

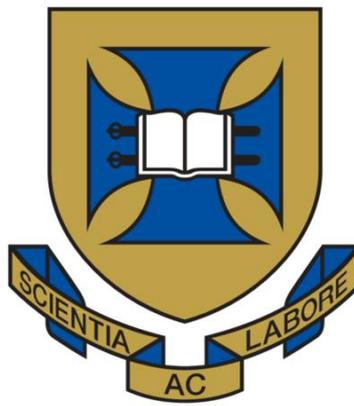


TWENTY-EIGHTH ANNUAL

WILLEM C. VIS

INTERNATIONAL COMMERCIAL ARBITRATION MOOT

MEMORANDUM FOR THE RESPONDENTS



ON BEHALF OF:

AGAINST:

CamVir Ltd

112 Rue L. Pasteur
Oceanside
Equatoriana

RESPONDENT 1

VectorVir Ltd

67 Wallace Rowe Drive
Oceanside
Equatoriana

RESPONDENT 2

RespiVac plc

Rue Wittle 9
Capital City
Mediterraneo

CLAIMANT

THE UNIVERSITY OF QUEENSLAND

A U S T R A L I A

WILLIAM
GARSKE

GABRIELA
ROWORTH

CONNOR
WRIGHT

REX
YUAN



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INDEX OF ABBREVIATIONS

ABBREVIATION	TERM
§	Paragraph(s)
%	Per Cent
AC	Advisory Council
ACICA	Australian Centre for International Commercial Arbitration
AG	Aktiengesellschaft (German) for 'shares corporation'
Agreement	Purchase, Collaboration and License Agreement between Claimant and Respondent 1
Answer	Answer to the Notice of Arbitration (14 August 2020)
Arbitration Clause	Section 14 of the Purchase, Collaboration and License Agreement between Claimant and Respondent 1 Section 14 of the Collaboration and License Agreement between Respondent 2 and Ross Pharmaceuticals
Art(s)	Article(s)
Base Materials	HEK-294 cells and growth medium
CEO	Chief Executive Officer
Cl	Clause(s)



ABBREVIATION	TERM
Claimant	RespiVac plc
COO	Chief Operating Officer
HKIAC	Hong Kong International Arbitration Centre
IP	Intellectual Property
LCIA	London Commercial of International Arbitration
Ltd	Limited
Mr Doherty	Mr Peter Doherty Head of contract department for Respondent 1 (From 1 January 2019)
Mr Metschnikow	Mr Paul Metschnikow COO of Claimant
Ms Bordet	Ms Julia Bordet Head of Contract and IP of Ross Pharmaceuticals
Ms Flemming	Ms Alexandra Flemming CEO of Respondent 1
Ms Hübner	Ms Rosaly Hübner CFO of Claimant
No.	Number
Notice	Notice of Arbitration (15 July 2020)



ABBREVIATION	TERM
Parties	Claimant, Respondent 1
plc	Public limited company
PO1	Procedural Order No. 1
PO2	Procedural Order No. 2
Production Option	Agreement, Clause 16.2
Purchase Obligation	Agreement, Clause 16.1
Respondent 1	CamVir Ltd
Respondent 2	VectorVir Ltd
Respondents	Respondent 1, Respondent 2
Ross Agreement	Collaboration and License Agreement between Respondent 2 and Ross Pharmaceuticals
SCAI	Swiss Chambers' Arbitration Institute
Tribunal	Arbitral Tribunal
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law



INDEX OF LEGISLATIVE MATERIALS

<i>CITED AS</i>	CITATION
CESL	Common European Sales Law, 2011
CISG	Convention on the International Sale of Goods, 1998
Danubian Arbitration Law	United Nations Commission on International Trade Law Model Law on International Commercial Arbitration, 2006
DCFR	Draft Common Frame of Reference, 2007
HKIAC Rules	Hong Kong International Commercial Arbitration Centre Administered Arbitration Rules, 2018
IBA Rules	IBA Rules on the Taking of Evidence in International Arbitration, 2010
ICAC Rules	International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry, 2020
ICC Rules	International Chamber of Commerce Arbitration Rules, 2021
JCAA Rules	Japanese Commercial Arbitration Association Commercial Arbitration Rules, 2019
LCIA Rules	London International Arbitration Centre Arbitration Rules, 2020
NAI Rules	Netherlands Arbitration Institution Arbitration Rules, 2015
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958



