

WIPO Arbitration in Life Sciences Disputes

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1. Introduction

The life sciences sector, which includes pharmaceuticals, medical devices, diagnostics, vaccines, digital and health technologies, has seen substantial expansion in recent years and is one of the world's fastest expanding sectors. As expected, this has led to an increase in cross-jurisdictional life sciences disputes. Life sciences disputes have traditionally been contested in national courts, however there is a growing tendency towards resolving such issues through international arbitration. This development is reflected in the statistics of many of the leading arbitral institutes, the increase in the inclusion of arbitration clauses in contracts concluded in the life sciences sector, and changes to the procedures of arbitral institutions (such as the International Chamber of Commerce (ICC), International Centre for Dispute Resolution (ICDR) or WIPO Arbitration and Mediation Centre (WIPO Centre)) to better suit the needs of this sector.

Many specialists in the field have singled out the WIPO Centre as the most fitting arbitral institute for life sciences disputes among the other international arbitration

institutes. The goal of this study is to delve into the rules of the WIPO Centre and explain the procedural elements that make it appealing for life sciences disputes (in comparison to other major arbitral institutions).

As this paper will argue, two main factors make the WIPO Centre especially suitable for life sciences arbitration. First, many life sciences issues involve intellectual property and technical matters, and WIPO Rules have specific provisions on expertise, confidentiality and technical evidence that are useful in such disputes. Second, collaboration in this sector is typically long-term. New medications or health technology take years to develop, involving different international partners, and much of the production is outsourced to low and medium income countries. WIPO has lately approved new policies tailored for the life sciences that support dispute settlement in long term relationships.

The paper is organized as follow: It provides background on the global life sciences sector and the shift from litigation towards international arbitration (Section 2). It then explains the drivers behind this change (Section 3). Then, it zooms in on the WIPO Centre (Section 4) and highlights the main features of WIPO arbitration rules that make it fitting for life sciences disputes (Section 5). Section 6 concludes.

While this paper focuses on technical and procedural issues, keep in mind the big picture: In the case of the life sciences sector, effective dispute resolution is important for more than just the parties involved but has systemic value. The life sciences industry develops and manufactures global goods such as pharmaceuticals, health technologies, and vaccines. These products are crucial for the health of the global population and thus ensuring access to medicines, vaccines is crucial for humanity. As a result, effective and sustainable conflict resolution has externalities that extend beyond the parties involved and has global systemic value. It is vital for global health to have effective international arbitration systems that enable international cooperation in order to be better prepared for future pandemics and other global health emergencies.

2. Global Life Sciences Sector: A Shift towards International Arbitration

Globalisation, the shift of supply chains to low- and middle-income nations, and rising worldwide demand for medical goods and technologies have all contributed to significant growth in the life sciences sector during the last decade. While most disputes were formerly resolved by litigation in national courts, there has been a considerable increase in international arbitration through various international arbitration bodies.¹ According to statistics released by the ICC, LCIA, ICDR, and WIPO, the life sciences sector is increasingly utilising arbitration, resulting in a large increase in life sciences arbitration.² According to the WIPO Centre, filings (arbitration, mediation, and expert decision) climbed by more than 15% between 2018 and 2019, remained stable in 2020, and increased by 44% between 2020 and 2021.³

This has been further amplified following the Covid-19 pandemic: Based on my own research of media reports and arbitration databases (such as Kluwer Arbitration or Jus Mundi), there are several known disputes that arose from COVID-19 related collaborations that are being resolved through international arbitration: Dominican

¹ James P. Duffy, 'Arbitration's Benefits for the Life Sciences Industry', (2020) 75(2) Dispute Resolution Journal 17 - 30

² Tom Walsh, Alexandra van der Meulen, Tim Chen 'Freshfields' International Arbitration Top Trends 2023 International Arbitration Top Trends 2023: International arbitration in the life sciences sector' <https://www.freshfields.us/insights/campaigns/international-arbitration-in-2023/international-arbitration-in-the-life-sciences-sector/>

³ Ignacio de Castro, Heike Wollgast and Justine Ferland, 'Recent Trends in WIPO Arbitration and Mediation', in The Guide to IP Arbitration, eds. John V H Pierce and Pierre-Yves Gunter (2nd edition, 2022, GAR) 238-239 https://www.wipo.int/export/sites/www/amc/en/docs/2023/recent_trends_in_wipo_arbitration_and_mediation.pdf

Republic vs. AstraZeneca,⁴ HDT Bio Corp. v. Genova Biopharmaceuticals Limited,⁵ J&J vs. Emergent,⁶ and Novavax - Gavi Arbitration.⁷

Furthermore, many contracts now include arbitration clauses, according to my own analysis of a database maintained by the Global Healthcare Innovation Alliance Accelerator (GHIAA) that gathers contracts concerning Covid-19 medical technology that were concluded during the pandemic. While contracts to which western governments (EU or US) are parties continue to refer to court-based dispute resolution, philanthropic foundations and pharmaceutical firms prefer arbitration. Most of the arbitration clauses contracts refer to the ICC, LCIA, UNCITRAL or WIPO rules. Examples include COVAX and GAVI contracts (UNCITRAL),⁸ CEPI or DNDi contracts with developers (LCIA),⁹ Pfizer contracts with developing country governments or voluntary licensing contracts with MPP (ICC),¹⁰ MPP sub-license

