Dispute Resolution Provisions in Life Sciences Agreements

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I. INTRODUCTION

This paper surveys the dispute resolution provisions of 15 life sciences research and development collaboration and license agreements that are non-confidential exhibits to reports filed with the United States Securities and Exchange Commission during the first seven months of 2020 (the "Agreements"). Part II provides an overview of the Agreements, including the governance provisions. Part III reviews the dispute resolution provisions, and describes the disputes the parties have agreed to submit to internal resolution procedures, the disputes they have agreed to exclude from any form of external resolution, and the disputes they have agreed to submit to expert determination, mediation, arbitration, or litigation, or some combination of these procedures. Part IV describes the parties' approaches to the substantive law governing their disputes. For disputes the parties have agreed to submit to arbitration, Part V describes the arbitration agreements, focusing on scope, choice of seat, and arbitrator selection. Finally, Part VI concludes that the complex dispute resolution provisions in these Agreements can lead to litigation on scope and exercise of decision rights, jurisdictional disputes, parallel arbitration and litigation proceedings, and inconsistent judgments.

II. THE AGREEMENTS

The Agreements are between biopharmaceutical firms for the development of pre-clinical or clinical stage assets, and the commercialization worldwide of one or more approved drugs developed from those assets,

for the treatment of specified diseases or conditions. There is an upfront payment from one party to the other, sometimes paid out in stages over time. Additional payments are made contingent upon achieving specified development, regulatory, and other milestones. There may be fees to reserve manufacturing capacity. One party may fund the other's early stage research. Royalties may be paid on net sales, or the parties may share equally, or in some other proportion, the costs of development and commercialization and the profits from sales. There may be an equity investment, or payments to exercise options on an equity investment or on future in-licensed assets. An option to participate in projects may be exercised at different points along a project's timeline. Sometimes one of the parties solely is responsible worldwide, or in specified territories, for registering a drug product with regulatory authorities, for manufacturing and supply, or for product marketing, distribution, and sales.

One party, or each party, grants to the other, one or more licenses under patents, know-how, and other intellectual property covering background technology, collaboration technology, and in-licensed third party technology, to research, develop, and commercialize one or more jointly developed products, in accordance with detailed development and commercialization budgets and plans that may involve material and technology transfers. There are detailed rules on the development and ownership of know-how and inventions, and on the prosecution, maintenance, enforcement, and defense of patent and other intellectual property rights. The licenses may be exclusive, co-exclusive, non-exclusive for some purposes, or exclusive in specified fields of use, for specified indications or conditions, or as to specified research platforms or programs. Sometimes one or more rights may be retained (e.g. to sell worldwide "except in Japan, where [Company] will [retain] exclusive rights [to sell the product].").

Some Agreements contain exclusivity provisions. The Agreements contain lengthy representations and warranties, and detailed provisions on confidentiality, publication, and publicity; regulatory responsibilities; compliance; and termination and its consequences. Most provide for good faith negotiation of ancillary agreements, outline terms for those agreements, or provide templates for future agreements, such as supply and manufacturing, distribution, marketing, promotion, and sales agreements.

Each Agreement is a collaboration agreement with an internal governance and dispute resolution structure that includes a joint steering committee responsible for strategic alignment, drug development plans and budgets, manufacturing and supply plans, marketing and other commercialization plans, and relationship management, including dispute resolution. The joint steering committee may establish and oversee joint subcommittees, including a joint development committee, a joint manufacturing committee, and a joint commercialization committee, or these may be stand-alone committees. There may be joint working groups, working with joint subcommittees or joint stand-alone committees. A joint intellectual property committee may be advisory only, or have limited decision rights. Alliance managers facilitate communications, coordinate and track meetings, and support the parties in managing their relationship. The joint steering committees, and the research and development, manufacturing, and commercialization stand-alone committees and subcommittees, have well-defined responsibilities, including decision-making responsibilities. All decisions are made by consensus. Each party has one vote.

III. THE DISPUTE RESOLUTION PROVISIONS

The Agreements define or list the matters that come before the joint committees for decision. If there is no consensus on a matter, the joint committee "escalates" the deadlocked matter to the joint steering committee for resolution. The joint steering committee, in turn, escalates a deadlocked matter to the parties' executive officers for negotiation and resolution. If the executives do not resolve the escalated committee dispute, the dispute may remain deadlocked under certain conditions or, more often, is escalated to a party for unilateral decision, or proceeds to expert determination, mediation, arbitration, or litigation, or some combination of these dispute resolution procedures. Some Agreements also require escalation of deadlocks on non-committee matters to the parties' executives for negotiation and resolution. In these cases, unresolved disputes proceed to arbitration or litigation.

