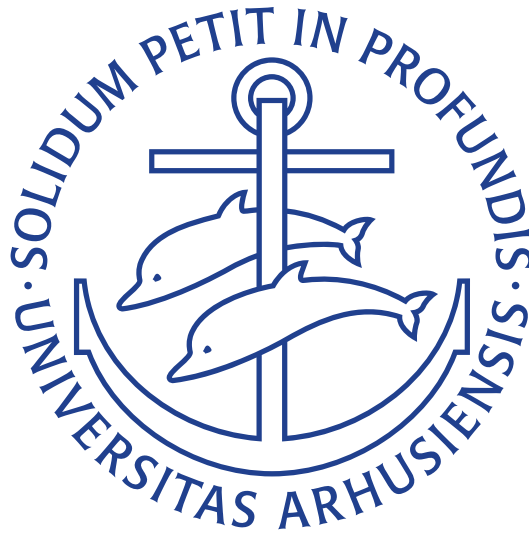


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Willem C. Vis International Commercial Arbitration Moot
27th March – 1st April 2021 in Vindobona

AARHUS UNIVERSITY



MEMORANDUM FOR CLAIMANT

Swiss Chambers' Arbitration Institution Case No: 300610-2020

On behalf of CLAIMANT	against RESPONDENT 1	and RESPONDENT 2
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TABLE OF ABBREVIATIONS

ABBREVIATION	REFERENCE
Agreement	Purchase, Collaboration and License Agreement
App	Appendix
Arbitration Clause	Section 14 of the Agreement
Art/Arts	Article/Articles
CLAIMANT	RespiVac plc
COVID-19	SARS-CoV-2
ed/eds	Editor/editors
edn	Edition
et al	<i>Et alia</i> (and others)
EUR	Euro
Ex C	CLAIMANT's Exhibit No
Ex R	RESPONDENT's Exhibit No
ICC	International Chamber of Commerce
IP	Industrial property or other intellectual property
Letter Fasttrack	Letter by Fasttrack (2 October 2020)
Letter Langweiler	Letter by Langweiler (2 October 2020)
Letter SCAI	Letter by SCAI (17 August 2020)
Letter Sinoussi	Letter by Sinoussi (4 September 2020)
n	Note
No	Number
NoA	CLAIMANT's Notice of Arbitration

ABBREVIATION	REFERENCE
p/pp	Page/Pages
para/paras	Paragraph/Paragraphs
PO1	Procedural Order No 1 (9 October 2020)
PO2	Procedural Order No 2 (7 November 2020)
RESPONDENT 1	CamVir Ltd
RESPONDENT 2	VectorVir Ltd
RESPONDENTS	RESPONDENT 1 and RESPONDENT 2
RNoA	RESPONDENTS' Answer to Notice of Arbitration
Ross	Ross Pharmaceuticals
SCAI	Swiss Chambers' Arbitration Institution
sec/secs	Section/Sections
Tribunal	The Tribunal of the Arbitration case no 300610-2020, respectively, Prof. Françoise Sinoussi, Mr Ilja Ehrlich, and Dr Youtou You
v	versus
Vector/Vectors	GorAdCam viral vector/GorAdCam viral vectors
vol	Volume

STATEMENT OF FACTS

- 1 **RespiVac plc** ('CLAIMANT') is a Mediterraneo-based company which engages in the research and production of vaccines against respiratory diseases, including COVID-19. **CamVir Ltd** ('RESPONDENT 1') is based in Equatoriana and is the contract manufacturing organisation of the Roctis Group, the biggest biopharmaceutical company in the world. **VectorVir Ltd** ('RESPONDENT 2') is based in Equatoriana and owns the patent for the GorAdCam vector ('Vector'), used for the development of vaccines against COVID-19. RESPONDENT 2 is a sister company of RESPONDENT 1.
- 2 On **15 June 2014**, RESPONDENT 2 sells an exclusive, worldwide GorAdCam-license to Ross, the biggest life-science company in Danubia ('Ross Agreement'). The license allows Ross the exclusive right to use RESPONDENT 2's patented Vector for the research and production of a vaccine against malaria and 'related infectious diseases'. Ross pays an additional EUR 600,000 for RESPONDENT 2 to include 'related infectious diseases' in the license.
- 3 On **10 September 2018**, RESPONDENT 2 grants an exclusive license to RESPONDENT 1 for the use of the Vector. The license does not mirror the Ross Agreement, granting rights for applications 'with the exceptions of malaria and related infectious diseases', but instead covers 'all applications with the exceptions of malaria'.
- 4 In **December 2018**, CLAIMANT and RESPONDENT 1 initiate negotiations of the 'Purchase, Collaboration and License Agreement' ('Agreement'). The negotiations are based on a prior contract drafted by RESPONDENT 2. In addition to minor changes, RESPONDENT 1 adds section 16, 'Purchase obligations for vaccine production', to the Agreement. Section 16 obliges CLAIMANT to purchase the necessary base materials for vaccine production from RESPONDENT 1. The dispute resolution clause in section 14 and virtual hearings are not discussed during the negotiations.
- 5 On **1 January 2019**, CLAIMANT and RESPONDENT 1 effectuate the Agreement under which CLAIMANT purchases a batch of Vectors along with the right to use them for the research of vaccines against 'infectious and non-infectious respiratory diseases'. This wording was included

despite the fact that RESPONDENT 1's negotiator knew that Ross was of the opinion that its exclusive license included 'infectious respiratory diseases'.

- 6 On **1 May 2020**, CLAIMANT is made aware of Ross' exclusive right to use the Vectors under the Ross Agreement and expresses its concerns about a possible infringement to RESPONDENT 1 the following day. On 4 May 2020, RESPONDENT 1 rejects CLAIMANT's concerns.
- 7 On **15 July 2020**, CLAIMANT initiates arbitration at the Swiss Chambers' Arbitration Institution against RESPONDENT 1 and RESPONDENT 2 which consents to join the proceedings. In RESPONDENTS' Answer to the Notice of Arbitration ('RNoA'), they request to join Ross. Both Ross and CLAIMANT object to this request. Due to the consequences of COVID-19, the Tribunal proposes a remote hearing to avoid postponements, but RESPONDENTS object.

INTRODUCTION

- 8 At its core, this case is about RESPONDENT 1 selling a right which apparently was not RESPONDENT 1's to sell. CLAIMANT relies on this right for the use of the Vectors to develop a vaccine against COVID-19. For this purpose, it is decisive that CLAIMANT can be confident that it has indeed obtained the right agreed upon. However, RESPONDENT 1 has failed to reassure CLAIMANT that its right does not infringe Ross' exclusive license to use the Vectors. Like Damocles, CLAIMANT now has a 'sword' hanging over its head because Ross can pursue its right any time. To obtain clarity, CLAIMANT has been forced to commence the present proceedings.
- 9 CLAIMANT is on the brink of commercialising a world-wide vaccine against COVID-19, and therefore, the need for an efficient arbitral procedure is of the utmost importance. CLAIMANT expects and is still prepared for an efficient process, but RESPONDENTS insist on putting obstacles in the way. These obstacles will not only prolong CLAIMANT's position of uncertainty; CLAIMANT also stands to lose its market share to competitors in the meantime.
- 10 Addressing the procedural obstacles, Ross cannot be joined to the proceedings because not all parties have consented to arbitrate with one another. Even if they had consented, joining Ross would unnecessarily prolong the proceedings (**Part I**). Furthermore, a hearing can and should be held remotely if necessary. This will ensure efficient proceedings, while an in-person hearing would only ensure delays (**Part II**).
- 11 On the merits of the case, RESPONDENT 1's sale of Vectors along with the purchase obligation in section 16 constitutes a sale of goods within the meaning of the CISG, and the CISG therefore applies to the Agreement (**Part III**).
- 12 Addressing the central question of the dispute, RESPONDENT 1 knew that the Vectors were, at the very least, encumbered with a possible third-party IP-right. Accordingly, RESPONDENT 1 breached its obligation to deliver goods free from third-party IP-rights or -claim pursuant to Art 42 CISG (**Part IV**).

PART I: ROSS SHOULD NOT BE JOINED TO THE ARBITRAL PROCEEDINGS

- 13 CLAIMANT and RESPONDENT 1 are parties to the Agreement which contains the Arbitration Clause [Ex C3, sec 14]. RESPONDENT 2 and Ross are parties to another agreement, the Ross Agreement, also containing an arbitration clause [Ex R3, sec 14]. To join Ross, RESPONDENTS rely on the mere fact that both arbitration clauses point to the Swiss Rules even though Ross is neither a signatory nor has any relation to the Agreement [RNoA, para 22].
- 14 RESPONDENTS' request to join Ross raises two separate issues. First, the Tribunal must ensure that it is competent to order a joinder which is only the case if CLAIMANT and Ross have consented to arbitrate with one another. Second, the Tribunal must assess whether it would be suitable to join Ross to the proceedings. This second issue only becomes relevant if the Tribunal actually has the competence to join Ross. With regard to these issues, CLAIMANT and Ross have objected to joined arbitral proceedings, both on grounds of competence and suitability [Letter SCAI; Letter Sinoussi; Letter Langweiler].
- 15 RESPONDENTS argue that both CLAIMANT and Ross have consented to arbitrate with each other merely because they have chosen to arbitrate under the Swiss Rules in two identically worded, but separate arbitration clauses [RNoA, para 22; Ex C3, sec 14; Ex R3, sec 14]. Nonetheless, consent to arbitrate can only follow from either the parties' signature to the same arbitration agreement or in limited cases, the parties' behaviour indicating an intention to arbitrate. Grasping at straws, RESPONDENTS try to stretch the concept of consent, relying on the fact that CLAIMANT, RESPONDENTS, and Ross happen to have chosen the same set of institutional rules.
- 16 Following this, CLAIMANT submits that the Tribunal should reject RESPONDENTS' request to join Ross. First, the Tribunal lacks the competence to order a joinder because not all parties have consented to arbitrate with one another (1.). Second, even if the parties had consented to arbitrate with each other, it would not be suitable to join Ross (2.).

1. CLAIMANT and Ross Have Not Consented to Arbitrate with One Another

- 17 CLAIMANT has only consented to arbitrate with RESPONDENTS; not Ross [NoA; Ex C3]. As arbitration is a creature of consent, Ross can only be joined if CLAIMANT, RESPONDENTS, and

Ross all consent [see Art 8 DAL; Art II NYC; Titan Unity case; First Options case; Moses, p 2; Born 2014, p 250; Lew et al, para 6.1; Hanotiau 2001, p 254; Park 2009, para 1.01].