⁴Toby Fisher, 'Dominican Republic threatens claim against AstraZeneca' (20 April 2022) *Global Arbitration Review* <https://globalarbitrationreview.com/dominican-republic-threatens-claim-against-astrazeneca>

⁵*HDT Bio Corp. v. Genova Biopharmaceuticals Limited* (2022) LCIA Case No. 225457

<https://jusmundi.co,m/en/document/decision/en-hdt-bio-corp-v-genova-biopharmaceuticals-party-representatives>;

Max Bayer, 'NIH-backed HDT Bio sues Indian partner for \$950M, alleging it stole trade secrets' (*Fierce Biotech*, 23 March 2022) <https://www.fiercebiotech.com/biotech/nih-backed-hdt-bio-sues-indian-partner-950m-alleging-it-willfully-and-maliciously-stole>;

Sebastian Perry, 'Indian drugmaker faces LCIA claim over covid vaccine' (30 March 2022) *Global Arbitration Review* <https://globalarbitrationreview.com/indian-drugmaker-faces-lcia-claim-over-covid-vaccine>

⁶Jon Swaine and Christopher Rowland, 'Emergent plant that ruined Johnson & Johnson vaccine doses had prior FDA violations' *The Washington Post* (1 April 2021)

<https://www.washingtonpost.com/business/2021/04/01/emergent-jj-vaccine-plant-inspection/>

⁷Stephanie Nolen and Rebecca Robbins, 'Vaccine Makers Kept \$1.4 Billion in Prepayments for Cancelled Covid Shots for the World's Poor' *New York Times* (1 February 2023)

<https://www.nytimes.com/2023/02/01/health/covid-vaccines-covax-gavi-prepayments.html>

⁸Gavi Alliance – Novavax, COVID-19 Vaccine Advance Purchase Agreement,

https://ghiaa.org/provision_document/gavi-alliance-novavax-covid-19-vaccine-advance-purchase-agreement-12/

⁹CEPI – Valneva, Chikungunya Vaccine Funding Agreement, https://ghiaa.org/provision_document/cepi-valneva-chikungunya-vaccine-funding-agreement-17/; Entasis – DNDi/GARDP, Gonorrhoea Medication, Collaboration Agreement, https://ghiaa.org/provision_document/entasis-dndi-gardp-gonorrhoea-medication-collaboration-agreement-15/

¹⁰'Pfizer and The Medicines Patent Pool (MPP) Sign Licensing Agreement for COVID-19 Oral Antiviral Treatment Candidate to Expand Access in Low- and Middle-Income Countries', (*Pfizer press release*, 16 November 2021) <https://www.pfizer.com/news/press-release/press-release-detail/pfizer-and-medicines-patent-pool-mpp-sign-licensing>

License Agreement between Pfizer and Medicines Patent Pool Foundation (15 November 2021), <https://medicinespatentpool.org/uploads/2021/11/Pfizer-MPP-License-and-Sublicense-website.pdf>

agreements with local manufacturers (WIPO Mediation then ICC Arbitration),¹¹ and Afrigen voluntary licensing contracts with MPP (WIPO Arbitration).¹²

3. Explaining the Shift to International Arbitration in Life Sciences

What explains this shift to international arbitration? Apart from the overall trend towards international arbitration that characterizes the global economy, there are also several elements unique to the life sciences sector.

A. Cost and Time

As with other fields of the global economy, the shift towards arbitration in the life sciences sector can be linked to a desire to reduce dispute settlement costs and time.¹³ Many life sciences disputes concern intellectual property (IP) dispute, and In contrast to costs and time for IP related disputes set out in the table below, WIPO Arbitration takes 13.5 months on average and costs 86000 USD.¹⁴

¹¹ ‘35 generic manufacturers sign agreements with MPP to produce low-cost, generic versions of Pfizer’s oral COVID-19 treatment nirmatrelvir in combination with ritonavir for supply in 95 low- and middle-income countries’ (Medicines Patent Pool press release, 17 March 2022) <https://medicinespatentpool.org/news-publications-post/35-generic-manufacturers-sign-agreements-with-mpp-to-produce-low-cost-generic-versions-of-pfizers-oral-covid-19-treatment-nirmatrelvir-in-combination-with-ritonavir-for-supply-in-95-low-and>

¹² ‘Afrigen signs grant agreement with MPP to establish a technology transfer hub for COVID-19 mRNA vaccines’ (Medicines Patent Pool press release, 3 February 2022); <https://medicinespatentpool.org/news-publications-post/afri-gen-signs-grant-agreement-with-mpp-to-establish-a-technology-transfer-hub-for-covid-19-mrna-vaccines>.

¹³ Judith Schallnau, ‘Resolving Life Sciences Disputes Through WIPO Mediation and Arbitration: Overview, Cases, and Contract Clauses’ (2018) 1 Life Science Recht 12-22

¹⁴ Ibid.