<i>CITED AS</i>	CITATION
PICC	UNIDROIT Principles of International Commercial Contracts, 2016
SCC Rules	Serbian Chamber of Commerce Rules
SIAC Rules	Singapore International Arbitration Centre Rules, 1997
Swiss Rules	Swiss Rules of International Arbitration, 2012
UNCITRAL Rules	UNCITRAL Arbitration Rules, 2013



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<i>BONNELL</i>	<p>Bonnell, Stephen</p> <p>Article 4.3 in</p> <p>Stephen Bonnell (ed), ‘The UNIDROIT Principles in Practice (Second Edition)</p> <p>New York, Transnational Publishers</p> <p>2006</p> <p>CITED AT: § 119</p>
<i>BORN</i>	<p>Born, Gary</p> <p>Gary Born (ed), ‘International Commercial Arbitration (Third Edition)’</p> <p>Netherlands, Kluwer Law International</p> <p>2021</p> <p>CITED AT: §§ 20, 66</p>



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<i>TELEPHONE CASE</i>	<i>Telephone Case</i> Oberlandesgericht Karlsruhe 15 U 29/92 20 November 1992 AVAILABLE IN: < http://www.unilex.info/cisg/case/63 > CITED AT: § 151



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Corte di Cassazione

6499

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JUDGMENT OF 22 JANUARY 2008

*A.C. SE, A.D. Ltd. and others v. K. SAS, First Civil Law
Division, 4A_244/2007*

Federal Supreme Court of Switzerland, 1st Civil Law
Chamber

4A_244/2007

22 January 2008

AVAILABLE IN:

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CITED AT: § 24



UNITED KINGDOM

*OAO Northern Shipping Company v. Remolcadores de Marin
Sl*

Court of Appeal, Commercial Court, England

*OAO NORTHERN SHIPPING
COMPANY*

27 July 2007

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UNITED STATES

Pacific Sunwear of California Inc. v Olaes Enters., Inc.

Court of Appeals California

PACIFIC SUNWEAR CASE

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SOUTHLAND CORP V KEATING

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NOTE ON THE PREPARATION OF THIS MEMORANDUM

References to books and journal articles within the text of this Memorandum contain the surname of the author. Where there are multiple authors, their surnames are separated by a forward slash. If an author has written multiple publications or different chapters from the same publication, their name is followed by a number. References to books and journals are followed by the page number of the publication, where there are page numbers. Cases and awards are referenced in-text using a shortened version of the case or award name as contained in the Indices of Cases and Awards. Where there is no case or award name, sources are referenced using a case or award reference number, or the date of judgement. Page and paragraph numbers follow where available, separated by a comma. Paragraph numbers are denoted by a §. If multiple sources support the same premise, each source is separated by a semi-colon. Contrasting sources are separated by ‘cf’, an abbreviation of the Latin *confer/conferatur* meaning compare. ‘See’ and ‘see, eg,’ are used to introduce examples and other relevant sources where appropriate. References to exhibits are followed by the exhibit number, page number, and if applicable, paragraph number. References to other documents in the Problem are referred to using an abbreviation of the name of the document, as found in the Index of Abbreviations. The case authority table references cases using any of the following information, in the following order: name, court (country), medium neutral citation, docket number, date of decision, CISG-Online number, URL. Case names are listed in italics, and the abbreviated titles are listed in small capital letters. The award authority table references awards using any of the following information, in the following order: name, nature of proceeding, tribunal, date, URL or journal source and page numbers. The academic commentary authority table references academic commentary using any of the following information, in the following order: author, title, volume (issue) journal, (if chapter of book) position within book, place of publication, publisher, year of publication, edition, relevant pages. URLs, or other relevant bibliographical information is included as necessary to supplement a lack of any of the above categories of information. Authorities are listed in alphabetical order of abbreviated title (cases and awards) or author (academic commentary). ‘Pinpoint’ references in each of the authority tables refer to paragraphs within the Memorandum where the relevant authority is cited. References to material within the Memorandum are made with either *infra*, or *supra*. The latter indicates material that follows the reference, whilst the former indicates material that precedes the reference.



