive and lowers the chances of success. Thus, sending a complete set of relevant documents early on ultimately saves money later. Experienced counsel are used to going through large volumes of documents in a short period of time. Counsel may also have artificial-intelligence powered document review tools, which are most effective with complete datasets, and will make the document review even more efficient.

Budgeting And Alternative Fee Arrangements

Many medtech companies ask external counsel to provide a budget or to offer alternative fee arrangements (AFA), such as fixed fees. In arbitration, fee estimates or fixed fees that are broken down by phase of the proceedings often work best. When requesting a budget or AFA, you should think of how you would approach a manufacturer for a medical device: you would presumably not expect to obtain a reliable quote if you did not provide the manufacturer with sufficiently detailed information about the complexity and specifications of the device and its parts, and the overall volumes. Likewise, to obtain reliable budgets or proposals from legal counsel, it is crucial to submit sufficient information about the factual and legal complexity of the dispute, the arguments and counter-arguments raised by both sides, the number of potential witnesses, and the volume of documents. In fact, counsel who has been asked to prepare an early case assessment already has all this information and is therefore best positioned to provide a reliable quote.

Third-Party Funding

Another recent trend in international arbitration is the use of third-party litigation funding. This type of funding of legal costs and expenses is primarily aimed at claimants or counter-claimants in arbitrations with large claims, and is increasingly used by financially strong companies. There are many different funders and products. Usually, a funder will want to review the relevant documents and, if possible, a case assessment by outside counsel. If the funder sees sufficient chances of success, it will typically fund the proceedings on a non-recourse basis, without any assignment of the claim or counter-claim, in return for a share of the proceeds if the case is won (often 20-40%).

The obvious advantages of third-party funding include ready access to cash (other than your working capital), and transfer of the cost risk of losing the case, especially if the funder also agrees to cover any adverse cost award. However, there are disadvantages as well, beyond the funder's share in the proceeds. If you have a third party pay for the arbitration, you must be prepared for a certain loss of autonomy, as most funders will want to have a say in the proceedings. There is also a potential conflict of interest between you and the funder in case of settlement offers. While these aspects may not be an issue in many cases, there is also a high risk of procedural implications – such as a (controversial) duty to disclose the third-party funding, which can lead to a conflict of interest for an arbitrator

and can be used as a basis for the other side to request that you provide security for its legal costs. Conversely, the disclosure of third-party funding can also signal the strength of your position, since a third party apparently found your case sufficiently strong to invest in it.

The above tips should give you food for thought and would need to be adjusted in light of each company's circumstances. Whatever method you choose to save time and costs in resolving a dispute, keep one thing in mind: if you decide to enter into a dispute, you had better do it well. If you lose a case you should have won, the fact that you saved a bit of time and money may be of little comfort.

This article has been prepared for informational purposes only and does not constitute legal advice. This information is not intended to create, and the receipt of it does not constitute, a lawyer-client relationship. Readers should not act upon this without seeking advice from professional advisers. The content of the article is personal to the author, and does not reflect the views of the firm.

Published online 6 May 2019