Table 1: Patent Life Sciences Litigation in Selected Jurisdictions				
Country	Characteristic of Legal System	Competent Courts	Average Length	Average Cost
Brazil	Civil Law Unified Litigation Specialized courts	First Instance Court of Appeal Superior Court of Justice Supreme Federal Court	2–4 years 1–3 years 1–3 years 1–3 years	USD 50,000–1 Mio USD 20,000–150,000 USD 10,000–300,000 USD 10,000–300,000
China	Civil Law Bifurcated Litigation Specialized courts	Specialized IP Courts* Higher People's Court Supreme Court Intermediate Court** Higher People's Court Supreme Court <i>*Beijing, Shanghai, Guangdong</i> <i>**Other provinces</i>	1–2 years* 6 months–1 year* 6 months–1 year 1–2 years* 6 months–1 year* 6 months–1 year	USD 150,000–250,000 USD 100,000–150,000 USD 100,000–300,000 USD 150,000–250,000 USD 100,000–150,000 USD 100,000–300,000
France	Civil Law Unified Litigation	Tribunal de Grande Instance, Paris Court of Appeal, Paris Supreme Court	18 months 2 years 18 months	EUR 200,000–500,000 EUR 150,000–375,000 EUR 50,000
Germany	Civil Law Bifurcated Litigation Specialized courts	<i>Infringement:</i> Regional Court Higher District Court Federal Supreme Court <i>Invalidity:</i> Federal Patent Court – Revocation Chamber Federal Supreme Court <i>*Value in dispute: 1Mio-15Mio</i>	6–12 months 12–18 months 18–24 months 18–24 months 20–24 months	EUR 80,000–650,000 EUR 90,000–765,000 EUR 115,000–1 Mio EUR 85,000–740,000 EUR 105,000–880,000
India	Common Law Unified Litigation	District Court High Court Supreme Court	3–5 years 3–5 years 3–5 years	EUR 25,000–150,000 EUR 20,000–500,000 EUR 20,000–100,000
Japan	Civil Law Unified Litigation Specialized courts	District Court IP High Court Supreme Court	15.7 months 6.7 months 12.5 months	USD 100,000–1 Mio USD 50,000–100,000 USD 50,000–100,000
Republic of Korea	Civil Law Bifurcated Litigation Specialized courts	<i>Infringement:</i> District Court High Court Supreme Court <i>Invalidity:</i> Patent Tribunal Patent Court Supreme Court	12–18 months 12–18 months 6–24 months 10–12 months 12–18 months 6–24 months	USD 50,000–200,000 USD 50,000–300,000 USD 50,000–500,000 USD 10,000–50,000 USD 50,000–300,000 USD 50,000–500,000
Russia	Civil Law Bifurcated Litigation Specialized courts	First instance court Appellate court (First Appeal) IP court (Second Appeal) Supreme Court	6–9 months 2–3 months 3–4 months 5–12 months	USD 60,000–80,000 USD 15,000–25,000 USD 15,000–25,000 USD 5,000–17,000
Spain	Civil Law Unified Litigation	Court of First Instance Court of Appeal Supreme Court	12–18 months 12–18 months 2–3 years	EUR 75,000–200,000 EUR 50,000 EUR 50,000
Sweden	Civil Law Unified Litigation	Stockholm City Court Court of Appeal Supreme Court	12–18 months 1 year 1 year	EUR 150,000 EUR 100,000 EUR 75,000
Switzerland	Civil Law Unified Litigation Specialized courts	Swiss Federal Patent Court Swiss Federal Supreme Court	Nullity: 1.5 years; Infringement: 2 years; Preliminary injunction: 4 months–1 year 6–8 months	CHF 100,000–150,000 CHF 100,000–300,000 CHF 80,000–160,000 CHF 40,000–80,000
The Netherlands	Civil Law Unified Litigation Specialized courts?	District Court of The Hague The Hague Court of Appeal Supreme Court	10–12 months 14 months 18 months	USD 200,000 USD 175,000 USD 125,000
United Kingdom	Common Law Unified Litigation Specialized courts	Intellectual Property Enterprise Court (IPEC) Patents Court – Chancery Division of the High Court Court of Appeal of England and Wales Supreme Court	12–18 months 12–18 months 12 months 18–24 months	USD 150,000–250,000 USD 800,000 USD 400,000 USD 400,000
United States of America	Common Law Unified Litigation Specialized court of appeal Jury trial	District Courts Court of Appeals for the Federal Circuit Supreme Court USPTO – PTAB Inter Partes Review Post Grant Review	24–40 months 1 year 1 year 18 months from filing 18 months from filing	USD 4–6 Mio USD 1 Mio USD 1 Mio USD 500,000–600,000 USD 500,000–600,000

Source: "Resolving Life Sciences Disputes Through WIPO Mediation and Arbitration"

B. Confidentiality

Because the life sciences have many disputes that concern secret inventions and know how, the Working Group on Life Sciences Dispute Resolution highlighted the particular importance of confidentiality. Confidentiality is also important because in many licensing contracts, the terms of the contract (e.g. pricing) is unknown to the public and the parties prefer to keep those terms secret.¹⁵ For example, pricing of vaccines manufactured under a license or provided during the COVID-19 pandemic has been kept secret.