- 18 The Arbitration Clause in the Agreement is only an expression of consent between CLAIMANT and RESPONDENT 1, whereas the Ross Agreement is an expression of consent between RESPONDENT 2 and Ross [Ex C3; Ex R3]. CLAIMANT, RESPONDENTS, and Ross come from countries whose contract law is a verbatim adoption of UPICC which contains the principle of ‘privity of contract’ [PO1, para 3; Art 1.3 DCL, ECL, and MCL]. It follows from this principle that rights and obligations only apply to the contracting parties [Vogenauer in Vogenauer, Art 5.2.1, para 3; Collins, p 302; Hanotiau 2010, p 7]. As only CLAIMANT and RESPONDENT 1 are signatories to the Agreement, they are not obliged to arbitrate with anyone else. The same applies to the parties of the Ross Agreement. It is clear that neither the Agreement nor the Ross Agreement provide definite consent.
- 19 What is equally clear, is that CLAIMANT and Ross have not shown any intent to arbitrate with one another through their behaviour. Such behaviour can be present if the non-signatory has participated in the negotiation or conclusion of the agreement; the fulfilment of the obligations; or by referencing between the agreements [E. Holding case; Dalico case; Pyramids case; see Park 2009, paras 1.11-12; Born 2014, pp 1427-31]. Neither CLAIMANT nor Ross has shown any such behaviour to indicate intent to arbitrate with each other. In fact, CLAIMANT did not know about the existence of the Ross Agreement until May 2020 which is more than a year after the conclusion of the Agreement [Ex C5; Ex C3]. CLAIMANT and Ross have therefore not shown any intention to arbitrate with each other.
- 20 RESPONDENTS argue that CLAIMANT and Ross have consented, simply because they have adopted identical wording in their respective arbitration clauses [RNoA, para 22]. RESPONDENTS ignore the fact that the contracts are independent. The Agreement was concluded almost five years after the Ross Agreement, and both agreements were concluded between different parties. The mere occurrence of identical clauses does not constitute consent to arbitrate across agreements [Born 2014, pp 2583-84].
- 21 Consequently, CLAIMANT and Ross have not expressed any consent to arbitrate with one another through the Agreement or the Ross Agreement, their behaviour, or the identically worded

arbitration clauses. Recognising the fact that such consent is not present, RESPONDENTS argue that CLAIMANT and Ross have consented solely by agreeing to arbitrate under the Swiss Rules [RNoA, *para* 22]. However, RESPONDENTS' argument is based on a misinterpretation of the Swiss Rules because the adoption of the Swiss Rules does not constitute consent (1.1.).

1.1. The Adoption of the Swiss Rules Does Not Constitute Consent

22 RESPONDENTS' argument, that the mere reference to the Swiss Rules constitutes consent, fails to take into account the consensual nature of arbitration. The Swiss Rules contains a provision on the procedural aspects of joinder in Art 4(2) Swiss Rules after which the Tribunal can decide on a joinder 'after consulting with all of the parties [...] taking into account all relevant circumstances'. Although not explicitly stated, the provision still requires consent which a mere reference to the Swiss Rules is not. RESPONDENTS' interpretation rests on a novel understanding of the provision which CLAIMANT and Ross could not reasonably have foreseen. In fact, there is no published case using Art 4(2) Swiss Rules as the sole foundation for joining a third person [Bamforth/Maidment, *p* 13; Born 2014, *p* 2560].

23 According to the wording of Art 4(2) Swiss Rules, the provision is nothing more than a procedural framework (1.1.1.). This is further supported by the understanding of other institutes' provisions concerning joinder (1.1.2.). Last, it would lead to unwanted consequences if the reference to the Swiss Rules constitutes consent (1.1.3.).

1.1.1. Art 4(2) Swiss Rules Is Merely a Procedural Framework

24 Art 4(2) Swiss Rules only provides the procedural framework for joining third persons if there is consent to joinder [Voser, *p* 396; Meier 2007, *p* 107]. Scholars agree that the mere adoption of the Swiss Rules is not sufficient to constitute consent [Girsberger/Voser, *para* 583; Bärtsch/Petti in Zuberbühler *et al*, Art 4, *n* 46; Marzolini, *pp* 126-27; Born 2014, *pp* 2560-61]. It follows from both the wording and placement of the provision that it is only a procedural framework [see Born 2014, *p* 1322; Fontaine/Ly, *p* 151].

25 First, it is evident from the wording of Art 4(2) Swiss Rules that it does not provide the Tribunal with a general competence to order a joinder without the parties' consent [see Bärtsch/Petti in Zuberbühler *et al*, Art 4, *n* 46; Habegger 2012, *p* 280]. Second, Art 4(2) Swiss Rules is placed in

section I, ‘Introductory Rules’, which contains rules concerning the procedure for commencement of arbitral proceedings. By contrast, the provisions in section III, ‘Arbitral Proceedings’, explicitly give the tribunal competence in certain matters. An example is the rule of ‘kompetenz-kompetenz’ in Art 21(1) Swiss Rules after which the tribunal ‘shall have the power to rule on any objections to its jurisdiction [...]’ [Berger/Pfisterer in *Zuberbühler et al*, Art 21(1), n 5; see *Redfern/Hunter*, para 5.105; *Rubino-Sammartano*, p 584]. If Art 4(2) Swiss Rules was meant to be a general competence for the Tribunal, it would have been placed in section III among the other rules containing general competence.

- 26 As described by one scholar: ‘Article 4(2) cannot serve as a substitute for the consent of either the parties to the arbitration or the third person’ [Habegger 2012, p 280]. Accordingly, Art 4(2) Swiss Rules is merely a procedural framework; it does not provide consent to joinder.

1.1.2. Other Joinder Rules Do Not Constitute Consent

- 27 The Tribunal should interpret Art 4(2) Swiss Rules in light of other joinder rules because the joinder provision in the Swiss Rules is based on the same underlying principles as other institutional joinder provisions [Bamforth/Maidment, p 12; Bärtsch/Petti in *Zuberbühler et al*, Art 4, n 39-40; *Hanotiau 2020*, para 770]. In the present case, the need for a comparative interpretation is supported by the fact that CLAIMANT did not specifically ask to arbitrate under the Swiss Rules but instead ‘under the rules of a “respected and neutral international arbitration institutions [...]”’ [sic] [PO2, para 31].
- 28 Arbitration institutes have adopted provisions to provide the procedural framework for joinder to navigate through complex multi-party proceedings; not to provide consent [Art 14 Vienna Rules; Art 7 ICC Rules; Art 27.1(a) HKIAC Rules; Art 7 SIAC 2016 Rules; see *Born 2014*, pp 2569-70; *Hanotiau 2009*, p 35]. Some of these joinder rules are, like Art 4(2) Swiss Rules, silent regarding consent, while others deal expressly with it.
- 29 First, the interpretation of institutional provisions that are similarly worded to Art 4(2) Swiss Rules confirms that these rules are procedural in nature, and that consent must be found elsewhere [Art 14 Vienna Rules; Art 19 DIS Rules; Art 7 ICC Rules]. Art 14 Vienna Rules is one of these similarly worded provisions. It states that the tribunal, like in Art 4(2) Swiss Rules, shall decide ‘upon the request [...] after hearing [the parties] as well as after considering all relevant

circumstances’. According to commentators, the mere ‘reference to the Vienna Rules, and thus to Art 14, cannot be understood as a general advance consent to the joinder of third parties’ [Oberhammer/Koller, p 95]. Art 4(2) Swiss Rules and Art 14 Vienna Rules are based on the same underlying principles and consist of almost identical wording. Therefore, they must be understood the same: a reference to institutional rules does not constitute consent to joinder. Doctrine follows the same interpretation for other joinder rules of similar nature, such as Art 19 DIS Rules and Art 7 ICC Rules [Heckel/Sessler in *Flecke-Gimmarco et al*, Art 19, para 15; Meier 2018, para 8].

30 Second, provisions which deal expressly with consent also confirm the interpretation that Art 4(2) Swiss Rules does not constitute consent to joinder in the present case. Even these other provisions require more than the mere adoption of the rule to constitute consent [Art 27.1(a) HKIAC Rules; Art 7 SIAC 2016 Rules; Art 24(1)(b) SIAC 2013 Rules; Born 2014, p 2603; Choong et al, para 7.27; Savage/Dunbar in *Mistelis*, p 803]. Art 27.1(a) HKIAC Rules is illustrative, as it only presumes consent if the third person has agreed to the HKIAC Rules and is a party to the same arbitration agreement as the original parties [Kondev, p 111; Moser/Bao, para 10.15]. In these situations, consent is already established. CLAIMANT is not a party to the Ross Agreement, and Ross is not a party to the Agreement. Thus, CLAIMANT has not consented to joined arbitral proceedings by reference to the Swiss Rules, even if it was interpreted in accordance with the expansive wording of the HKIAC Rules or similar rules.

31 Finally, case law shows that the mere adoption of institutional rules cannot substitute consent to joinder. In the *First Media case*, the tribunal took a similar approach to the one advocated by RESPONDENTS; it found that a party had consented to joinder by the mere adoption of SIAC 2007 Rules. The award was later held unenforceable by the Supreme Court of Singapore. The court stated that any provision allowing forced joinder ‘must be decidedly unambiguous’ which was not the case with Art 24(b) SIAC 2007 Rules. In its decision, the court found that a forced joinder would violate the consensual nature of arbitration [First Media case, para 197]. Similarly, Art 4(2) Swiss Rules does not decidedly unambiguously establish consent, and joining Ross against its and CLAIMANT’s objection would be equally controversial considering the consensual nature of arbitration.

1.1.3. It Would Lead to Unwanted Consequences If Adoption of the Swiss Rules Constitutes Consent

32 If parties' acceptance of the Swiss Rules was the only requirement for joining additional parties to proceedings, CLAIMANT could possibly be forced to arbitrate with whomever has adopted the Swiss Rules. This would mean that CLAIMANT could be joined to the 116 different cases pending at SCAI as of 31 December 2019 [SCAI *Statistics 2019*]. When the Agreement was concluded, CLAIMANT had no knowledge of the Ross Agreement, like it had no knowledge of any other agreement containing an arbitration clause with reference to the Swiss Rules. Therefore, if Art 4(2) Swiss Rules is understood in accordance with the interpretation proposed by RESPONDENTS, it would be impossible to foresee with whom one could be forced to arbitrate.

2. Even If the Parties Had Consented to Joint Arbitral Proceedings, the Tribunal Should Not Join Ross

33 Even if the Tribunal finds that it is competent to order a joinder, it must assess whether it should join Ross considering 'all relevant circumstances' [Art 4(2) *Swiss Rules*]. This expression cannot be put into a formula; it is a broad term and can include a wide range of different circumstances depending on the specific case, including the fact that both CLAIMANT and Ross object [see *Schramm*, paras 60-66; *Bamforth/Maidment*, p 13]. Case law and scholars agree that the relevance of the third party, issues of confidentiality, efficiency, and issues of enforceability must all be weighed [First Media case, para 197; *Born 2014*, pp 2594-95; *Bärtsch/Petti in Zuberbühler et al*, Art 4, n 46; *Kondev*, p 87].

34 In the present case, the Tribunal must take the following into consideration. First, there is no link between CLAIMANT and Ross, and involving Ross is unnecessary to solve the dispute between CLAIMANT and RESPONDENT 1 (2.1.). Second, joining Ross would lead to an inefficient resolution of the dispute between CLAIMANT and RESPONDENT 1 (2.2.). Third, joining Ross would lead to the exchange of confidential information between competing companies (2.3.). Last, the enforceability of the award would be jeopardised if Ross is joined to the arbitral proceedings (2.4.). An overall assessment of all these circumstances leads to the conclusion that Ross should not be joined.

2.1. Ross Is of No Relevance for the Outcome of the Dispute

35 The Tribunal must take into consideration that Ross is unnecessary to solve the dispute between CLAIMANT and RESPONDENTS [see *Bamforth/Maidment*, p 13; *Bärtsch/Petti in Zuberbühler et al*, Art 4, n 46; *Kondev*, p 87]. As it will be shown, either a mere assertion of a right or a fairly likely claim is sufficient to constitute a breach under Art 42 CISG [*infra*, paras 114-119]. The Tribunal can therefore conduct the assessment under Art 42 CISG without joining Ross, as all the relevant information, including witness statements and the Ross Agreement, is already included in this case [Ex C7; Ex R2; Ex R3]. Therefore, the outcome of the dispute between CLAIMANT and RESPONDENT 1 is not dependent upon the dispute between Ross and RESPONDENT 2.