STATEMENT OF FACTS

1. Roctis AG (“**ROCTIS**”) is the holding company for the pharmaceutical group, Roctis Group [NOTICE, §2]. CamVir Ltd (“**RESPONDENT 1**”) and VectorVir Ltd (“**RESPONDENT 2**”) are wholly owned subsidiaries of ROCTIS [NOTICE, §2]. RespiVac plc (“**CLAIMANT**”) is a biopharmaceutical company engaged in the development of vaccines for respiratory diseases caused by viruses [NOTICE, §1].
2. On **15 June 2014**, RESPONDENT 2 entered into a Collaboration and License Agreement (“**Ross Agreement**”) with life-science company, ROSS PHARMACEUTICALS (“**ROSS**”) [NOTICE, §8; EX R3]. Under the Ross Agreement, RESPONDENT 2 granted ROSS an exclusive licence for the use of the GorAdCam viral vector for the development and production of vaccines in the field of ‘*malaria and related infectious diseases*’ [NOTICE, §8; ROSS AGREEMENT, cl 1.3].
3. In **Summer 2018**, ROSS alleged to RESPONDENT 2 that ROSS’ licence extended to respiratory diseases [ANSWER, §12]. Given the clear wording of the Ross Agreement and its drafting history, RESPONDENT 2 concluded that the scope of ROSS’ licence obviously did not extend to respiratory diseases [ANSWER, §12].
4. In **December 2018**, CLAIMANT and RESPONDENT 1 (“**Parties**”) began negotiating the Purchase, Collaboration and Licensing Agreement (“**Agreement**”). Mr Doherty (Head of Contracting for RESPONDENT 2) represented RESPONDENT 1 in the negotiations [NOTICE, §12].
5. On **6 December 2018**, Ms Bordet (ROSS’ Head of Contract and IP) contacted Mr Doherty to raise ROSS’ view that there was a lack of clarity regarding the scope of ROSS’ licence and offered to settle the dispute [ANSWER, §13; EX R4; PO2, 43C]. RESPONDENT 1 concluded that ROSS were merely using a minor ambiguity to negotiate an extension of its licence [ANSWER, §13]. RESPONDENT 1 saw no reason to stop negotiations with potential licensees for the use of the GorAdCam vector in the field of respiratory diseases [ANSWER, §14].
6. On **1 January 2019**, the Agreement was concluded between CLAIMANT and RESPONDENT 1 [NOTICE, §11]. The purpose of the Agreement is to engage in ‘*collaborative activities with respect to GorAdCam vectors for the indication of infectious and non-infectious respiratory diseases*’ [AGREEMENT, cl 2]. The Agreement is largely identical to the Ross Agreement [NOTICE, §11; PO2, §25].
7. In **April 2020**, CLAIMANT was acquired by KHORANA LIFESCIENCE, one of the leading life-science companies in Danubia [ANSWER, §2; EX R1].
8. On **2 May 2020**, CLAIMANT emailed RESPONDENT 1 to express CLAIMANT’S concern over ROSS’ exclusive licence [EX C5; NOTICE, §20]. On **4 May 2020**, RESPONDENT 1 replied that ROSS had never received an exclusive license in the field of respiratory diseases and was trying to use its interpretation of its licence as a negotiation tool [NOTICE, §21; EX C6].