C. Expert Arbitrators

National judges lack the expertise to effectively and quickly understand the technical complexities which characterize many life sciences disputes. Thus, arbitrators with relevant expertise in specific subject matters, technical fields and/or in specific commercial fields or specific fields of the law, enable more effective and faster understanding and resolution of the case.¹⁶

D. Long-Term Cross-Jurisdictional Contracts

One of the key characteristics of the life sciences industry is that it necessitates contracting with parties in different jurisdictions, with most collaboration lasting for a long time. The development of new medicines takes approximately 15 years, and given the fragmented and intensive nature of new health product development (funding, primary scientific research, advanced industry research, clinical trials, regulatory approvals, etc.), is frequently the result of collaboration between different parties and at different stages of the development and manufacturing cycle. These partners include research institutes, universities, pharmaceutical businesses, donors (public, private, and charitable), clinical trial companies, government agencies, local manufacturers and distributors, and so on. The growth of digital health and health technology has also resulted in increasing cooperation between the life sciences and technology sectors. While most R&D is done in developed countries, manufacturing is frequently done in low and medium income countries. As a result, a web of

¹⁵ Ibid.

¹⁶ Ibid.

multiple cross-jurisdictional, long-term contracts on R&D, voluntary licencing, manufacturing, and other topics has emerged.

This collaborative and contractual trend has been amplified by the COVID-19 pandemic. It resulted in a massive global demand for vaccinations, medications, and diagnostics, with high-income countries purchasing most of the available supply. As a result of the pandemic, measures have been made to mobilize R&D and manufacturing capability in low and middle-income nations. As a result, cross-jurisdictional contracts for R&D funding, voluntary licensing and technology transfer, etc. have increased.

Effective long term contract and collaboration management necessitates good dispute resolution which allows to solve disputes while maintaining good working relationships. Further, the cross-jurisdictional nature of these contracts, with parties based in different jurisdictions, leads party to seek a neutral forum, rather than litigation in a national court. Litigation before a national court may give the local party a “home advantage” and the foreign party also isn’t as familiar with the local laws, processes etc. Thus, more parties agree on international arbitration (as reflected in the cases noted above).

E. Arbitrability of IP Disputes

Many life sciences disputes concern intellectual property. While many countries formerly considered IP conflicts not arbitrable for public policy grounds, numerous jurisdictions have been liberalising their attitudes towards the arbitrability of IP issues, with many more now considering them arbitrable.¹⁷ These days there is broad agreement that international IP cases are arbitrable¹⁸ Indeed, the WIPO Centre states that “it is now broadly accepted that disputes relating to IP rights are

¹⁷ The Guide to IP Arbitration, eds. John V H. Pierce and Pierre-Yves Gunter (2nd edition, 2022, GAR)2 https://www.wipo.int/export/sites/www/amc/en/docs/2023/recent_trends_in_wipo_arbitration_and_mediation.pdf. In the case of a dispute involving IP issues, a seat with a liberal approach to arbitrability of IP disputes should be chosen like Switzerland

¹⁸ Michael Woller (Schoenherr) and Michaela Pohl, 'IP Arbitration on the Rise' (Kluwer Arbitration Blog, 16 July 2019) <https://arbitrationblog.kluwerarbitration.com/2019/07/16/ip-arbitration-on-the-rise/>

arbitrable.”¹⁹ Thus, more parties include arbitration clauses and refer disputes to arbitration.

4. WIPO Centre and Lifesciences Disputes

The World Intellectual Property Organisation (WIPO) was established in 1967 as a United Nations agency to promote international intellectual property cooperation. The WIPO Centre was created in 1994 as an international non-for profit body that provides alternative dispute resolution (ADR).

The WIPO Centre administers dispute resolution procedures through the WIPO Mediation Rules,²⁰ WIPO Arbitration Rules,²¹ WIPO Expedited Arbitration Rules,²² and WIPO Expert Determination Rules.²³ This paper focuses only on arbitration (and expedited arbitration) and does not address the other dispute solution methods.

The WIPO Centre provides case management services. This involves supporting parties in choosing an arbitrator (see below), providing secretarial services, enforcing timetables, supporting communication between the parties, and arranging secretarial, translation, and other support services. It also involves videoconferencing and online case administration (for example, an online docket WIPO eADR).²⁴ WIPO Centre has offices in Geneva and Singapore (since 2010).²⁵

¹⁹ Marc Labgold, ‘Should I Arbitrate My Patent Dispute?’ (Kluwer Arbitration Blog, November 29, 2022) <https://arbitrationblog-kluwerarbitration-com.libproxy1.nus.edu.sg/2022/11/29/should-i-arbitrate-my-patent-dispute/>

²⁰ WIPO Mediation Rules (July 2021), https://www.wipo.int/export/sites/www/amc/en/docs/mediation_rules_and_fees_2021.pdf