36 Even more, Ross is unnecessary to the present case because CLAIMANT and Ross have no relation with each other. Joint arbitral proceedings are sensible and can be necessary if there is a direct economical or contractual link between the parties; however, no such link exists between the direct competitors, CLAIMANT and Ross [see *Dow Chemical case*; *Dutco case*; *Adgas case*; *Hanotiau 2020*, para 534; *Redfern/Hunter*, para 2.218]. First, CLAIMANT and Ross have contracted with two different parties [Ex C3; Ex R3]. Second, they are in different stages of the development of two independent vaccines [PO2, para 16]. Last, they are not working together in any other way. In fact, the only common ground of relevance to the case is that none of them consent to joinder [Letter Langweiler; Letter Sinoussi; Letter SCAI].

2.2. Joining Ross Would Be Inefficient to the Proceedings

37 Joining Ross will prolong the arbitral proceedings because it would lead to additional disputes and arguments for the Tribunal to address [see *Born 2016*, p 228]. Prolonging the proceedings cannot be accepted, as CLAIMANT is on the brink of finalising its vaccine [PO2, para 16]. With a successful vaccine, CLAIMANT stands to make annual net sales of between EUR 2 and 4 billion [PO2, para 6]. Every day the proceedings are prolonged is a day CLAIMANT cannot sell its vaccine. Accordingly, CLAIMANT will miss out on between EUR 5.5 and 11 million in daily net sales. CLAIMANT might even lose its potential market share to competitors in the meantime. Joining Ross will prolong the proceedings and conflict with a core value of arbitration: efficient dispute resolution [Art 15(7) *Swiss Rules*; see *Waincymer 2012*, pp 384-85; *Born 2014*, pp 2123-24].

2.3. Joining Ross Would Lead to Exchange of Confidential Information

- 38 Joining Ross will entail a flow of confidential information between CLAIMANT and Ross. Confidentiality must be regarded when commercial parties are involved; especially when they, like CLAIMANT and Ross, are direct competitors [see *First Media Case*, para 197; *Platte*, p 79; *Bamforth/Maidment*, pp 5-6; *Born 2016*, p 228].
- 39 Confidentiality is important for the protection of CLAIMANT's know-how and business strategy. For this reason, CLAIMANT and RESPONDENT 1 included a confidentiality clause in the Agreement [Ex C3, sec 10; PO2, para 30]. CLAIMANT's know-how consists of the data obtained through its vaccine research, in which it will invest up to EUR 400 million [PO2, App 1]. At present, CLAIMANT is ready to start the final trials of its vaccine, while Ross has not even started testing its vaccine on humans [PO2, para 16]. Maintaining this lead is important for CLAIMANT's business.
- 40 There is a risk that Ross gains access to CLAIMANT's research and business strategy if Ross is joined to the proceedings. During legal proceedings, all kinds of information and knowledge might become relevant to disclose. The present IP-dispute relates to vaccines against 'respiratory diseases', and resolving this dispute would require an understanding of CLAIMANT's vaccine in the context of this term. Additionally, arbitral proceedings will disclose sensitive information about CLAIMANT's business strategy. As examples, internal calculations, information regarding production and sales of the vaccine, and contractual information have already been presented [Ex C3; Ex C5; PO2, para 6; PO2, App 1]. In order to protect the confidentiality of the proceedings, it is vital for CLAIMANT that its direct competitor is not joined to the proceedings.

2.4. The Enforceability of the Award Would Be Jeopardised If Ross Is Joined

- 41 The Tribunal must take into account that joining Ross to the proceedings would jeopardise the award's enforceability. It follows from Arts II, V(1)(a), and V(1)(c) NYC that an award is unenforceable if the parties have not consented to joint arbitral proceedings [*Bridas II case*; *Dallah case*; *Pyramids case*; *Javor v Francoeur case*; *Sarhank case*; *First Media case*; *Waincymer 2012*, pp 542-43; *Bamforth/Maidment*, pp 6-7]. When assessing if Ross should be joined, it must be reiterated that RESPONDENTS argue that the Tribunal is competent merely because the parties have chosen

the Swiss Rules [RNoA, *para 22*]. Such interpretation of the Swiss Rules has not previously been seen in case law [*Bamforth/Maidment*, p 13; *Born 2014*, p 2560].

42 However, what can be deduced from case law is the consequences of a forced joinder solely based on the parties' choice of the same set of institutional rules [*First Media case*]. In *First Media case*, the tribunal had ordered a joinder without consent from all parties [*supra*, *para 31*]. The Supreme Court of Singapore found that the award was unenforceable because the mere adoption of the institutional rules was not sufficient to constitute consent. As neither CLAIMANT nor Ross has consented to joinder, but only have adopted the Swiss Rules, the risk of an unenforceable award is significant [see *Letter SCAI*; *Letter Sinoussi*; *Letter Langweiler*].

43 In conclusion, Ross should not be joined to the arbitral proceedings, as neither CLAIMANT nor Ross have consented to arbitrate with one another. The Agreement and the Ross Agreement do not provide consent to joint arbitral proceedings, nor does the mere adoption of the Swiss Rules. Even if CLAIMANT and Ross had consented, it would not be suitable to join Ross. Ross is an unnecessary third person, as it does not benefit the proceedings. On the contrary, it will entail problems, as the proceedings will be inefficient, confidential information will be exchanged, and the enforceability of the award will be jeopardised.

PART II: THE HEARING OF WITNESSES AND EXPERTS SHOULD BE CONDUCTED REMOTELY IF NEEDED

44 CLAIMANT agrees with the Tribunal that the hearing should be held remotely if needed [*Letter Sinoussi*]. CLAIMANT does not request a remote hearing regardless of the surrounding circumstances; only if it is impossible or inappropriate to conduct an in-person hearing. As clarified by the Tribunal, it will, under such circumstances, either have to postpone the hearing by at least four months or conduct the hearing remotely [*PO2*, *para 42(a)*]. Despite this postponement, RESPONDENTS oppose a remote hearing, claiming that the Tribunal lacks the necessary power and that a remote hearing is insufficient [*Letter Fasttrack*].

45 However, a remote hearing is a tried and tested approach that will entail integrity and efficiency. Modern technology ensures that the only difference between a remote hearing and an in-person

hearing is the fact that not all participants are physically in the same room. Technology is commonly used for communication in the commercial world, and businesses have requested a further use of remote hearings in arbitration [*Queen Mary 2019*, pp 26-29; *Piers/Aschauer*, pp 17-18]. It is therefore not surprising that remote hearings have been widely and successfully used in arbitration during the pandemic [*Bateson*, p 159; *Saunders*, p 101; *Mak*; *Lozano/Mazumy*].

46 CLAIMANT submits that the Tribunal holds the power to order a remote hearing (3.) and asks the Tribunal to use this procedural power to conduct the hearings remotely if needed (4.). Finally, implementing a remote hearing will result in an enforceable award that cannot be set aside (5.).

3. The Tribunal Can Order a Remote Hearing

47 CLAIMANT and RESPONDENT 1 agreed upon the Swiss Rules model arbitration clause with the addition that ‘[h]earings shall be held, at [the Tribunal’s] discretion, either in Vindobona or in the city where [RESPONDENT 1] has its place of business’ [*Ex C3, sec 14*]. The Arbitration Clause does not mention remote hearings nor a multitude of similar procedural issues. The Agreement only sets the framework for arbitration, which is far from uncommon, as parties to an agreement cannot foresee how to conduct the proceedings in a fair and efficient manner [*Born 2014*, pp 2144-45; *Hanefeld/de Jong*, p 250].

48 The Tribunal holds an inherent power to regulate the conduct of the proceedings where the Arbitration Clause is silent on a procedural matter [*Art 19(2) DAL*; *Art 15(1) Swiss Rules*; see *Focuhard et al*, para 1164; *Petrochilos*, para 5.125; *Redfern/Hunter*, para 5.15]. This power encompasses ordering a remote hearing (3.1.) which, in the present case, is confirmed through the provisions related to hearings in the Swiss Rules and DAL (3.2.). Contrary to RESPONDENTS’ allegations, this inherent power has not been restricted by the Agreement (3.3.).

3.1. The Tribunal Has an Inherent Power to Order a Remote Hearing

49 When CLAIMANT and RESPONDENTS consented to arbitration, they gave the Tribunal an inherent power to conduct the proceedings as it considers appropriate [see *Esso case*; *Casado case*; *Focuhard et al*, para 1164; *Born 2014*, p 2146; *Hanefeld/de Jong*, p 252; *Petrochilos*, para 5.125]. This is confirmed through the *lex arbitri* and choice of institutional rules made by CLAIMANT and RESPONDENT 1 [*Ex C3, sec 14*; *Art 19(2) DAL*; *Art 15(1) Swiss Rules*].

50 This inherent power is generally held to encompass full control of the proceedings, unless the parties agree otherwise [Art 19(2) DAL; *Born 2014*, p 2145; *Park 2012*, p 527; *Waincymer 2012*, p 115; *Lew et al*, para 21-65; *Fouchard et al*, para 1226; *Ali et al*, p 279]. Accordingly, the presentation of evidence, including the conduct of hearings, is within the Tribunal's discretion. This is supported by scholars and codifications of best practices, such as the IBA Rules [Art 8(2) IBA Rules; *Khodykin et al*, para 11.25; *Redfern/Hunter*, para 6.168; *Lew et al*, para 22-69; *Waincymer 2012*, p 723; *Ali et al*, p 280; *Holtzmann/Neuhaus*, p 696; *Fouchard et al*, para 1296]. As a tribunal can conduct hearings as it deems fit, it is only natural that the Tribunal, in the present case, has the power to order a remote hearing [see *Austrian Videoconference case*; *Bateson*, pp 159-60; *Scherer*, p 422; *Waincymer 2020*, pp 7-8].

3.2. Art 25 Swiss Rules and Art 24 DAL Confirm the Tribunal's Power

51 RESPONDENTS argue that the Tribunal's power is limited by Arts 25 Swiss Rules and 24 DAL [*Letter Fasttrack*]. When referring to these provisions, RESPONDENTS have made little effort to clarify which – if any particular – part it intends to rely on [*Letter Fasttrack*]. A reading of the provisions suggests that the relevant parts would be Arts 25(1) and (4) Swiss Rules and Art 24(1) DAL, as these are the only provisions relating to the conduct and location of the hearing. Contrary to RESPONDENTS' interpretation, the provisions only require the hearings to be oral; not in-person.

52 First, Art 24(1) DAL provides that 'the arbitral tribunal shall decide whether to hold oral hearings', and that 'the arbitral tribunal shall hold such hearings [...] if so requested by a party'. The only requirement set out by Art 24(1) DAL is that the hearing must be oral. A remote hearing meets this requirement, as it is oral as well [*Waincymer 2020*, p 7; *Scherer*, p 417; *Lim/Market*; see *Ortolani in Bantekas et al*, pp 669-70].

53 That the Tribunal can order a video hearing is best exemplified in the IBA Rules which provides specifically for such hearings [Art 8(1) IBA Rules; *Khodykin et al*, paras 11.10-23; *Girsberger/Voser*, para 1008]. CLAIMANT submits that Art 24(1) DAL should be interpreted in accordance with the IBA Rules. This is because the IBA Rules is based on the basic principles in the Model Law which DAL is a verbatim adoption of [see *Redfern/Hunter*, para 6.95; *Khodykin et al*, para 1.01; *Ortolani in Bantekas et al*, p 211].