A. Dispute Definition

Each Agreement includes provisions for different methods of dispute resolution for different types of disputes and defines or uses the term "dispute" differently for different purposes. For example, for purposes of internal dispute resolution procedures, one Agreement lists the matters before the joint committees, and defines disputes as any decision on a matter before it about which a joint committee is incapable of reaching unanimous agreement. For purposes of submission to arbitration, this Agreement defines a dispute as "any dispute arising out of or in connection with" the Agreement, except for disputes at the joint committees, and those "relating to the scope, validity, enforceability or infringement" of patents. For purposes of choice of governing law, the same Agreement provides that "the Agreement and any dispute arising from [its] performance or breach" are governed by the substantive law of New York.

Other Agreements take a similar approach in defining disputes differently for different purposes, e.g., for purposes of submission to arbitration, "except as otherwise [provided in the section on joint committee dispute resolution] or with respect to any matter for which a Party has final decision-making authority as expressly provided herein, any dispute arising out of or relating to the Agreement, or the breach, termination or validity thereof."

These Agreements do not discuss disputes about whether a dispute escalated to a party for its unilateral decision should have been so escalated or, if so, whether the party properly exercised its unilateral decision rights considering the contractual limitations on the exercise of those rights. This raises the issue whether these categories of disputes were intended to remain joint steering committee matters for internal resolution or a party's unilateral decision, or were intended to be arbitrated, or litigated.

Some Agreements, however, aiming to cover most disputes and most methods of dispute resolution required by the Agreement, define or use the term "dispute" more broadly, e.g., for purposes of submission to arbitration, "any dispute arising out of or in connection with this Agreement, including any alleged breach under this Agreement or any dispute relating to the validity, performance, construction or

interpretation of this Agreement," if any such dispute, including any patent-related dispute, has not been resolved by the parties' executives following escalation from the joint steering committee.

B. Disputes Submitted to Internal Resolution

Matters before the joint steering committee include, in addition to supervising and directing subcommittees and deciding deadlocked matters escalated by subcommittees or stand-alone committees, the review and approval of research, development, manufacturing, and commercialization plans and budgets, whether or not to terminate a particular project; whether and how to prioritize particular projects, "and such other functions expressly set forth or allocated to it by the Parties' written agreement." In addition to listing matters properly before a joint steering committee, some Agreements list matters excluded from joint steering committee jurisdiction, such as the authority to modify or amend the terms and conditions of the Agreement, to waive or determine a party's compliance with the terms and conditions, or to decide an issue "in a manner that would conflict with the express terms and conditions" of the Agreement.

Disputes about whether or not a matter is properly before a committee, and therefore capable of committee deadlock and escalation to the parties' executives, are rare during the period when the matter is pending before the committee. After the executives do not resolve an escalated dispute, however, there may be disputes about whether the dispute was properly before the committee; whether it should have been escalated to a party for decision; whether the party properly exercised its discretion in making its decision; and whether the dispute should have been litigated, or arbitrated.

As one example, an Agreement expressly excludes from internal resolution any dispute regarding the scope or validity of patents, requiring that all such disputes be litigated. This raises the issue whether a dispute before the joint steering committee involving a factually complex scientific or technical matter bearing on patent scope or validity should be escalated to a party for its unilateral decision, or litigated.

C. Disputes Excluded from External Resolution

If the executives do not resolve a deadlocked joint steering committee dispute, the Agreements aspire to exclude certain types of deadlocked disputes from any form of external resolution whatsoever. In general, these types of deadlocked disputes may involve narrowly defined, factually complex scientific or technical information; details about the conduct or direction of a research project or program; details leading to decisions about whether to continue a particular research project or program; or the terms of a future ancillary agreement, such as an in-license agreement or a supply and manufacturing agreement. The parties have redacted the details of these categories of disputes from the non-confidential versions of their Agreements filed with the Securities and Exchange Commission.[1]

If the parties' executive officers do not resolve these categories of deadlocked disputes, some Agreements provide that a specified dispute nevertheless "must be decided by unanimous agreement," or that it will remain deadlocked under certain conditions. Most Agreements, however, provide that the unresolved deadlocked dispute is "escalated to a party" i.e., it is escalated to one party, which unilaterally and finally decides the deadlocked dispute. In most Agreements, each party has unilateral decision rights on one or more of these categories of escalated disputes, reflecting each party's contributions to the collaboration conducted under the Agreement. Exceptionally, one party may have all of the escalated unilateral decision rights, which it must exercise "in good faith."