²¹ WIPO Arbitration Rules (July 2021), https://www.wipo.int/export/sites/www/amc/en/docs/arbitration_rules_and_fees_2021.pdf

²² WIPO Expedited Arbitration Rules (July 2021), https://www.wipo.int/export/sites/www/amc/en/docs/expedited_arbitration_rules_and_fees_2021.pdf

²³ WIPO Expert Determination Rules, https://www.wipo.int/export/sites/www/amc/en/docs/expert_determination_rules_and_fees_2021.pdf

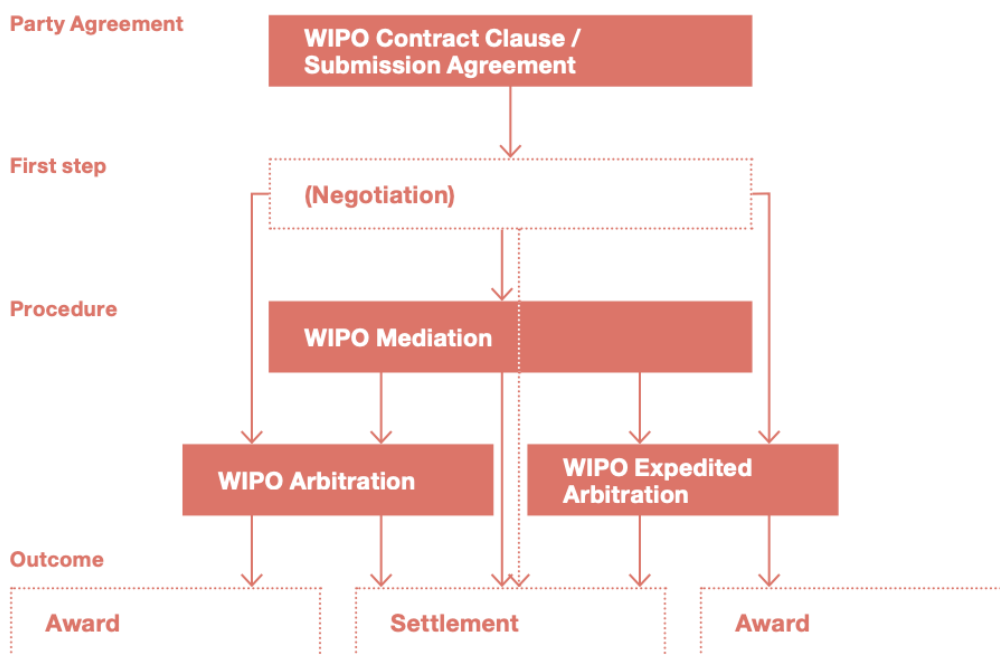
²⁴ Chiara Accornero, Heike Wollgast, Sally Shorthose, ‘WIPO arbitration and mediation for life sciences disputes’ (2020) 3 Life Sciences Lawyer https://patentlawyermagazine.com/wp-content/uploads/2023/08/Life-Sciences-Lawyer-Issue-3-2020_interactive.pdf

²⁵ Heike Wollgast and Chiara Accornero, ‘The WIPO Arbitration and Mediation Center Singapore Office – Recent Developments’ (2020) Singapore Law Gazette <https://lawgazette.com.sg/news/updates/wipo-recent-developments/>

The WIPO Centre can be used by individuals or legal entities, for commercial or IP matters, including for the life sciences. WIPO ADR is suitable for both common law and civil law disputes.

The ADR choices are depicted in the infographic below. Following the preliminary negotiation stage, parties may elect to proceed to mediation, arbitration, or expedited arbitration.

WIPO Arbitration options



Source: Guide to WIPO Arbitration https://www.wipo.int/edocs/pubdocs/en/wipo_pub_919_2020.pdf

According to WIPO Centre statistics, life sciences account for 15% of all disputes in recent years. It addresses issues in the pharmaceutical, biosciences, biotechnology, medical devices, and chemical industries. The Centre administered cases ranging in value from US\$15,000 to US\$1 billion as of 2022.²⁶ WIPO life sciences disputes include those involving intellectual property,²⁷ biodiversity, material transfer

²⁶ Ignacio de Castro, Heike Wollgast and Justine Ferland, ‘Recent Trends in WIPO Arbitration and Mediation’, in The Guide to IP Arbitration, eds. John V H Pierce and Pierre-Yves Gunter (2nd edition, 2022, GAR) 238-239 https://www.wipo.int/export/sites/www/amc/en/docs/2023/recent_trends_in_wipo_arbitration_and_mediation.pdf

²⁷ WIPO, ‘WIPO Alternative Dispute Resolution (ADR) for Life Sciences: WIPO Arbitration Case Examples’, <https://www.wipo.int/amc/en/arbitration/case-example.html#a2>

agreements, biotechnology, R&D, technology transfer, funding, licencing, franchising, and distribution agreements, among other things.²⁸

Multinational corporations, SMEs, research institutes, universities, industry associations, financing bodies, government agencies, IP transfer agencies, insurance companies, and others have referred issues to the WIPO Centre.²⁹ The majority of the parties are from Europe, the United States, and Asia.³⁰ The majority of claims seek monetary compensation, but some also demand performance.

