

Licensing as the currency of the industry

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Few medicines sold by the Basel groups today were discovered entirely in their own laboratories. A large share of their portfolios originates in universities, biotech companies or other pharmaceutical firms, from which the rights were acquired by licence, collaboration or acquisition. Roche's growth since the 1990s rests to a considerable extent on its majority holding in Genentech, acquired in 1990 and completed by the purchase of the remaining minority in 2009, and on its controlling stake in the Japanese company Chugai, acquired in 2002.¹ Novartis has likewise built much of its pipeline through in-licensing and acquisitions, including the purchase of companies active in gene therapy, radioligand therapy and cardiovascular medicine.²

The licence is the legal instrument through which these transfers take place. Under Swiss law it is an innominate contract, not specifically regulated in the Code of Obligations, whose content is determined by the agreement of the parties within the limits of patent law, competition law and the general rules of contract law.³ International pharmaceutical licences are usually governed by the law of New York, England or Switzerland, with arbitration clauses that often designate Zurich, Geneva or London as the seat. Swiss law is popular as a governing law in these agreements because it is considered neutral, predictable and respectful of party autonomy.⁴

A licence typically grants the licensee the right to develop, manufacture and commercialise a product in a defined territory and field, often exclusively. The licensor keeps ownership of the patents and frequently retains some rights, for example for particular territories or indications. Many agreements combine a licence with a research collaboration, a supply arrangement and a governance structure in which joint committees of both parties supervise development. Because these relationships can last for decades, the provisions on termination, change of control and the

treatment of improvements are at least as important in negotiation as the headline financial terms.

1 Notes

1. On Roche's acquisition of a majority stake in Genentech in 1990, the purchase of the remaining minority in 2009 for about USD 47 billion, and the alliance with Chugai Pharmaceutical concluded in 2001–2002, see Roche's annual reports and the corporate history literature. Figures to be verified. ↩
2. Novartis annual reports on acquisitions such as AveXis (2018), Advanced Accelerator Applications (2018), Endocyte (2018) and The Medicines Company (2020). To be verified. ↩
3. On the licence agreement as an innominate contract under Swiss law and the applicable provisions of the Code of Obligations by analogy, see the standard Swiss literature on licensing law and Art. 34 PatG on the grant of licences. To be verified. ↩
4. On the choice of Swiss law and of Swiss seats of arbitration in international licence and collaboration agreements in the life sciences, see the Swiss Rules of International Arbitration and practitioner literature. To be verified. ↩

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