There are, however, contractual limitations on the exercise of unilateral decision rights under these Agreements. For example, a party with unilateral decision rights "shall not unilaterally reduce its diligence obligations" or "make material amendments" to a research and development plan that would "have an adverse impact" on the other party, or "unilaterally decide on any matter concerning" joint inventions and joint patent rights, or "unilaterally alter or amend the terms and conditions" of the

[1] See Rule 246-2 of the Securities and Exchange Act of 1934, as amended.

Agreement, and "shall have no jurisdiction over any dispute relating to the validity, performance, construction or interpretation" of the Agreement. Nor may it "take any action" that the other party "reasonably believes" would cause it to violate applicable law, regulatory requirements, or an agreement with a third party, including any third party in-license agreement, or infringe or misappropriate any third party intellectual property rights.

These provisions invite litigation or arbitration, or both, about whether a party is entitled to exercise a unilateral decision right and, if so, whether it did so in good faith, and in a manner consistent with the contractual limitations on the exercise of that right.

D. Disputes Submitted to Expert Determination

Under three Agreements, if the parties' executives do not resolve an escalated deadlocked issue, certain disputes are referred to "expert determination."

One Agreement refers deadlocked regulatory matters to a "regulatory expert," a regulatory consulting firm which, after receiving the parties' written submissions, renders a written decision "which will be conclusive and binding" on the parties. To select that regulatory expert, each party lists proposed "regulatory consulting firms," each of which "must have sufficient expertise and experience and not have been engaged by such Party previously." If the parties' lists name one or more of the same consulting firms, "then [redacted] will select" one of those common firms to serve as the regulatory expert. If the parties' lists do not name at least one of the same consulting firms, "then [redacted] will have the right to select the regulatory consulting firm" to serve as the expert. The Agreement does not state whether there is any limitation on that right.

Another Agreement refers certain deadlocked research and development disputes to expert determination. It provides that if the dispute "arises out of any of [redacted subject]" the parties will submit the matter "for resolution in accordance with" a [redacted] schedule to the Agreement; "the determination of the

[R&D expert] will be binding" on the parties; and neither a party nor the joint steering committee "will have authority to modify or amend the finding of the [expert]." The parties redacted the details of the procedure, including those related to expert selection, from the version of the Agreement filed with the Securities and Exchange Commission.

A third Agreement refers certain deadlocked disputes, including disputes about the fair market value of certain products and compounds, and whether or not a particular milestone has been achieved, to a third party expert. It provides that the parties "will mutually identify a Third Party expert to resolve such dispute" and who (or which) "will be instructed to provide its resolution of such dispute . . . and the determination of such expert will be binding" on the parties. The Agreement does not state what happens if the parties do not agree on an expert.

The three Agreements, as filed with the Securities and Exchange Commission, do not state what happens if a party does not agree that a matter should be referred to expert determination, if a party declines to comply with an expert determination, or if a party objects to an expert's appointment or challenges the expert's impartiality. Under two of these Agreements, all disputes are litigated, except those escalated to a party or referred to expert determination. Under the third Agreement, all disputes are litigated except those escalated to a party, referred to expert determination or, on two different subjects, submitted to arbitration. Under these circumstances, these disputes can lead to litigation on scope of dispute submitted, expert selection or removal, and to set aside or enforce an expert determination.

E. Disputes Submitted to Litigation

Under four of the 15 Agreements, the dispute resolution default is litigation. Two provide that all deadlocked disputes other than disputes escalated to a party or referred to expert determination, are litigated. A third provides that all deadlocked disputes other than disputes escalated to a party, referred to expert determination, or submitted to arbitration on two discrete subjects, are litigated. The fourth Agreement provides that all deadlocked disputes are litigated.

Under 11 of the 15 Agreements, the dispute resolution default is arbitration. Most of these Agreements provide, however, that certain categories of disputes must be litigated, not arbitrated, for example, patent disputes, e.g. "Any dispute, controversy or claim relating to the scope, validity, enforceability or infringement of any Patents . . . shall be submitted to a court of competent jurisdiction in the country in which such Patents were granted or arose." One Agreement also excludes antitrust claims from arbitration, and provides that all antitrust and intellectual property claims must be litigated. These dispute resolution provisions can lead to parallel litigation and arbitration, and inconsistent judgments.

