

Arbitration: The fallout from a wave of disputes since the initial COVID-19 outbreak will ricochet over the coming year

ARBITRATION TRENDS:



Expect to see an increase in disputes over earn-out clauses in M&A transactions and third-party funding of significant claims in arbitration.



It is also likely that there will be a rise in investor-state claims alleging breach of international investment protection agreements.




Paperless proceedings and video hearings are here to stay.



Insolvent parties in arbitrations will increasingly be a problem.






We anticipate seeing an increase in disputes that have, directly or indirectly, been caused by COVID-19. The pandemic greatly increased the costs of transportation and certain raw materials, complicated the manufacturing of drugs and medical equipment, and generally affected international trade.

Urgent demand for certain products resulted in an increase in complaints about inferior products entering the market and being rejected by customers. We saw governments taking a keen interest in diversifying supply chains in order to ensure a reliable and secure supply of materials over the longer term. Some governments pushed for new, domestic sources of supply. They directed exporters to prioritize new local or national needs over fulfilling their contractual obligations with overseas customers. All of these factors triggered disputes. We also saw disputes arising as life sciences companies restructured their supply networks or sought price adjustments, and defenses such as force majeure or hardship increased.

M&A transactions have included more earn-out components to address the uncertainties arising from the pandemic by linking part of the purchase price to the company's future performance. In the future, we anticipate an increase in disputes over earn-out clauses, which are often resolved through arbitration.

The pandemic also accelerated the need for innovation, with manufacturers and governments working to expedite advanced critical drug development. At the same time, we saw increased tension between the need to protect the legitimate IP rights arising from innovation and the need to expand access to IP. In some instances, governments led the charge to make critical drugs widely and cheaply available, even to the extent of overriding existing licensing arrangements and underlying patent protection. These will likely give rise not just to contractual breach claims, but also to investor-state claims alleging breach of international investment protection agreements.

Third-party funding of significant claims in arbitration is now a common feature in international arbitration and has become available in more



jurisdictions that previously were subject to regulatory restrictions. These funding arrangements are anticipated to increase further. They will also offer interesting options for investors, who might want to consider the option of putting money into third-party funding of cases in the life sciences sector. The increased availability of third-party funding creates opportunities for life sciences companies to consider utilizing such options to help manage their litigation budgets.

In 2022, we anticipate that arbitral tribunals will more frequently need to address the issue of parties having financial difficulties or becoming insolvent, and the possible consequences for an arbitration. Issues that may arise include security for costs orders, the question of whether an insolvent company still has standing to sue or to be sued, delays in proceedings to determine who has authority to act for an insolvent company, etc.

ARBITRATION TIPS:

- Life sciences companies should consider whether available third-party funding options could help manage their litigation budgets. This decision requires careful weighing of the advantages and disadvantages of third-party funding, such as a limited cost exposure versus ceding to the funder some degree of control and a significant part of any amounts won.
- Investors are increasingly putting money into third-party funding of cases in all sectors, including life sciences.
- Life sciences companies should carefully consider the financial standing and risk of insolvency of their counterparty before initiating legal proceedings.

Contacts

[Marinn Carlson](#), [Dorothee Schramm](#), and [Friven Yeoh](#)