54 Second, Arts 25(1) and (4) Swiss Rules embrace remote hearings. Art 25(1) Swiss Rules instructs tribunals to give parties notice of the time and place of an oral hearing [*Nater-Bass/Rowvinez in Zuberbühler et al*, Art 25, n 9; *Nater-Bass/Pfisterer*, para 8]. Like Art 24(1) DAL, this provision presumes an oral hearing but does not require an in-person hearing. This is confirmed by Art 25(4) Swiss Rules which states ‘that witnesses or expert witnesses be examined through means that do not require their physical presence at the hearing (including by videoconference)’. It follows that remote hearings are compatible with the Swiss Rules.

55 The Tribunal’s power to conduct a remote hearing is only codified for specific situations in Art 25(4) Swiss Rules. This provision confirms the Tribunal’s power to examine witnesses and experts in a manner it deems fit, e.g., through video hearings [*see Girsberger/Voser*, para 1009]. Such hearings are just one of the tools proposed, and Art 25(4) Swiss Rules actually verifies the Tribunal’s power to let everyone, and not only witnesses and experts, participate remotely [*see Nater-Bass/Pfisterer*, para 56; *Nater-Bass/Rowvinez in Zuberbühler et al*, Art 25, n 31].

3.3. The Agreement Has Not Otherwise Restricted the Tribunal’s Power

56 RESPONDENTS argue that the Arbitration Clause prohibits remote hearings even though this term neither appears in the Agreement nor was it discussed during the negotiations [*Ex C3*, sec 14; *Letter Fasttrack*; *PO2*, para 32]. This interpretation is not only incompatible with the wording of the Arbitration Clause but with the very purpose of arbitration; to provide efficient and fair solutions to commercial disputes [*see Waincymer 2012*, pp 384-85; *Redfern/Hunter*, para 6.53]. CLAIMANT therefore submits that the Arbitration Clause must be interpreted in a way that supports an efficient arbitral process. First, the Arbitration Clause only regulates the place of an in-person hearing; not whether it can be held remotely (3.3.1.). Second, even if the Arbitration Clause regulates remote hearings, such hearings meet the requirements set out in this clause (3.3.2.). Last, should the Tribunal find that the clause hinders remote hearings, it can and should adjust the Arbitration Clause (3.3.3.).

3.3.1. The Arbitration Clause Does Not Regulate Remote Hearings

57 CLAIMANT submits that the Arbitration Clause does not limit the Tribunal’s competence to order a remote hearing. The Arbitration Clause only regulates the location of an in-person hearing; a regulation applicable only when an in-person hearing is actually conducted [*Ex C3*, sec 14].

- 58 CLAIMANT and RESPONDENT 1 did not negotiate the wording of the Arbitration Clause, nor did they in any other way express subjective intent. The Tribunal must therefore interpret the clause as any reasonable business person in the same position as CLAIMANT would [PO1, para 4; Art 8(2) CISG; Art 4.1(2) DCL; see *Brunner et al in Brunner/Gottlieb*, Art 8, para 7; *Vogenauer in Vogenauer*, Art 4.1, para 5; *Spagnolo*, para 36]. A reasonable business person would read the clause for what it is; a choice of venue in case there is a need for an in-person hearing. She would also note that remote hearings are not mentioned in the clause, and that the wording does not demand an in-person hearing.
- 59 However, she would not interpret the clause expansively if it leads to a significant delay of the proceedings [PO2, para 42(a)]. An efficient interpretation is supported by a survey of businesses showing that ‘an overwhelming majority of respondents favour the greater use in the future of [...] “virtual hearing rooms”’ [*Queen Mary 2019*, pp 26-29; see *Piers/Achauer*, pp 17-18]. Therefore, the Arbitration Clause has not restricted the Tribunal’s power to conduct hearings remotely.

3.3.2. A Remote Hearing Meets the Requirements Set Out by the Arbitration Clause

- 60 Even if the Tribunal finds that the Arbitration Clause also regulates remote hearings, it does not prohibit such hearings. This follows from the fact that a remote hearing is functionally equivalent to having an in-person hearing. If the Arbitration Clause were to be construed formalistically, it is in fact possible to have virtual hearings which are technically and legally speaking conducted in either Vindobona or Oceanside.
- 61 First, the requirement of a hearing does not necessitate that all participants are at the same venue [Scherer, p 413; see *Waincymer 2020*, pp 6-7; *Bateson*, pp 159-60]. In fact, a remote hearing through video conference will mirror an in-person hearing on all relevant points: it will be oral, direct, and immediate [Scherer, p 411]. This is further supported by the view adopted by other arbitral institutions in light of the COVID-19 pandemic. As an example, the ICC describes an in-person hearing as a ‘live, adversarial exchange [...] by virtual means if the circumstances so warrant’ [ICC Guidelines, para 23; *Waincymer 2020*, p 7]. There is no reason why the same issue should be interpreted differently under the Swiss Rules.
- 62 Second, it is possible for a remote hearing to take place at the designated location. Conducting a fully remote hearing will in principle mean a delocalisation of the hearing [*Halla*, p 218; *Lanier*, p

6; Ganesh]. It follows that determining the location of the remote hearing presents unfamiliar problems. However, arbitral institutions have developed an approach, as evinced by the AAA Guidelines on remote hearings, according to which the tribunal can order that the ‘hearing will be deemed to have taken place in [locale/place of arbitration]’ [AAA Guidelines].

63 This approach encompasses a practical and flexible view which is a core characteristic of international arbitration [Born 2014, p 2123; Redfern/Hunter, para 6.01; Waincymer 2012, p 384]. Indeed, the approach merely develops on the long-accepted practice whereby the parties or the tribunal are free to decide on a seat of arbitration [Redfern/Hunter, para 3.59; Petrochilos, para 3.70; Fouchard et al, para 1240]. CLAIMANT submits that the Tribunal should adopt a similar standpoint and decide to formally hold the hearing in either Vindobona or Oceanside. All in all, a remote hearing meets the requirements set out by the Arbitration Clause.

3.3.3. If the Arbitration Clause Hinders a Remote Hearing, the Tribunal Can and Should Adjust It

64 Should the Tribunal find that the Arbitration Clause prohibits a remote hearing, it should adjust the Arbitration Clause to accommodate a remote hearing. Such procedural measure might be rare, but it is called for in the light of the present pandemic and the detrimental effects a delay of unknown length would have [*supra*, para 37].

65 In the present case, CLAIMANT and RESPONDENT 1 have exercised their party autonomy in the interest of efficient proceedings by agreeing to arbitrate under the Swiss Rules [Ex C3, sec 14; Art 15(7) Swiss Rules]. This exercise of party autonomy is as valid as – and at present more important than – the choice of a physical venue. Accordingly, scholars and case law alike hold that a tribunal can adjust the parties’ agreement if it does not conform with the agreement to ensure efficient proceedings [Larsen case; see Garuda case; Fiebinger/Hauser, p 180; Born 2014, pp 2149-54; Habegger 2017, p 128; see Redfern/Hunter, para 6.16]. Therefore, when the Arbitration Clause unexpectedly fails to ensure efficiency due to COVID-19, the Tribunal can and should adjust it.

4. The Tribunal Should Use Its Procedural Power to Conduct a Remote Hearing

66 CLAIMANT submits that the Tribunal should use its inherent procedural power to conduct the hearing remotely if needed. There is, in CLAIMANT’s view, nothing controversial about this

request which is made at the Tribunal's suggestion to facilitate the proper and expedient conduct of the hearing. Multiple arbitral institutions have already used remote hearings in a number of cases and have developed guidelines to ensure a proper conduct [ICC Guidelines; AAA Guidelines; HKIAC Guidelines; Seoul Guidelines]. Essentially, the Tribunal is requested to use an ordinary technology for an ordinary purpose, as this is the only way to protect the need for an efficient procedure.

67 RESPONDENTS have not shown why a remote hearing is not a viable solution, but instead point to concerns ‘more of a general perception than the result of an evaluation based on hard facts’ [PO2, para 38]. This far from suffices as grounds for denying a remote hearing which is clearly relevant in the present case. First, a remote hearing will ensure an efficient procedure and protect the purpose of the case (4.1.). Second, modern technology can retain the evidentiary value of a remote hearing (4.2.). Last, the security of a remote hearing can be ensured (4.3).

4.1. A Remote Hearing Ensures Efficiency in a Practical Manner

68 The need for efficiency is an ever-present trait of arbitration, and one which comes to the forefront in the present case [see *Waincymer 2012*, pp 384-85; *Redfern/Hunter*, para 6.53; *Born 2014*, pp 2123-24]. Having just entered Phase III-trials, CLAIMANT is on the verge of commercialising its vaccine [PO2, para 16]. However, CLAIMANT will not be in a position to benefit from this commercialisation if the license to the Vector violates Ross’ exclusive right. It is imperative that the dispute is resolved efficiently, as a delay will have detrimental effects on CLAIMANT’s economy [*supra*, para 37].

69 Insisting on an in-person hearing will in the best case scenario lead to a four-month postponement of the hearing [PO2, para 42(a)]. If there is anything to be learned from the pandemic, it is that nothing is certain. What is certain, however, is that a remote hearing will be unaffected by any regulations potentially imposed and will eliminate the risk of delays. Thus, a remote hearing can ensure efficient proceedings while an in-person hearing cannot.

70 Efficiency is not secured at the expense of practicality, as a time difference of 11 hours is not a problem [*Letter Sinoussi*; PO2, para 36]. First, one must remember that the difficulties arising from time zones do not occur as a result of remote hearings – the alternative is a long journey followed by days of getting used to a different time zone [see *Austrian Videoconference case*]. Whether remote

or in-person, hearings between parties from various time-zones require scheduling a suitable time for the hearing. One solution in the present case could be to have shorter hearing days which fit into reasonable hours in the respective time zones. This might prolong the procedure by a few days, but it is still more efficient than a four-month delay.

4.2. The Evidentiary Value of the Hearing Will Be Retained

71 Despite RESPONDENTS' concerns, a remote hearing will retain the credibility of witnesses and experts whereby the evidentiary value will be retained [PO2, *para 38*]. Modern technology allows for a proper assessment of credibility through basic equipment like microphones, webcams, and screens [*Credibility case; Waincymer 2020, pp 14-15; Hristova/Robach*]. As one scholar puts it, 'if you cannot see the whites of the witness' eyes, get a bigger screen' [Scherer, *p 416*]. If anything, technology makes for a better establishment of credibility, as a recording gives the Tribunal the opportunity to look over statements again.

72 RESPONDENTS argue that they may have to present explanations, presumably of technical nature [*Letter Fasttrack*]. However, moving to a digital platform does not hinder this. These platforms will enable experts to make use of screen sharing and live document editing. This will allow the Tribunal to determine the merits of the case on a well-informed basis.

4.3. A Remote Hearing Is Secure

73 Modern technology enables a secure hearing, and so accommodates RESPONDENTS' worry about data protection [PO2, *para 38*]. It is worth remembering that sensitive documents are shared and stored online regardless of the form of the hearing. Throughout their correspondence, the parties have shared multiple documents, some of which hold sensitive information [*Ex C3; Ex C5; PO2, para 6; PO2, App 1*]. The risk of a data breach is therefore not a new problem created as a result of a remote hearing.