The Agreements contain a savings clause providing that "notwithstanding" an agreement's dispute resolution procedures, a party "may seek provisional equitable relief" from a court, including restraining orders, "specific performance," and other injunctive relief "without first submitting" to the dispute resolution procedures specified in the agreement, e.g. "each Party shall have the right to seek interim injunctive relief in any court of competent jurisdiction as such Party deems necessary to preserve its rights and to protect its interests."

Upon the failure of their executives to resolve a dispute, these savings provisions could lead to an immediate application to a court for specific performance or other injunctive relief directed to the scope and exercise of a party's unilateral decision rights.

F. Disputes Submitted to Mediation and Arbitration

11 of the 15 Agreements provide that defined disputes shall be finally resolved by arbitration. These Agreements are discussed in Part V. One of the 15 Agreements requires non-binding mediation of a dispute as a precondition to arbitration of the dispute. The scope of this dispute to be submitted is "any dispute, controversy or claim . . . arising out of or relating to the Agreement," except "as otherwise provided" in the Agreement, and except for disputes "pertaining to the validity, construction, scope, enforceability, infringement or other violations" of defined patent rights or other intellectual property rights ("no such claim will be subject to mediation or arbitration"). The mediation is conducted by a

mediator appointed by an arbitral institution in New York. If the dispute is not resolved through mediation, it is submitted to arbitration administered by the same institution.

IV. GOVERNING SUBSTANTIVE LAW

In 13 Agreements, including eight in which the parties are incorporated in different countries, the parties have chosen the substantive law of a state of the United States to govern an Agreement, i.e., New York (ten Agreements), Delaware (two Agreements), and Massachusetts (one Agreement), "without reference to conflicts of laws principles," or "exclusive of its [the state's] conflicts of laws principles." One Agreement, between parties incorporated in European countries, is "exclusively governed by, and interpreted and enforced in accordance with Belgian law." The parties to one Agreement redacted the governing law from the non-confidential version filed with the Securities and Exchange Commission.

Five of the 15 Agreements, including the Agreement from which the parties redacted their choice of governing law, expressly exclude application of The United Nations Convention of International Contracts on the Sale of Goods (the Vienna Convention). The parties to six of the 15 Agreements, each choosing the substantive law of New York, make an "exception," or include an additional provision, for law applicable to certain intellectual property rights. Two of these six Agreements provide "with respect to matters involving the enforcement of intellectual property rights" the laws of "the applicable country" shall apply, without defining the "applicable country." One of the six provides that "any issue which depends upon the validity, scope or enforceability" of a patent "shall be determined in accordance with the laws of the country in which such patent was issued." Another applies the laws of "New York and the patent laws of the United States without giving effect to any law that would result in the application of a different body of law."

The governing substantive law provisions in these Agreements vary in scope, e.g., the governing law applies to the "Agreement and any dispute arising from [its] performance or breach"; the Agreement "and

all disputes arising" under the Agreement; and the Agreement "and any Dispute" are "governed by and construed and enforced in accordance with" the chosen substantive law.

V. ARBITRATION AGREEMENT

11 of the 15 Agreements include agreements to arbitrate (the "Arbitration Agreements"), i.e., agreements that defined disputes shall be finally resolved by arbitration. The parties to six of these Arbitration Agreements have redacted some or all provisions of their Arbitration Agreements from the non-confidential versions of their Agreements filed with the Securities and Exchange Commission, as discussed in this Part V.

At least eight of these 11 Arbitration Agreements provide for administration by an arbitral institution in accordance with that institution's rules.[2] The parties to most of these Arbitration Agreements have not expressly chosen the law governing their Arbitration Agreement, or the procedural law applicable to the arbitration. One Agreement provides, however, in its governing law provision, "notwithstanding the applicable [state of the United States] substantive law, any arbitration, decision, or award . . . and the validity, effect, and interpretation of the arbitration provision shall be governed by the Federal Arbitration Act." Another Agreement provides that the "arbitration will be governed by the United States Arbitration Act, 9 U.S.C. §§ 1-16 [Chapter One of the FAA], to the exclusion of any inconsistent state Law."