5. Why is WIPO Centre fit for Life Sciences Disputes?

WIPO arbitration has many of the benefits of arbitration that characterize other international arbitration institutes (ICC, LCIA, Swiss Arbitration Centre) --such as complete party autonomy to change the rules, time and cost advantages, enforcement under the NY Convention, and more.³¹ The most recent amendment of the rules was in 2021 in response to the COVID-19 pandemic, and it includes provisions on online case management and remote hearings.³²

While several arbitral institutions, such as the ICC or ICDR, have made efforts to adapt to life sciences disputes (for example, by building rosters of experts in the field), many experts in the field point to the WIPO Centre as the preeminent arbitral institute for such disputes. In this section I lay out the rules which may be fitting for life sciences disputes.

Life science disputes are managed under WIPO's "ordinary" Arbitration and Expedited Arbitration rules, as well as a ADR process for the life sciences which was

²⁸ WIPO, 'WIPO Alternative Dispute Resolution (ADR) for Life Sciences: Selected Areas of Dispute', <https://www.wipo.int/amc/en/center/specific-sectors/lifesciences/>

²⁹ Recent Trends in WIPO Arbitration and Mediation, supra note 3, 238-239; WIPO, 'WIPO Alternative Dispute Resolution (ADR) for Life Sciences: Potential Stakeholders to Dispute', <https://www.wipo.int/amc/en/center/specific-sectors/lifesciences/>

³⁰ Recent Trends in WIPO Arbitration and Mediation, supra note 3, 238-239; Accornero, Wollgast & Shorthose, supra note 24.

³¹ Accornero, Wollgast & Shorthose, supra note 24.

³² WIPO Mediation Rules, Article 3(a); WIPO Arbitration Rules, Article 4(a); WIPO Expedited Arbitration Rules, Article 4(a); WIPO Expert Determination Rules, Article 3(a).
20 WIPO Mediation Rules, Article 10; WIPO Arbitration Rules, Articles 40, 49 and 55; WIPO Expedited Arbitration Rules, Articles 34, 43 and 49; WIPO Expert Determination Rules, Article 14(f). 21 WIPO, 'WIPO Online Case Administration Tools', www.wipo.int/amc/en/eadr.

recently developed and published this year, in 2023. Together they form the procedural framework for the resolution of life sciences disputes at WIPO Centre.

As I explain further below, there are two main principles that make it particularly appropriate for life sciences disputes: First, WIPO Arbitration and Expedited Arbitration Rules are tailored to IP and technical issues, and life sciences disputes often concern IP and/ or technological matters. Second, the WIPO Centre has recently issued new WIPO ADR solutions geared specifically for life sciences disputes.³³ They support the character of this sector, which is built on long-term collaboration.

In the sections that follow, I highlight the key features of this framework that make WIPO particularly fitting for life sciences conflicts.

A. Appointment of Arbitrators Specialized in Life Sciences

As mentioned above, arbitrator subject matter expertise is one of the advantages of arbitration. Parties in the life sciences require commercially minded arbitrators who understand the sector and have technical competence, particularly when IP expertise is required. One of the main benefits of the WIPO Centre is that it maintains a very large roster of arbitrators ("Open Ended List of Experts Specialized in Life Sciences") from whom the parties can choose. Over 2000 specialists from over 100 countries are included on the list.³⁴ It includes mediators and arbitrators from many backgrounds, with intellectual property and commercial expertise, including in pharma, medical devices, biotechnology and other specific fields. This allows to find an expert with niche or rare experience. While other arbitral bodies, such as the ICDR and the ICC, have specific rosters, the WIPO Centre database is the largest and most specific.

³³ WIPO, 'WIPO Alternative Dispute Resolution (ADR) Services for Specific Sectors' <https://www.wipo.int/amc/en/center/specific-sectors/>

³⁴ Article 19(b) of the WIPO Arbitration Rules and Article 14(b) of the WIPO Expedited Arbitration Rules; WIPO, 'WIPO Neutrals' <https://www.wipo.int/amc/en/neutral/index.html>

B. Confidentiality

Confidentiality is one of the advantages of arbitration. Many international arbitration institutes, including the ICC, LCIA, SIAC, SCC, JCAA, and UNCITRAL, have confidentiality requirements in place.³⁵ They prohibit the parties and arbitrators from disclosing any material or awards from the arbitration to third parties, excluding third parties from hearings, and so on.³⁶ For example, the ICC Rules and the ICDR Rules state that the tribunal may make orders to protect trade secrets and confidential information. The Swiss Rules and the LCIA Rules both require the parties to maintain secrecy.

However, none of these go as far as the WIPO Rules. As mentioned above, confidentiality is especially important in life sciences disputes that concern intellectual property or technology, as they frequently contain secret know-how and trade secrets. In light of this, WIPO rules (Articles 75-78 and 54)³⁷ have been tailored to include specific, extensive, and comprehensive restrictions on confidentiality and trade secrets.³⁸

Articles 75-78 encompass all aspects of the arbitration process's confidentiality, including the existence of the arbitration, any disclosures of information made during the process, the award, and so on, and it applies by default to the arbitration process.