74 Nevertheless, a secure hearing can be conducted, as secure solutions can be provided by tech companies [*see Waincymer 2020, p 17; Schaumann/Burger-Scheidlin, p 73*]. Encrypted platforms can and should be used to limit the risk to a minimum [Scherer, *p 419*]. Additionally, multi-tiered authentication, secured collection, and storage as well as a robust management of breach incidents must be implemented [*Lozano/Masumy*].

5. The Award Can Neither Be Set Aside nor Will It Be Unenforceable

- 75 RESPONDENTS might argue that the award will be invalid on grounds of violation of their right to be heard or equal treatment [Arts 34(2)(a)(ii) and 36(1)(a)(ii) DAL; Art V(1)(b) NYC]. For the award to be unenforceable or set aside, RESPONDENTS must furnish proof that these due process rights have in fact been violated. Even more, this violation must have resulted in a substantially different outcome of the dispute [Soh Beng Tee case; Scherer, p 422; Lew et al, para 25-37].
- 76 If the Tribunal orders a remote hearing, RESPONDENTS' right to be heard is not violated because a remote hearing is just as effective as an in-person hearing [*supra*, paras 71-72]. This view is supported by case law from various jurisdictions, including RESPONDENTS' domicile, and scholars alike, as they consider remote hearings a perfectly viable option [PO2, para 37; Austrian Videoconference case; Robots of Mars case; Research case; Scherer, pp 439-40; Stein, p 172]. Furthermore, CLAIMANT and RESPONDENTS have been treated equally, as both have the necessary equipment to conduct remote hearings [PO2, para 38; see Soh Beng Tee case; Sino Dragon case; Scherer, p 444]. Consequently, there are no grounds for RESPONDENTS to challenge the validity of the award.
-
- 77 In conclusion, the Tribunal should ensure efficient proceedings through a remote hearing if it is impossible or inappropriate to have an in-person hearing. The Tribunal has the power to order a remote hearing which is confirmed through DAL and the Swiss Rules, and this power has not been limited through the Agreement. A remote hearing will ensure an efficient and well-functioning hearing while leaving no concerns regarding the award's validity.

PART III: THE CISG APPLIES TO THE AGREEMENT

- 78 The CISG applies to the Agreement which contains an immediate sale of goods as well as the framework for future purchases. CLAIMANT has bought Vectors from RESPONDENT 1 for its research on a vaccine against COVID-19. Along with the purchase of Vectors, CLAIMANT obtained the right to use RESPONDENT 1's licensed technology for the research and development of a vaccine [Ex C3, sec 9.2]. In addition, it follows from section 16.1 of the Agreement that once the vaccine is commercialised, CLAIMANT will be obliged to purchase the necessary base materials to produce the vaccine from RESPONDENT 1 [Ex C3, sec 16.1]. Finally, section 16.2 provides CLAIMANT with the option to have RESPONDENT 1 produce the vaccines, which CLAIMANT will then buy [Ex C3, sec 16.2]. Thus, the Agreement regulates multiple sales of goods within the meaning of the CISG.
- 79 RESPONDENT 1 now claims that the CISG does not apply and supports this claim with an unsubstantiated reference to Arts 1-6 CISG [RN_oA, para 19]. Like the procedural issues discussed above, this is merely one of RESPONDENTS' attempts to draw focus away from the assessment under Art 42 CISG.
- 80 RESPONDENTS have not clarified which provisions exactly they intend to rely on. Nonetheless, only Arts 1, 3, and 6 CISG are relevant to the present dispute. Art 1 CISG is relevant because it defines an international sale of goods under the convention; Art 3(2) CISG because the Agreement may be considered a mixed contract where the main obligation is the sale of goods; Art 3(1) CISG because RESPONDENT 1's obligation can potentially develop into a sale of manufactured goods; and Art 6 CISG because neither CLAIMANT nor RESPONDENT 1 chose to opt out of the CISG. All of these provisions lead to the same result: the CISG governs the Agreement.
- 81 CLAIMANT submits that the CISG is the applicable law. First, the Agreement is a contract of sales within the meaning of Art 1 CISG, and the exception under Art 3(2) CISG does not apply (6.). Second, if the production option in section 16.2 is used, the CISG still applies by virtue of Art 3(1) CISG (7.).

6. The Agreement Is a Contract of Sales under Art 1 CISG

- 82 CLAIMANT submits that the Agreement is a contract of sales within the meaning of Art 1 CISG. CLAIMANT and RESPONDENT 1 chose Danubian law under which the CISG applies to international sales of goods [Ex C3, sec 15.2]. It is undisputed that CLAIMANT and RESPONDENT 1 are from different contracting states, and that the Vectors CLAIMANT bought are goods within the meaning of the CISG [Ex C3, sec 9.2; Art 1(1)(a) CISG; see *Mistelis in Kröll et al; Art 3, para 37; Secretariat Commentary, Art 1, paras 5-6; Honnold/Flechtner, Art 1, paras 40(1) and 48(2)*]. Already because of this, the requirements for applying the CISG are met. Neither CLAIMANT nor RESPONDENT 1 have chosen to opt out of the CISG even though Art 6 CISG provides a specific opportunity to do so [see *Steel Bars case; Huber/Mullis, pp 63-64; Schwenzler/Hachem in Schlechtriem/Schwenzler, Art 6, para 16; Honnold/Flechtner, Art 6, para 74; Schlechtriem/Butler, paras 19-20*].
- 83 CLAIMANT is aware that the right to use RESPONDENT 1's licensed technology for research into a vaccine was included in the Agreement [Ex C3, sec 9.2]. While this may suffice to make the Agreement a 'mixed contract' within the meaning of Art 3(2) CISG, it does not change the characterisation of the Agreement as a contract of sales [see *Secretariat Commentary, Art 3, para 2; Schwenzler/Hachem in Schlechtriem/Schwenzler, Art 3, para 22; Honnold/Flechtner, Art 3, paras 60.1 and 60.4; Bridge, para 10.19; Ferrari/Torsello, pp 119-120*]. On the contrary, according to Art 3(2) CISG, the applicability of the CISG is only exempted if RESPONDENTS prove that the preponderant part of RESPONDENT 1's obligations is 'labour or other services' [see *Honnold/Flechtner, Art 3, para 60.7; Bridge, para 10.19; Ferrari/Torsello, pp 119-120*]. The presumption is thus in favour of applying the CISG, and RESPONDENTS bear the burden of proving otherwise [see *Brunner/Feit in Brunner/Gottlieb, Art 3, para 8; Huber/Mullis, p 42*].
- 84 The wording of Art 3(2) CISG only mentions 'labour or other services'; not the transfer of a license. In CLAIMANT's view, the Agreement should therefore be considered exclusively under Art 1 CISG as a contract of sales. However, if the Tribunal is of the opinion that the transfer of a license is 'labour or other services', it would still not be the preponderant part of the Agreement (6.1.).

6.1. The Sale of Goods Is the Preponderant Part of the Agreement under Art 3(2) CISG

- 85 While the presumption is in favour of applying the CISG, CLAIMANT will take the extra step of showing that the preponderant part of the Agreement is in fact the sale of goods [Art 3(2) CISG]. It follows from case law and doctrine that the preponderant part under Art 3(2) CISG is determined by comparing the value of the different obligations in the Agreement [see *Recycling Machine case*; *Freezing Chamber case*; *Waste Recycling Plant case*; *Brunner/Feit in Brunner/Gottlieb*, Art 3, para 8; *Ferrari in Ferrari et al*, p 72; *Schwenzer/Hachem in Schlechtriem/Schwenzer*, Art 3, para 18].
- 86 The Agreement establishes legal obligations both in the present and the future. All relevant obligations, both present and future, must be taken into consideration when determining the preponderant part under Art 3(2) CISG (6.1.1.). When these obligations are compared, it becomes apparent that the economic value of the purchase part exceeds the value of the license part (6.1.2.), and that the CISG still applies when surrounding circumstances are considered (6.1.3.).

6.1.1. All Present and Future Obligations Must Be Considered

- 87 The applicability of the CISG is determined at the time of contract conclusion [Art 3(2) CISG; *Schwenzer/Hachem in Schlechtriem/Schwenzer*, Art 3, para 19; *Staudinger/Magnus*, Art 3, paras 18 and 22; *Brunner/Feit in Brunner/Gottlieb*, Art 3, para 8]. At this point in time, both present and future legal obligations are established. All obligations relating to the sale of goods and payment for the license must be considered under an economic assessment.
- 88 The initial purchase of Vectors at a price of EUR 2.5 million covered both the Vectors and access to RESPONDENT 1's licensed technology [Ex C3, sec 9.2]. The value of the respective parts was not defined at the time of this purchase and cannot otherwise be determined. What can be determined is the exact value of the future obligations. These obligations include CLAIMANT's purchase of base materials for the production of its vaccine as well as milestone payments and royalty payments [Ex C3, secs 9.4-5 and 16.1; PO2, App 1].
- 89 As the purchase obligation in section 16.1 of the Agreement determines the price and quantum of future purchases, it sets the frame for the future sales of goods [Ex C3, sec 16.1]. Therefore, the Agreement is comparable to framework agreements, which also regulate the price and quantum

of future obligations [see *Gelato case*; *Wine case*; *Bridge*, para 10.22]. In framework agreements, the assessment of whether or not the CISG applies includes these future contractual obligations as well [*Metallurgical Sands case*; *Schwenzer/Hachem in Schlechtriem/Schwenzer*, Art 1, para 14].

90 An illustrative example is the *Metallurgical Sands case*. In this case, much like in the present, two parties had entered into an agreement in which the price and quantum of future sales were determined. The Polish Supreme Court held that the CISG applied to the agreement because the future sales would be governed by the CISG. As CLAIMANT's future purchases of base materials will also be governed by the CISG, the same reasoning must apply to the present dispute.

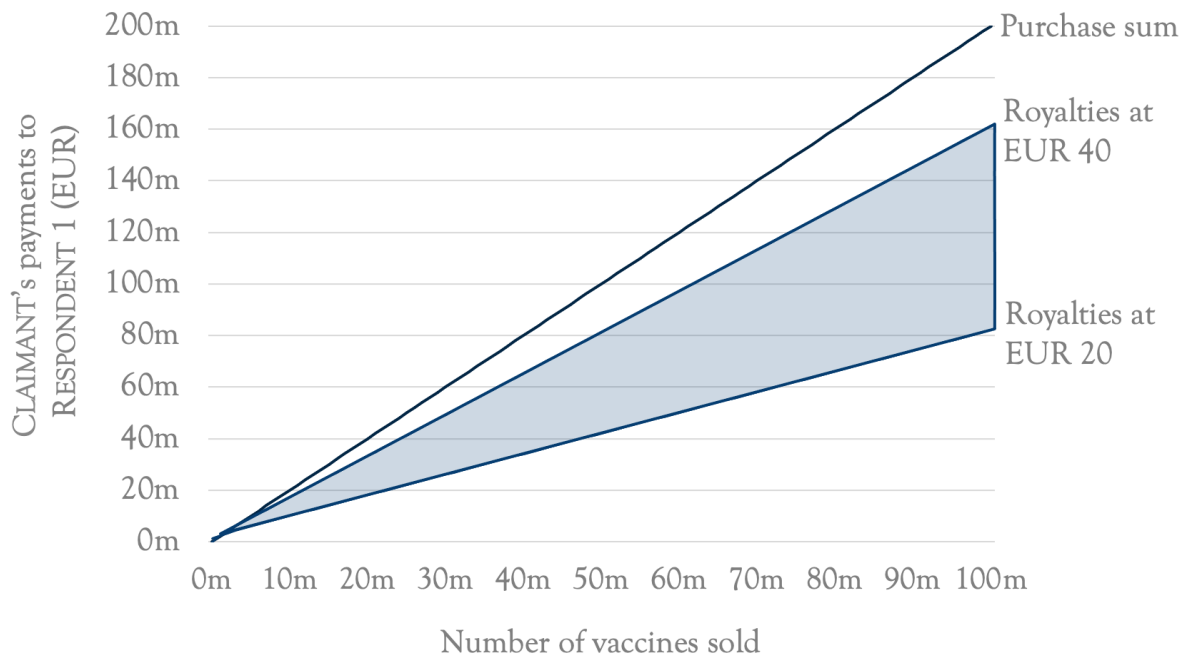
91 This is further supported by other case law and doctrine [see *Fax Machine case*; *Forklifts case*; *Schwenzer/Hachem in Schlechtriem/Schwenzer*, Art 1, para 14; *Bridge*, para 10.22]. In the words of one scholar, it would seem 'pedantic to effect a sharp separation between individual sales and the framework contract', concluding that there is 'every reason to avoid if possible an uncomfortable clash between the CISG in its application to individual sales and any law applicable to the framework contract' [*Bridge*, para 10.22]. Accordingly, when assessing the applicability of the CISG, all relevant legal obligations, both present and in the future, must be taken into account.