A. Scope

[2] The parties to three Arbitration Agreements have redacted this information from the versions of their Agreements filed with the Securities and Exchange Commission. The institutions named in eight Arbitration Agreements are: the American Arbitration Association (AAA-ICDR), the International Chamber of Commerce (ICC), the International Institute of Conflict Prevention and Resolution (CPR), the Judicial Arbitration and Mediation Services, Inc. (JAMS), and the World Intellectual Property Organization (WIPO). The Arbitration Agreements choose the institutions' rules in effect on the date of commencement of proceedings.

In defining the categories of disputes to be arbitrated, the parties to these Agreements did not adopt the model clauses provided by arbitral institutions.[3] Instead, they define the scope of disputes to be submitted to arbitration as those arising out of or relating to the Agreement except for disputes to be escalated to a party for its unilateral decision, to be referred to expert determination, or to be litigated. For example, one Arbitration Agreement provides for the submission to arbitration of "any dispute, claim or controversy of any nature arising out of or relating to" the Agreement, "including any action or claim based on tort, contract or statute, or concerning the interpretation, effect, termination, validity, performance or breach" of the Agreement, except for disputes "for which a Party has final decision-making" rights, and "any dispute, controversy or claim that concerns" the "validity, enforceability, or infringement of any patent, trademark, or copyright" or "any antitrust, anti-monopoly or competition law or regulation, whether or not statutory." This approach can lead to parallel litigation and arbitration proceedings, jurisdictional disputes, and inconsistent judgments.

B. Seat

These are global research, development, and commercialization agreements between parties organized under the laws of different countries (nine Agreements), or that involve property located abroad (e.g., intellectual property, factories), envisage performance or enforcement abroad (e.g. regulatory filings and regulatory activities worldwide), or have some other reasonable relation with one or more foreign countries (all Agreements). It is assumed, for purposes of this paper, that these Agreements fall under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards,[4] enforced in

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[3] For example: "Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be determined by arbitration . . . ." (International Centre for Dispute Resolution).

[4] Article 1(1) of the New York Convention provides that it "shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought." Article 1(3) provides "When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply

United States federal courts in accordance with Chapter 2 of the Federal Arbitration Act, 9 U.S.C. §§ 201-208.[5]

With that in mind, the place, or legal seat, of arbitration, is the jurisdiction where the arbitration award is "made" for purposes of the New York Convention, and should be chosen carefully, because it is the only jurisdiction in which an action to annul the award may be brought,[6] and usually determines the procedural law of the arbitration, generally the seat's arbitration legislation, applied by the courts of the seat in exercising supervisory authority over the arbitration.[7]

In three of the 11 Agreements in which the parties have chosen arbitration, the parties have chosen New York, New York, as the seat, using a model clause, e.g., "The seat [or place] of the arbitration shall be [city, (province or state), country]." In three other Agreements, the parties appear to have confused the seat, or legal jurisdiction of the arbitration with the physical location of the hearings, i.e., disputes "submitted to [arbitral institution] in New York, New York for arbitration"; any arbitration "will be held in New York, New York, United States, unless another location is mutually agreed by the Parties"; and the "location of the arbitration will be Zurich, Switzerland." In five Agreements, the parties redacted the

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the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration."

[5] Of interest to litigators in this field defending an action first brought in state court are provisions in Chapter 2 of the FAA on federal subject matter jurisdiction, removal, and venue, among others. *See also* Gary B. Born, *The New York Convention: A Self-Executing Treaty*, 40 Mich. J. Int'l L. 115, 132 (2018) (arguing that Articles II through VI of the New York Convention "are best considered as self-executing treaty provisions, directly applicable in United States and other domestic courts," and, at 148-50, demonstrating that the phrase "enforced in United States courts" in § 202 of the FAA refers to United States federal courts).

[6] Under article V(1)(e) of the Convention, recognition and enforcement of the award may be refused only if the party against whom it is invoked proves to the competent authority where recognition and enforcement is sought that the "award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made."

[7] *See* Gary B. Born, *International Arbitration: Law and Practice* 118-19 (2d ed. 2016) ("The procedural law of the arbitration is distinguishable from the law governing the arbitration agreement and the law governing the underlying contract.").

seat of arbitration from the non-confidential versions of their Agreements filed with the Securities and Exchange Commission.