Article 54 addresses the confidentiality of certain information that a party wishes or is required to disclose (but not the confidentiality of the proceedings), and thus allows the party to apply for confidentiality. The confidentiality protection offered by Article 54 is in addition to the one granted by default by Articles 75-78. It defines "confidential information" (paragraph a), allows parties to apply for confidential

³⁵ Article 39(1) SIAC Rules

³⁶ 'Chapter 10: Confidentiality and Transparency in International Arbitration', in Gary B. Born (*ed.*), *International Arbitration: Law and Practice* (2021, Third Edition, Kluwer International Law) 231 – 242, 235

³⁷ WIPO Mediation Rules, Articles 15 to 18; WIPO Arbitration Rules, Articles 75 to 78; WIPO Expedited Arbitration Rules, Articles 67 to 70.

³⁸ Philipp Groz, 'Chapter 16, Part II: Commentary on the WIPO Arbitration and WIPO Expedited Arbitration Rules, WIPO Arbitration Rules, Article 54 / WIPO Expedited Arbitration Rules, Article 48 [Disclosure of Trade Secrets and Other Confidential Information]', in Manuel Arroyo (ed), *Arbitration in Switzerland: The Practitioner's Guide* (2018, Second Edition, Kluwer Law International) 1955 - 1967

information protection (paragraph b), and empowers the tribunal (paragraph c) to deal with specific confidentiality requests and issue protective orders regarding certain information, such as trade secrets.³⁹ Orders restricting access to confidential information to particular individuals or redaction of documents are examples of protective orders.⁴⁰ It also calls for the appointment of a confidentiality advisor (paragraph d) and a confidentiality expert (paragraph e).

Of course, one may argue that because tribunals in other institutions have general competence to conduct arbitrations, they could issue confidentiality orders even in the absence of specified confidentiality provisions. However, when it comes to rules, WIPO has the most comprehensive set.

C. Technical Evidence

Through its particular provisions on technical evidence in Articles 50-53 and 56-57, WIPO rules were designed for life sciences and intellectual property conflicts.⁴¹ The evidence rules are detailed in comparison to other arbitration rules (including the IBA rules) and list technical evidence of value in life science disputes. WIPO Rule 50(1)⁴² provides a non-exclusive list of several sorts of evidence. Among admissible evidence are experiments (Article 51), site visits and inspections (Article 52),⁴³ inspections, primers and models (Article 53), surveys (particularly important in trademark disputes to indicate distinctiveness), and others. This type of technical evidence is especially important in intellectual property and technology disputes. Experiments, for example, are useful in patent disputes, while inspections are useful for gathering evidence.

³⁹ 'Arbitration in the Life Sciences and Pharmaceutical Sector' (2017, October-December Issue) *Corporate Disputes Magazine*, 14 https://www.wipo.int/export/sites/www/amc/en/docs/2017_pharmacdm.pdf, Article 54 of the WIPO Arbitration Rules and Article 48 of the WIPO Expedited Arbitration Rules

⁴⁰ Phillip Landolt and Alejandro Garcia, 'Commentary on WIPO Arbitration Rules', 2017, 100-103 <https://www.wipo.int/export/sites/www/amc/en/docs/2017commentrulesarb.pdf>.

⁴¹ WIPO Arbitration Rules, Articles 50 to 53; WIPO Expedited Arbitration Rules, Articles 44 to 47; Michael Noth, 'Chapter 16, Part II: Commentary on the WIPO Arbitration and WIPO Expedited Arbitration Rules, WIPO Arbitration Rules, Article 52 / WIPO Expedited Arbitration Rules, Article 46 [Site Visits]', in in Manuel Arroyo (ed), *Arbitration in Switzerland: The Practitioner's Guide* (2018, Second Edition, Kluwer Law International) 1948 – 1951, 1948