6.1.2. The Value of the Purchased Goods Exceeds the Value of the License Part

92 As mentioned, the assessment of what constitutes the preponderant part of the Agreement must take its starting point in an economic comparison [*supra*, para 85]. When the value of the different obligations are compared, it becomes evident that the monetary value of the sales of goods exceeds the value of the license part with a minimum of EUR 35 million per year. The sum relating to the purchase obligation is EUR 200 million per year, as CLAIMANT will purchase base materials at this price for the yearly production of vaccines [*Ex C3*, secs 9.2 and 16.1].

93 By comparison, the sum relating to the license part will amount to a maximum of EUR 165 million per year. This amount is the sum of milestone and royalty payments. The milestone payments amount to EUR 3 million in total, which is paid before the vaccine is commercialised [*Ex C3*, sec 9.4]. After the vaccine is commercialised, multiple royalty payments to RESPONDENT 1 fall due. The royalties are based on percentages of CLAIMANT's annual net sales [*Ex C3*, sec 9.5]. As CLAIMANT can sell at least 100 million vaccines per year at a price of EUR 20-

40 per dose, CLAIMANT's annual net sales will be EUR 2-4 billion [Ex C3, sec 9.5; PO2, para 6]. The royalties will therefore amount to a maximum of EUR 162 million per year [Ex C3, secs 9.5]. Accordingly, the value of the sale of goods exceeds the value of the license part with a minimum of EUR 35 million per year. The difference between the purchase sum and royalties is visualised in the following graph.



94 As shown by the graph, the sale of goods will at any given point in time outweigh the royalty payments connected to the license. Because the difference of *at least* EUR 35 million expresses the preponderance of the purchase obligation, the real difference, as measured over the 10-year lifespan of the Agreement, is EUR 350 million [PO2, para 6]. Consequently, under an economic assessment, the preponderant part of the Agreement is a sale of goods [Art 3(2) CISG; see *Schwenzer/Hachem in Schlechtriem/Schwenzer, Art 3, para 20*; *Brunner/Feit in Brunner/Gottlieb, Art 3, para 8*].

6.1.3. The CISG Still Applies When Surrounding Circumstances Are Considered

95 The Tribunal may decide to supplement the economic assessment by including circumstances surrounding the Agreement [see *Recycling Machine case*; *Mistelis/Raymond in Kröll et al, Art 3, para 19*; *Brunner/Feit in Brunner/Gottlieb, Art 3, para 8*; *Ferrari/Torsello, p 123*]. Under such an assessment, the sale of goods is still the preponderant part of the Agreement.

- 96 RESPONDENT 1 is commercially dependent on sale of goods. In September 2018, just three months prior to the conclusion of the Agreement, RESPONDENT 1 increased its production capacity for base materials for this very purpose [RNoA, *para* 8]. Around the same time, RESPONDENT 1's CEO publicly stated that the potential for RESPONDENT 1 lies within the production and sale of base materials to use for the production of vaccines [Ex C2].
- 97 Furthermore, it was RESPONDENT 1's intention to enter into a contract of sales [Ex C2]. Case law and scholars agree that the seller's intentions are relevant when circumstances surrounding an agreement are included in the assessment of what constitutes the preponderant part [Art 8 CISG; *Software case*; *Schwenzer/Hachem in Schlechtriem/Schwenzer, Art 3, paras 18-19*; *Huber/Mullis, p 47*]. Before starting negotiations, RESPONDENT 1 explained that it generally intended to sell 'not only the first batch of [Vectors] and to license out its use for further research but to continuously deliver at least the base materials for vaccine production' [Ex C2]. With this intention in mind, RESPONDENT 1 changed what was a standard license agreement into a contract of sales [NoA, *para 11*; Ex R2, *para 8*]. The clearest reflection of this change is, of course, the addition of the word 'Purchase' to the name of the Agreement [Ex C3, *secs 9.2 and 16.1*].
- 98 Accordingly, regardless of whether the Agreement is considered from an economic perspective alone, or if the assessment is supplemented by other surrounding circumstances, the sale of goods is the preponderant part of the Agreement [Arts 1 and 3(2) CISG].

7. The CISG Still Applies under Art 3(1) CISG If the Production Option Is Used

- 99 The production option in section 16.2 of the Agreement is only effectuated if CLAIMANT actively requests it. This is not an unlikely scenario because it would be beneficial for both RESPONDENT 1 and CLAIMANT [PO2, *App 1*]. Therefore, RESPONDENT 1 might reasonably argue that the production option should be taken into account. However, if the production option is effectuated, the Agreement will be a sale of goods 'to be manufactured or produced', and the CISG will apply by virtue of Art 3(1) CISG [Ex C3, *sec 16.2*].
- 100 According to Art 3(1), the CISG governs the sale of manufactured or produced goods unless the seller proves that the buyer supplies 'a substantial part of the materials necessary for such [...] production' [*Mistelis in Kröll et al, Art 3, para 2*; *Huber/Mullis, p 44*]. Already because CLAIMANT only supplies know-how, which is not 'materials' within the meaning of Art 3(1) CISG, the CISG

applies (7.1.). Even if the Tribunal considers CLAIMANT's contribution as 'materials', it will not amount to the substantial part (7.2.).

7.1. CLAIMANT Will Not Supply Materials within the Meaning of Art 3(1) CISG

101 CLAIMANT will only supply its know-how for the production of the vaccines and will therefore not supply 'materials' within the meaning of Art 3(1) CISG. Case law and scholars have established that 'materials' under Art 3(1) CISG does not include non-physical contributions, such as designs, plans, know-how, etc. [Art *Catalogue case*; *Schwenzer/Hachem in Schlechtriem/Schwenzer, Art 3, para 8*; *CISG-AC Opinion 4, para 2.12*; *Ferrari/Torsello, p 122*; *Bridge, para 10.18*]. In the present case, RESPONDENT 1 already owns, and therefore supplies, all the necessary materials and facilities, while CLAIMANT's contribution is merely instructions on how the vaccines are produced [*NoA, para 14*; *PO2, para 4*].

102 This issue is comparable to the *Shoes case*, where a German buyer created a design and sent it to an Italian seller who produced the shoes from this design. Since the German buyer provided no physical materials for the production, it was held by the court that the CISG applied under Art 3(1) CISG [*Shoes case*; see *Catalogue case*; *Art Books case*]. CLAIMANT submits that the Tribunal should follow the reasoning of the *Shoes case*, as CLAIMANT will not supply physical materials in the sense of Art 3(1) CISG.

7.2. Even If CLAIMANT's Know-How Is Considered a Material under Art 3(1) CISG, It Will Not Amount to the Substantial Part

103 Even if the Tribunal considers CLAIMANT's technical instructions as actual 'materials', it can by no means amount to the substantial part within the meaning of Art 3(1) CISG. The substantial part is, like the preponderant part under Art 3(2) CISG, determined by comparing the value of the materials provided by CLAIMANT and RESPONDENT 1 respectively [*supra, para 85*; see *Schwenzer/Hachem in Schlechtriem/Schwenzer, Art 3, paras 6-7*; *CISG-AC Opinion 4, para 2.10*; *Bridge, para 10.18*; *Honnold/Flechtner, para 59.1*].

104 Know-how is difficult to quantify, but CLAIMANT suggests that the Tribunal looks to CLAIMANT's research and development costs as indicative of the value. This investment amounts to between EUR 5 and 400 million in total [*PO2, App 1*]. By contrast, the value of RESPONDENT 1's

investment in materials would after 10 years amount to at least EUR 3,500 million in total [PO2, paras 5-6 and 43(a); PO2, App 1]. The value of the research and development provided by CLAIMANT would, therefore, be lower than the value of the base materials supplied by RESPONDENT 1 by almost a factor 10. Hence, CLAIMANT will not supply the substantial part of the materials, and the CISG still applies under Art 3(1) CISG.

105 In conclusion, the CISG applies to the Agreement because it is a contract of sales within the meaning of Art 1 CISG. Regardless of whether or not the license is considered, the sale of goods is the preponderant part, and the applicability is thus not exempted under Art 3(2) CISG. This conclusion is unaffected by the possibility that CLAIMANT invokes the production option because CLAIMANT will not supply any – or at least not the substantial part – of the materials under Art 3(1) CISG.

PART IV: RESPONDENT 1 HAS BREACHED THE AGREEMENT ACCORDING TO ART 42 CISG

106 CLAIMANT bought Vectors from RESPONDENT 1 to use in its development of vaccines against respiratory diseases. More than a year after the purchase, on 1 May 2020, CLAIMANT was made aware that Ross had an exclusive license to the same IP-right with the same scope [Ex C5; PO2, para 11]. For almost two years, Ross and the Roctis Group have discussed the extent of Ross' license in relation to the Ross Agreement [RNoA, para 12; Ex C7, para 6]. During these discussions, Ross made it clear that it is of the firm belief that its exclusive license extends to infectious respiratory diseases [Ex R4]. As CLAIMANT is currently developing a vaccine against COVID-19 – an infectious respiratory disease – it is left with uncertainties relating to its use of the Vectors and its ability to sell the vaccines [NoA, paras 1 and 18-21].

107 CLAIMANT's uncertainty was amplified when RESPONDENTS entered the Ross Agreement into evidence, as the scope of Ross' exclusive license turned out to cover 'malaria and related infectious diseases' [Ex R3, sec 2, emphasis added]. Despite CLAIMANT's inquiries, RESPONDENT 1 has not been able to reassure CLAIMANT that there is no risk that its license infringes Ross' IP-right [Ex C5; Ex C6].

108 Art 42 CISG applies when goods are encumbered with third-party IP-rights, and the seller knew or could not have been unaware of these rights before contract conclusion [*Date-Bah in Bianca/Bonell, Art 42, para 2.1*]. The provision protects buyers against the risks associated with purchasing goods potentially encumbered with third-party IP-rights [*Secretariat Commentary, Art 40, para 2*]. Subparagraphs (a) and (b) of Art 42(1) CISG are irrelevant to this case, since both the Ross Agreement and the Agreement concern worldwide licences [*Ex C3, para 3; Ex R3, para 5; PO2, para 10*].