C. Arbitrators

Nine of the 11 Arbitration Agreements provide that disputes submitted to arbitration will be heard and determined by a panel of three arbitrators. Two provide that one arbitrator will hear and determine the dispute, unless the parties agree to a panel of three arbitrators. Six of 11 Arbitration Agreements expressly state that each of the arbitrators shall have qualifications specific to the biopharmaceutical industry, i.e., three arbitrators "experienced in the biopharmaceutical industry"; three arbitrators "with at least [redacted] of relevant experience in the pharmaceutical and biotechnology industry"; three arbitrators who "shall have experience in pharmaceutical licensing disputes"; three arbitrators who are "experienced in the business of pharmaceuticals"; three arbitrators with "expertise with respect to development in the pharmaceutical and biotechnology industries"; and one or three arbitrators "knowledgeable in the subject matter at issue in the dispute and acceptable to both parties."

One Agreement contains a lengthy definition of the term "Arbitrator" in its definition section, stating, for purposes of certain disputes, that the arbitrator must be " a qualified attorney in private practice or a retired judge . . . admitted to practice law in the United States, with expertise in intellectual property matters in the pharmaceutical or biotechnology industry, . . . [who] is not from academia, . . . has not worked for or been engaged by either Party or its Affiliates, or any other portfolio companies of its material investors, in the [redacted] period immediately prior to selection of [the arbitrator or who] does not own equity or debt in either Party or its Affiliates (other than equity or debt owned through a broad based mutual fund or exchange traded fund)." For disputes of a financial nature, this definition specifies that the qualified attorney or retired judge must have "relevant experience in financial disputes pertaining [to] [the] pharmaceutical products."

One Arbitration Agreement, specifying three arbitrators "experienced in the business of pharmaceuticals," adds that "if the issues in dispute involve scientific, technical, or commercial matters," the arbitrators "shall engage experts" with "educational training or industry experience sufficient to demonstrate a reasonable level of relevant scientific, medical and industry knowledge, as necessary to resolve the dispute."

Perhaps anticipating disputes about arbitrator qualification, an Arbitration Agreement, specifying that three arbitrators must have experience in pharmaceutical licensing disputes, adds that an arbitrator "shall be deemed to meet this qualification unless a party objects within [redacted] after the arbitrator is nominated."

Most Arbitration Agreements also provide that each party will appoint one arbitrator, and the two party-appointed arbitrators will select the third arbitrator within a specified period, or else the designated arbitral institution will appoint the third arbitrator from its panel. Some Arbitration Agreements simply provide that each party will appoint one arbitrator, and the institution will appoint the third arbitrator, e.g. "with one arbitrator being appointed by each party and the third arbitrator being appointed by the [institution]."

D. Other Provisions

The Arbitration Agreements reference, and may incorporate, the rules of arbitral institutions in effect as of the date of submission of the claim to arbitration. They provide that the language of the arbitration shall be English, and include provisions on confidentiality of the proceedings (subject to superseding obligations to disclose in court, to the Securities and Exchange Commission, or to other authorities); limiting damages that may be awarded (compensatory, not punitive, special, or consequential); waiving appeal from any decision of the arbitrators or from an award; suspending cure and limitations periods pending arbitration; and consolidating any related arbitrations. Several Agreements provide for "baseball arbitration" of discrete issues, in which the parties submit competing terms of decision, and the arbitrator

must select one party's submissions, or the parties submit competing financial offers and the arbitrator must award the amount of one party's offer.

The Arbitration Agreements take different positions on the scope of discovery. One provides that, unless the parties agree on rules governing discovery and evidence, the United States Federal Rules of Civil Procedure will govern discovery, and the United States Federal Rules of Evidence will govern evidence, in the arbitration. In contrast, another Arbitration Agreement provides that "[u]nless the arbitrators expressly determine otherwise, neither Party shall be required to give general discovery of documents, but may be required only to produce specific, identified documents that are relevant to the Dispute."

VI. CONCLUSION

If escalated disputes are not resolved by the parties' executives, the complex dispute resolution provisions of these Agreements can lead to disputes about the scope and exercise of a joint committee's decision rights; the scope and exercise of a party's unilateral decision rights; whether these types of disputes are to be resolved by a court or an arbitrator; and whether a court or an arbitrator decides the threshold jurisdictional dispute. The provisions dividing disputes into those for a party's decision, expert determination, arbitration, or litigation, or some combination of those procedures, complicated by provisions excluding certain disputes from arbitration, can lead to, or exacerbate, disputes about the scope of a dispute; whether the dispute should be referred to expert determination, arbitrated, or litigated; and whether a court or an arbitrator should decide the threshold jurisdictional dispute. Finally, the provisions excluding certain patent and antitrust disputes from arbitration can lead to parallel arbitration and litigation proceedings, and inconsistent judgments.