SUMMARY OF ARGUMENTS

9. RESPONDENTS have prepared this Memorandum in accordance with the directions in Procedural Orders 1 and 2.
10. The Tribunal should join ROSS to the proceedings between CLAIMANT and RESPONDENTS (I). The Tribunal has the power to join ROSS because ROSS consented to joinder by adopting the Swiss Rules. The Tribunal should exercise this power because the balance of interests clearly weighs in favour of joinder. The balance of interests clearly weighs in favour of joinder for three reasons. First, joinder protects the Parties' interests in efficiency and avoiding conflicting findings since CLAIMANT and RESPONDENTS' claims are related. Second, joinder was foreseeable to CLAIMANT. Third, joining ROSS does not jeopardise the confidentiality of the proceedings.
11. The Tribunal should not conduct the second hearing of 3rd – 7th May 2021 for the examination of witnesses and experts virtually if a hearing in person is not possible or inappropriate (II). The Tribunal does not have the power to hold hearings virtually. The Parties agreed to hold hearings in person and this agreement is binding on the Tribunal. Alternatively, the Tribunal should not exercise any power to hold hearings virtually because there are not compelling justifications for doing so. Compelling justifications are required because the Parties agreed or expected that the Tribunal would hold hearings in person. CLAIMANT has not established that there are compelling justifications for two reasons. First, holding hearings virtually jeopardises the Parties' right to be heard and treated equally. Second, holding hearings virtually jeopardises the confidentiality of the proceedings.
12. The CISG is not applicable to the Agreement (III). Article 3(2) excludes the application of the CISG because RESPONDENT 1's service obligations, namely its licence and transfer of know-how, are the preponderant part of the Agreement. The Tribunal should apply the 'essential' criterion because it is impossible or inappropriate to apply the 'economic value' criterion. The economic value criterion is impossible to apply because the prices for the goods and services are inseparable and the prices for the goods and services are uncertain. The economic value criterion is inappropriate, and the essential criterion is satisfied, because the Parties prioritised RESPONDENT 1's service obligations and the Agreement's purpose is most dependant on these service obligations.
13. Even if the CISG is applicable, RESPONDENT 1 has not breached Article 42 CISG (IV). ROSS has not made a claim for the purposes of Article 42 because ROSS' allegation is frivolous, ROSS has not asserted its allegation against CLAIMANT, or it is not 'fairly likely' that ROSS will initiate proceedings against CLAIMANT. In the alternative, RESPONDENT 1 did not have sufficient knowledge of any claim by ROSS.



ARGUMENT I

THE TRIBUNAL SHOULD JOIN ROSS TO THE PROCEEDINGS

14. The substance of this dispute turns on the relationship between ROSS and RESPONDENTS. However, ROSS is not a party to the proceedings.
15. CLAIMANT seeks a declaration that RESPONDENT 1 has breached Article 42 CISG due to ROSS' differing interpretation of the licence granted to it by RESPONDENT 2 under the Ross Agreement [NOTICE, §30]. RESPONDENTS request the Tribunal to join ROSS so that the Tribunal can conclusively determine the scope of the licence granted under the Ross Agreement [ANSWER, §22]. RESPONDENTS seek declaratory relief in the form of an order that ROSS must '*refrain from making any further allegations that it holds an exclusive licence for the use of the GorAdCam vector in relation to any research into vaccines for respiratory diseases*' [ANSWER, §23b].
16. The Agreement and Ross Agreement contain identical dispute resolution clauses [ROSS AGREEMENT, cl 14.1; AGREEMENT, cl 14.1]. The dispute resolution clauses provide for arbitration in accordance with the Swiss Rules and provide that the institution will appoint all arbitrators [ROSS AGREEMENT, cl 14.1; AGREEMENT, cl 14.1]. Article 4(2) Swiss Rules enables the Tribunal to join a third party after consulting with all the parties and considering all relevant circumstances.
17. The Tribunal has the power to join ROSS (A) and the Tribunal should exercise this power because the balance of interests clearly weighs in favour of joinder (B).

A. THE TRIBUNAL HAS THE POWER TO JOIN ROSS

18. The Tribunal has the power to join ROSS as a party to the arbitration for three reasons. First, the Tribunal has jurisdiction over ROSS because ROSS provided anticipatory consent to joinder by adopting the Swiss Rules (1). Second, *arguendo*, the Swiss Rules do not require the specific consent of CLAIMANT nor ROSS at the time RESPONDENTS requested joinder (2). Third, the Swiss Rules do not require that joinder was foreseeable to CLAIMANT (3). In any case, RESPONDENT 1's interest in joining ROSS was foreseeable to CLAIMANT (4).
1. THE TRIBUNAL HAS JURISDICTION OVER ROSS BECAUSE ROSS PROVIDED ANTICIPATORY CONSENT TO JOINDER BY ADOPTING THE SWISS RULES
19. CLAIMANT argues that the Tribunal has no jurisdiction over ROSS because ROSS has not consented to joinder [C MEMO, §13, 15]. On the contrary, the Tribunal has jurisdiction because ROSS consented to joinder by adopting the Swiss Rules [see ROSS AGREEMENT, cl 14.1; cf C MEMO, §15].
 20. Although the specific consent of ROSS at the time RESPONDENTS requested joinder is not required [infra A.2], RESPONDENTS agree that the Tribunal still needs a jurisdictional basis to join ROSS [C