109 CLAIMANT submits that RESPONDENT 1 has breached the Agreement because it has delivered Vectors encumbered with a third-party IP-right and -claim (8.), and RESPONDENT 1 knew or could not have been unaware of Ross' alleged right at contract conclusion (9.). Furthermore, RESPONDENT 1's liability is not exempted pursuant to Arts 42(2)(a) or 43 CISG (10.).

8. RESPONDENT 1 Has Delivered Vectors Encumbered with a Third-Party IP-Right or -Claim

110 It would be commercially unsound for CLAIMANT to continue its work on the vaccine as long as there is uncertainty about the scope of Ross' right. If CLAIMANT's right infringes Ross' right, CLAIMANT cannot commercialise the vaccine and all of CLAIMANT's hard work will be in vain. In other words, CLAIMANT's business is left on unsolid ground.

111 RESPONDENTS argue that the Agreement has not been breached because Ross has no conflicting right nor has Ross raised a claim against CLAIMANT [*RNoA, para 20*]. Within the meaning of Art 42 CISG, a claim does not require a right and a right does not require a claim. The two are independent, and only one has to be present to constitute a breach under Art 42 CISG [*see Janal, p 208; Rauda/Etier, pp 36-37*].

112 Ross bases its right to use the Vectors for vaccine development against infectious, respiratory diseases on the fact that the scope of the Ross Agreement extends to 'malaria and *related infectious diseases*' [*Ex R3, sec 2, emphasis added*]. This wording is open for interpretation which RESPONDENTS themselves acknowledge [*RNoA, para 13*]. One fair and plausible reading is certainly that Ross has a right that prevents CLAIMANT's research into 'infectious [...] respiratory diseases' including COVID-19 [*Ex C3, sec 2; PO2, para 23*]. This understanding is underlined by the fact that Ross paid an additional EUR 600,000 for the expansion of 'related infectious diseases' [*Ex R2, para 5*]. Moreover, Ross mentioned the infectious disease 'cholera' as an example

of the broadened scope during the negotiations [PO2, para 20]. Thus, Ross paid a significant amount of money for a broad wording that extends to infectious diseases different from malaria. In spite of these circumstances, RESPONDENTS maintain that CLAIMANT's IP-right does not infringe Ross'.

113 Bearing in mind that Art 42 CISG protects the buyer's right and expectation to receive unencumbered goods, CLAIMANT submits that RESPONDENT 1 failed to deliver Vectors free of any IP-claims and -rights [see *Secretariat Commentary*, Art 40, para 2; *Tebel in Brunner/Gottlieb*, Art 41, para 1; *Kröll in Kröll et al*, Art 42, para 1; *Rauda/Etier*, p 59]. First, the mere assertion of a third-party IP-right is enough to constitute a breach pursuant to Art 42 CISG (8.1.) and second, a fairly likely third-party claim is sufficient to breach the Agreement pursuant to Art 42 CISG (8.2.). Either a right or a claim is sufficient to constitute a breach, but CLAIMANT will for good measure show that both are present.

8.1. The Mere Assertion of a Third-Party IP-Right Is Sufficient to Constitute a Breach

114 The mere assertion of a third-party IP-right is such a burden for the buyer that it constitutes a breach under Art 42 CISG [*Lookofsky*, p 101; see *Tebel in Brunner/Gottlieb*, Art 42 para 4; *Janal*, p 208]. One of the underlying purposes of Art 42 CISG is to protect the buyer from the fear of not knowing if or when a third party will assert its right [see *Secretariat Commentary*, Art 40, para 2; *Bonell in Bianca/Bonell*, p 14; *Kröll in Kröll et al*, Art 42, para 1; *Rauda/Etier*, p 59]. Regardless of whether there is a right or a potential right, the situation is the same: RESPONDENT 1 has put an impediment on CLAIMANT's vaccine development [see *Rauda/Etier*, p 37; *VanDuzer*].

115 Furthermore, it is within RESPONDENT 1's sphere to deal with Ross' alleged right. Case law and scholars have previously held that it is within the sellers' sphere to deal with and resolve third-party IP-rights [*LED Illuminator case*; *CD Media case*; *Janal*, p 206; *Date-Bah in Bianca/Bonell*, Art 42, para 2.2]. Being the seller of the Vectors, RESPONDENT 1 was closest to knowing about other rights concerning the Vectors. This is even more so, as RESPONDENT 1 could have obtained the knowledge from its sister company, RESPONDENT 2, from which it got the license [*NoA*, para 10].

116 An illustrative example is the *LED Illuminator case*, where the seller, a Korean company selling LED illuminators for cars, had sold possibly IP-infringing illuminators to an American buyer. After the buyer received notice from a third-party demanding them to stop the use of the LED

illuminators, the buyer sued the seller. The Seoul High Court held that it was the seller who was closest to knowing whether its LED illuminators infringed any rights. As RESPONDENT 1, like the Korean seller, is closest to knowing if the Vectors infringe any rights, it must be up to RESPONDENT 1 to deal with third-party IP-rights in the present case.

- 117 Accordingly, Ross' right is by no means unfounded, and therefore, RESPONDENT 1 is obliged to present actual reassurance to CLAIMANT that the right does not exist or at least infringe on CLAIMANT. Because RESPONDENT 1 has not done so, there is a breach under Art 42 CISG.

8.2. A Fairly Likely Third-Party Claim Is Sufficient to Constitute a Breach

- 118 It is correct that Ross has not yet raised a concrete claim against CLAIMANT [*NoA*, para 20]. However, it is not a requirement that a claim has actually been raised for Art 42 CISG to be applicable; a fairly likely claim is sufficient [*Kröll in Kröll et al*, Art 42, para 10; see *Schwenzer in Schlechtriem/Schwenzer*, Art 42, para 6; *Achilles*, p 10]. In the words of one scholar, 'Art. 42 also covers cases where it is not yet certain whether the goods actually infringe the intellectual property of a third party and where the third party has yet to raise a claim' [*Kröll in Kröll et al*, Art 42, para 10]. Like with the mere assertion of a third-party IP-right, this understanding is supported by the protective purpose behind Art 42 CISG [*supra*, para 114]. Ross' IP-right is not unfounded, and a potential claim is thus sufficient to constitute a breach.
- 119 In the present case, the application of Art 42 CISG is supported by the fact that Ross has made inquiries on the subject. Ross' inquiry of 6 December 2018 illustrates the likelihood of a claim being raised against CLAIMANT [*Ex R4*; see *Schwenzer in Schlechtriem/Schwenzer*, Art 42, para 6; *Achilles*, p 10]. It is stated in the email that 'in [Ross'] view, [Ross' license] would also cover infectious respiratory diseases'. This wording shows that Ross is genuine in its belief that its exclusive license is being infringed and implies its willingness to act on this belief. It is held by scholars that, '[this inquiry] already entitles [the buyer] to assert a claim under Art 42 CISG' [*Schwenzer et al*, Art 42, para 6; *Achilles*, p 10]. In short, it is not just fairly likely, but only a matter of time before Ross will raise a claim towards CLAIMANT.

9. RESPONDENT 1 Knew or Could Not Have Been Unaware of Ross' Alleged Right

- 120 RESPONDENT 1 had knowledge of the possibly conflicting rights when it entered into the Agreement with CLAIMANT. When assessing the seller's knowledge, the relevant point in time is at contract conclusion [Art 42 CISG; *Wehkamp v Maglificio Esse*; *Zheng*, p 420, para 54; *Honnold/Flechtner*, Art 42, para 270.1; *Schlechtriem/Butler*, para 175; *Staudinger/Magnus*, Art 42, para 23]. For this matter, the seller's evaluation of the existence of a right is irrelevant for its knowledge under Art 42 CISG [*Tebel in Brunner/Gottlieb*, Art 42, para 10; *Kröll in Kröll et al*, Art 42, para 26; *Staudinger/Magnus*, Art 42, para 13 and 22]. Following this, CLAIMANT submits that RESPONDENT 1 knew of Ross' alleged right when the Agreement was concluded. In any event, RESPONDENT 1 could not have been unaware of Ross' alleged right.
- 121 First, Peter Doherty had knowledge of Ross' alleged right. The negotiations of the Agreement were conducted by Peter Doherty, who is now head of contracting at RESPONDENT 1's [Ex R2]. He had previously negotiated the Ross Agreement for RESPONDENT 2 as its Director Legal. Because of this, he had knowledge of the extent of the licenses in both agreements [Ex R2, paras 5 and 7]. Not only did Peter Doherty have specific knowledge regarding the two agreements; on 6 December 2018, he was also informed that Ross is of the opinion that it has an exclusive right to use the Vectors for vaccines against 'infectious respiratory diseases' [Ex R4]. In other words, Peter Doherty - on behalf of RESPONDENT 1 - sold a right to CLAIMANT that he knew was possibly infringing Ross' exclusive right.
- 122 Peter Doherty's knowledge is RESPONDENT 1's knowledge. Because Peter Doherty negotiated the Agreement for RESPONDENT 1, he was working in the function of a so-called auxiliary person. Case law and doctrine have established that the knowledge of an auxiliary person is attributable to the seller's knowledge [*Coke case*; *Schwenzer in Schlechtriem/Schwenzer*, Art 40, para 7; *Kröll in Kröll et al*, Art 40, para 21; *Staudinger/Magnus*, Art 40, para 9]. In the *Coke case*, a seller had hired an intermediary to sell the goods for it. In regard to whether the intermediary's knowledge was the seller's knowledge, the tribunal held that 'if the seller uses auxiliary people [...] the consequences of their knowledge or grossly negligent lack of knowledge of the non-conformity have to be borne by the seller as if it had acted itself'. RESPONDENT 1, like the seller in the *Coke case*, has used an auxiliary person by involving Peter Doherty in the negotiations. As a result, his

knowledge is attributable to RESPONDENT 1's knowledge. All in all, RESPONDENT 1 had knowledge of Ross' right at the time of contract conclusion.

- 123 Second, even if Peter Doherty's knowledge alone is not enough, RESPONDENT 1 must have had knowledge of Ross' right from its sister company, RESPONDENT 2. The scope of Ross' right was first mentioned by Ross in the summer of 2018 when it attempted to buy RESPONDENT 2 [RNoA, para 12]. Furthermore, it is uncontested that RESPONDENT 2 and Roctis AG had knowledge of the issue regarding the scope of the Ross Agreement [PO2, para 1]. RESPONDENT 1, RESPONDENT 2, and Roctis AG are all part of the Roctis Group, and it is only natural if information flows freely between the companies. In fact, licenses and employees have already been transferred between the companies [NoA, para 10; Ex R4]. As a result, RESPONDENT 1 could not have been unaware of Ross' alleged right.

10. RESPONDENT 1's Liability Is Not Exempted

- 124 CLAIMANT submits that RESPONDENT 1 is liable because the exemptions in Arts 42(2)(a) and 43 CISG are not applicable. First, CLAIMANT should not have been aware of Ross' alleged right at contract conclusion (10.1.). Second, CLAIMANT gave timely notice of the breach (10.2.).