⁴² Article 44 of the WIPO Expedited Arbitration rules

⁴³ Article 46 WIPO Expedited Arbitration rules

D. New WIPO Alternative Dispute Resolution (ADR) for Life Sciences

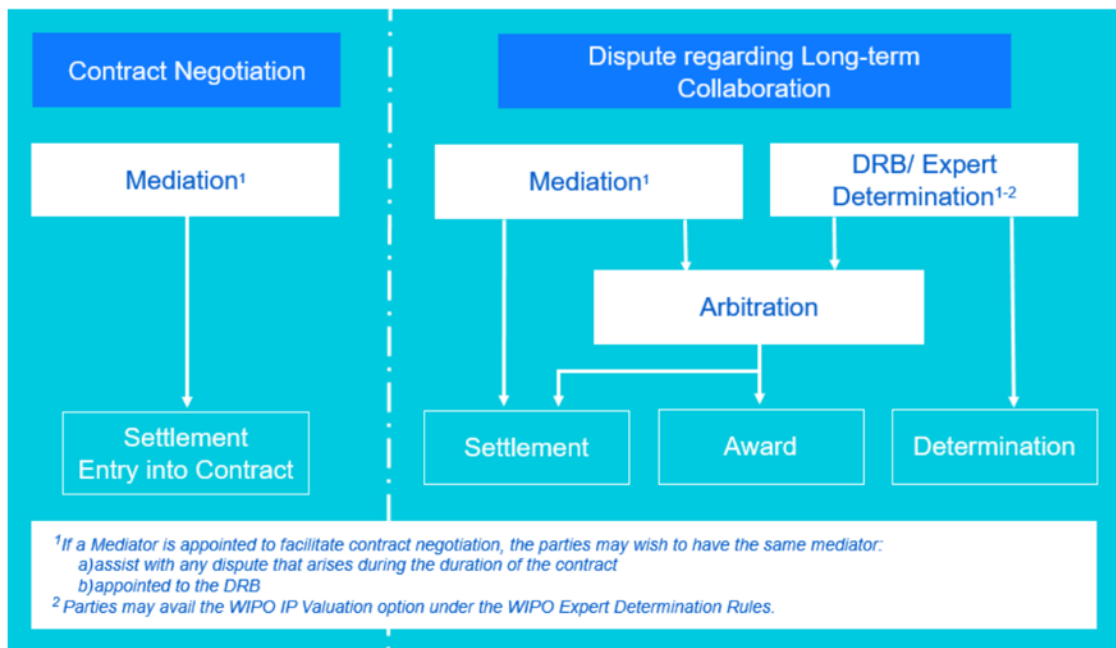
As mentioned above, one of the characteristics of this sector is that it is based on long term cooperation. Many R&D or licensing contracts require long term cooperation. Thus, there is a need to effectively manage disputes that arise over the course of the cooperation while maintaining business relationships.

Against this background, WIPO has enacted new procedures for ADR in the life sciences, in addition to the procedures outlined above. The goal is to incorporate procedural mechanisms designed for long-term dispute resolution in the life sciences that allow to settle disputes while preserving business relationships. These additional ADR options can be utilised independently or in conjunction with the existing ones.

The new ADR procedures are depicted in the infographic below and add:

- Mediation for contract negotiation and dispute management
- “Standing” Mediation for dispute settlement
- Establishment of dispute resolution boards or expert determination.
- Arbitration: In all such cases (whether mediation, DRB or expert determination), the parties can go to arbitration if they are unable to settle the dispute.

New Tailored WIPO ADR Procedures for Life Sciences



Source: https://www.wipo.int/export/sites/www/amc/en/docs/2022/lifesciences_adroptions.pdf

The fundamental reason for these new procedures is because most life sciences collaborations are, as mentioned above, long-term. The new "Dispute Resolution Boards" (DRB) mechanism is made up of experts and is intended to manage long-term collaborations. Its role is to enable the parties to resolve minor and major disputes throughout the course of their collaboration. It can be beneficial to have the same person or persons hear each issue linked to a specific relationship or project. It expedites resolution because the DRB is familiar with the issues, and it also maintains confidentiality. Its decisions can be binding or not, depending on the parties.⁴⁴ It's worth noting that Dispute Boards are increasingly being seen as a Novel Dispute-Resolution Technique for Life Sciences Companies Facing COVID-19.⁴⁵ Similarly, "standing" mediation can be beneficial in long-term partnerships.⁴⁶

⁴⁴ WIPO, 'WIPO ADR Options for Life Sciences Dispute Management and Resolution' (2022) https://www.wipo.int/export/sites/www/amc/en/docs/2022/lifesciences_adroptions.pdf, 6

⁴⁵ 'Dispute Boards: A Novel Dispute-Resolution Technique for Life Sciences Companies Fighting COVID-19' (Dechert News & Insights, 2 June 2020) <https://www.dechert.com/knowledge/onpoint/2020/6/dispute-boards--a-novel-dispute-resolution-technique-for-life-sc.html>

⁴⁶ 'WIPO ADR Options for Life Sciences Dispute Management and Resolution' supra note 44.

6. Conclusion

Historically, the life sciences sector has resolved disputes through litigation in national courts. In recent years, there has been a shift towards international arbitration. Aside from the general, global factors that have led to an increase in international arbitration (the desire for effective, fast, confidential and final dispute resolution by expert arbitrators), I have highlighted factors of particular importance in the life sciences industry, including an increase in cross-jurisdictional contracts for long-term cooperation, and the now widely accepted view that intellectual property disputes are arbitrable.

As a result of this trend, international arbitration bodies institutions have begun to readapt in order to better serve life sciences disputes. Experts frequently mention the WIPO Centre as being particularly appropriate. As a result, the purpose of this paper was to highlight the fundamental procedures of WIPO rules that make it appealing. It has highlighted the following: a roster of expert arbitrators in niche fields, special confidentiality rules, and technical evidence rules. In addition, in 2023, WIPO Centre developed special processes that combine dispute resolution boards/mediation with arbitration, enabling for effective dispute resolution among long-term partners.

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