10.1. CLAIMANT Should Not Have Been Aware of Ross' Alleged Right

- 125 CLAIMANT should not have been aware of Ross' alleged right at contract conclusion and RESPONDENT 1's liability can therefore not be exempted [Art 42(2)(a) CISG; see *IP Infringing Shirts case*; *Tachon v Marshoes*; *Magnus in Honsell*, Art 42, para 17]. To be clear, RESPONDENTS have not made this argument – presumably because they are well aware that it is untenable. And even if RESPONDENTS were to argue that CLAIMANT had knowledge at the time of contract conclusion, they must prove that this is the case [see *CD Media Case*; *Tebel in Brunner/Gottlieb*, Art 42, para 29; *Staudinger/Magnus*, Art 42, para 34; *Magnus in Honsell*, Art 42, para 21]. RESPONDENTS will however not be able to satisfy this burden of proof because CLAIMANT had no duty to investigate the Vectors for any third-party rights, and it should not have been aware of the article in Biopharma Science.
- 126 First, there is no duty for the buyer to investigate, when the seller is closest to knowing about rights concerning its licenses [Schwenzer in *Schlechtriem/Schwenzer*, Art 42, para 18;

Staudinger/Magnus, Art 42, para 26; Shinn, p 125]. In the present case, the relevant knowledge concerns a third-party right based on an exclusive license granted to RESPONDENT 1 from its sister company, RESPONDENT 2. Accordingly, RESPONDENT 1 is closest to knowing about Ross' alleged right [*supra, para 115; see Janal, p 219; Bacher, p 125; Kröll in Kröll et al, Art 42, para 38*]. Therefore, CLAIMANT had no duty to investigate third-party IP-rights [*see Enderlein, p 183*].

127 Furthermore, in section 11.1 of the Agreement, RESPONDENT 1 has warranted that '[t]here are to Licensor's Knowledge no claims, judgments or settlements pending with respect to the Licensed Technology [...]' [Ex C3, sec 11.1.4]. CLAIMANT naturally read this warranty and was comforted in its position. In such a situation, there was no reason for CLAIMANT to investigate.

128 Second, CLAIMANT had terminated its subscription to Biopharma Science, and therefore had no knowledge of the content herein [PO2, para 8]. It is true that Biopharma Science, even though it is a Danubian journal, is popular in the bioscience start-up market in Mediterraneo [PO2, para 8]. That it is popular does not mean that it is read by everyone; and certainly not by companies which evidently do not subscribe. No company can be held accountable for all journals available to read in its country because this would require tremendous resources. In fact, CLAIMANT was first alerted about the article in Biopharma Science when it received the email on 1 May 2020 [Ex C5; PO2, para 8].

10.2. CLAIMANT Gave Timely Notice of the Breach

129 CLAIMANT gave timely notice, since notice of the breach was given the day after CLAIMANT was made aware and that is within reasonable time [Ex C6; Art 43(1) CISG; *see Stolen Car case; Blood Infusion Devices case; Flechtner, p 16; Ferrari/Torsello, p 291; Magnus in Honsell, Art 43, para 10*]. RESPONDENT 1 might argue that notice should have been given when Rosaly Hübner became an employee at CLAIMANT's because she was part of the team negotiating the Ross Agreement [Ex C7, para 3]. However, CLAIMANT did not become aware of Ross' alleged right at this point in time, and therefore, neither the law nor the facts support such argument [Ex C7, para 6; *see CD Media case; Staudinger/Magnus, Art 43, para 35; Tebel in Brunner/Gottlieb, Art 43, para 21*].

130 The Ross Agreement is just one of many contracts Rosaly Hübner has been a part of, seeing that she has been employed at Ross for at least five years [Ex C7, para 2]. It cannot be expected from Rosaly Hübner, as a finance employee, that she has a recollection of all legal details in every

negotiation she has ever been part of. No matter what, Rosaly Hübner has explained that she had no knowledge of the extent of the license in the Ross Agreement [Ex C7, para 6].

131 By virtue of Art 43(2) CISG, RESPONDENT 1 cannot rely on Art 43(1) CISG regarding timely notice if they already knew of the right in question. As shown, RESPONDENT 1 had knowledge about Ross' alleged right at the time of contract conclusion and can therefore not rely on Art 43(1) CISG [*supra*, paras 120-123; Art 43(2) CISG; see *Decathlon v Lidl*; *Staudinger/Magnus*, Art 43, para 36; *Beline*, sec II.C; *Honnold/Fletcher*, Art 43, para 271; *Schwerha*, sec II.B]. In any event, RESPONDENTS' liability cannot be exempted.

132 In conclusion, there is a breach of the Agreement pursuant to Art 42 CISG, as the Vectors purchased by CLAIMANT are encumbered with a third-party IP-right and -claim. Not only does Ross potentially have an exclusive right in conflict with CLAIMANT's; it is also fairly likely that a claim against CLAIMANT will be put forward. RESPONDENT 1 knew of the alleged right at the time of contract conclusion. Nevertheless, RESPONDENT 1 sold the right to CLAIMANT who had no knowledge of the potential infringement when the Agreement was concluded. RESPONDENT 1's liability is not exempted under Arts 42(2)(a) or 43 CISG, as CLAIMANT gave timely notice and RESPONDENT 1 knew of Ross' alleged right.

REQUEST FOR RELIEF

In view of the above, CLAIMANT respectfully requests the Tribunal to find that:

- I. Ross should not be joined to the arbitral proceedings;
- II. the hearings should be conducted remotely if necessary;
- III. the CISG applies to the Agreement; and
- IV. RESPONDENT 1 has breached the Agreement pursuant to Art 42 CISG.

CLAIMANT reserves the right to amend its request for relief as may be required.

TABLE OF LEGISLATION AND RULES

CITED AS	REFERENCE
CISG	United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) Cited in paras: 11, 12, 35, 58, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 89, 90, 91, 94, 97, 98, 99, 100, 101, 102, 103, 104, 105, 108, 109, 111, 113, 114, 117, 118, 119, 120, 124, 125, 126, 131, and 132
DAL	Danubian Arbitration Law – a verbatim adoption of the UNCITRAL Model Law on International Commercial Arbitration (amend. 2006) Cited in paras: 17, 48, 49, 50, 51, 52, 53, 54, 75, and 77
DCL	Danubian Contract Law – a verbatim adoption of the UNIDROIT Principles on International Commercial Contracts (2016) Cited in paras: 18 and 58
DIS Rules	German Institution of Arbitration, DIS Arbitration Rules (2018) Cited in para: 29
ECL	Equatorian Contract Law – a verbatim adoption of the UNIDROIT Principles on International Commercial Contracts (2016) Cited in para: 18

- IBA Rules** International Bar Association, IBA Rules on the Taking of Evidence in International Arbitration (2010)
Cited in paras: 50 and 53
- ICC Rules** International Chamber of Commerce, Arbitration Rules (2017)
Cited in paras: 28 and 29
- MCL** Mediterranean Contract Law – a verbatim adoption of the UNIDROIT Principles on International Commercial Contracts (2016)
Cited in para: 18
- Model Law** United Nations Commission on International Trade Law, UNCITRAL Model Law on International Commercial Arbitration (amend. 2006)
Cited in para: 53
- NYC** United Nations Commission on International Trade Law, Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)
Cited in paras: 17, 41, and 75
- SIAC 2007 Rules** Singapore International Arbitration Centre, Arbitration Rules of the Singapore International Arbitration Centre (2007)
Cited in para: 31
- SIAC 2013 Rules** Singapore International Arbitration Centre, Arbitration Rules of the Singapore International Arbitration Centre (2013)
Cited in para: 30

- SIAC 2016 Rules** Singapore International Arbitration Centre, Arbitration Rules of the Singapore International Arbitration Centre (2016)
Cited in paras: 28 and 30
- Swiss Rules** Swiss Chamber's Arbitration Institution, Swiss Rules of International Arbitration (2012)
Cited in paras: 13, 15, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 37, 41, 42, 43, 47, 48, 49, 51, 54, 55, 61, 65, and 77
- UPICC** International Institute for the Unification of Private Law, UNIDROIT Principles on International Commercial Contracts (2016)
Cited in para: 18
- Vienna Rules** Vienna International Arbitral Centre Rules of Arbitration and Mediation (2018)
Cited in paras: 28 and 29

TABLE OF ARBITRAL AWARDS AND COURT DECISIONS

All online materials were last accessed on 10 December 2020

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Adgas case

Jurisdiction: United Kingdom

Court of Appeal of the United Kingdom

[Judgment of 23 June 1983]

Abu Dhabi Gas Liquefaction Company v. Eastern Bechtel Corporation and Chiyoda Chemical Engineering & Construction Company, and Eastern Bechtel Corporation and Chiyoda Chemical Engineering & Construction Company v. Ishikawajima-Harima Heavy Industries Co.

Case No: 1981 A. No. 4268

Published: [1982] International Legal Materials 1054

Cited in para: 36

Art Books case

Jurisdiction: Switzerland

Commercial Court of Zürich

[Judgment of 10 February 1999]

Case No: HG 970238.1

Available at: <<https://cisgw3.law.pace.edu/cases/990210s1.html>>

Cited in para: 102

- Austrian**
Videoconference case
- Jurisdiction: Austria
Supreme Court of Austria
[Judgment of 23 July 2020]
Case No: 18 ONc 3/20s
Available at: <https://www.ris.bka.gv.at/Dokumente/Justiz/JJT_20200723_OGH0002_018ONC00003_20S0000_000/JJT_20200723_OGH0002_018ONC00003_20S0000_000.pdf>
Cited in paras: 50, 70, and 76
- Blood Infusion Devices**
case
- Jurisdiction: Switzerland
Court of Appeal of Luzern
[Judgment of 8 January 1997]
Case No: 11 95 123/357
Available at: <http://www.cisg-online.org/files/cases/6202/translationFile/228_11983760.pdf>
Cited in para: 129
- Bridas II case**
- Jurisdiction: United States of America
U.S. Court of Appeals of the 5th Circuit
[Judgment of 12 September 2003]
Published: 345 F.3d 347
Available at: <<https://law.justia.com/cases/federal/appellate-courts/F3/345/347/550644/>>
Cited in para: 41

- Casado case** International Centre of Settlement of Investment Disputes
(ICSID)
[Award of 25 September 2001]
Víctor Pey Casado Fundación Presidente Allende v la República de Chile
Case No: CIADI/ARB/98/2
Available at: <<https://www.italaw.com/sites/default/files/case-documents/ita0629.pdf?fbclid=IwAR0kXzo93A0z0me2M2rkWO3oldK1e8yhp2DZ15ezJ9E37U8vsbfTMO3vxM>>
Cited in para: 49
- Catalogue case** Jurisdiction: Switzerland
Commercial Court of Zürich
[Judgment of 21 September 1998]
A. S.p.A. v E.S. AG
Case No: HG 960527/O
Available at: <<https://cisgw3.law.pace.edu/cases/980921s1.html>>
Cited in paras: 101 and 102
- CD Media case** Jurisdiction: Austria
Supreme Court of Austria
[Judgment of 12 September 2006]
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Cited in paras: 115, 125, and 129

- Coke case** Court of Arbitration of the International Chamber of Commerce
[Award of 1 June 1999]
Case No: 9187 of June 1999
Available at: <<http://www.cisg-online.ch/content/api/cisg/urteile/705.htm>>
Cited in para: 122
- Credibility case** Jurisdiction: India
Supreme Court of India
[Judgment of 1 April 2003]
Case No: 476 of 2003
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CERTIFICATE OF VERIFICATION

We hereby confirm that no other than the parties listed below wrote this memorandum:

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