MEMO, §12]. As accepted by CLAIMANT, anticipatory consent to joinder is sufficient to provide this jurisdictional basis [*C MEMO*, §13; see *BORN 2*, 2583; *BORN*, §18.02.C.3.B; *SCHRAMM*, 495; *BREKOULAKIS 2*, 18; *BREKOULAKIS*, 118; *GILLIÉRON/PITTET*, 40-1; *BÄRTSCH/PETTI*, 64; *CASTELLO/DIGON*, 113; *MEIER/VOSE*, 119; *VOSE*, 395; *PLATTE*, 71-2; *CHOI*, 32].

21. Where a third party (ROSS) adopts the Swiss Rules, it provides anticipatory consent to be joined to any other compatible dispute conducted under the Swiss Rules at the request of its counterparty (RESPONDENTS) [see *KARRER*, 378; *GILLIÉRON/PITTET*, 41; *CASTELLO/DIGON*, 113; *LEW/MISTELIS/KRÖLL*, 390; *PLATTE*, 69; *BLACKABY*, 91; *SCHRAMM*, 495, 497; *WAINCYMER 2*, 559; *BORN 2*, 2583; *DE LY*, 69]. ROSS and RESPONDENT 2 agreed to arbitrate disputes under the Swiss Rules, which do not require specific consent at the time another party requests joinder [infra A.2]. Consequently, ROSS accepted that a tribunal could join it to a compatible arbitration at the request of RESPONDENT 2 [see *KARRER*, 378; *BLACKABY*, 91]. ROSS was free to agree with RESPONDENT 2 to ‘opt out’ or modify Article 4(2) Swiss Rules [see *SCHRAMM*, 484]. Instead, ROSS had no objections to arbitration under the Swiss Rules [*PO2*, §32].
22. RESPONDENT 2 is requesting that ROSS join a ‘compatible’ arbitration because the proceedings have the same number of arbitrators, language of arbitration, and seat of arbitration as that contemplated in ROSS’ Arbitration Clause [see *BÄRTSCH/PETTI*, 59, 64-5; cf *HABEGGER*, 280]. Indeed, the Arbitration Clauses under the Agreement and the Ross Agreement are identical [*AGREEMENT*, cl 14.1; *ROSS AGREEMENT*, cl 14.1; cf *HABEGGER*, 280; *BÄRTSCH/PETTI*, 64-5]. Therefore, ROSS has consented to join the present proceedings at the request of RESPONDENT 2.
23. Alternatively, if the mere adoption of the Swiss Rules is insufficient to establish consent in all circumstances, it is for the Tribunal to decide on a case-by-case basis whether a party adopting the Swiss Rules intended to give anticipatory consent to joinder [see *HABEGGER*, 280]. This will depend on the interpretation of ROSS’ Arbitration Clause.
24. The laws of Danubia govern the interpretation of the Arbitration Clause, as it is both the law of the underlying contract and the arbitral seat [*AGREEMENT*, cl 14.1, 15.2; see *ABOLAFIA*, 64; *BLACKABY*, 166]. Consequently, the law governing the interpretation of the Arbitration Clause is either the CISG, if applicable, or Danubia’s general contract law, the PICC [see *PO1*, §3-4; *BORN 3*, §4.04A.2.V; *JUDGMENT OF 22 JANUARY 2008*, 555; *SOUTHLAND CORP V KEATING*]. Article 8(1) CISG provides that contracts are to be interpreted according to the intent of a party ‘where the other party knew or could not have been unaware what that intent was’. Article 8(1) is inapplicable because there is insufficient evidence to determine ROSS’ subjective knowledge [cf *ART 8(1) CISG*; *ART 4.1(1) UNIDROIT PICC*]. Where Article 8(1) is not applicable, Article 8(2) provides that ‘statements made by and other conduct of a party are to be interpreted according to the



understanding that a reasonable person of the same kind as the other party would have had in the same circumstances'. Under Article 4.1(1) PICC, the Tribunal should interpret contractual terms 'according to the common intention of the parties'. If Article 4.1(1) is inapplicable, Article 4.1(2) PICC provides that the Tribunal should interpret contractual terms in the same manner as Article 8(2) CISG.

25. By adopting the Swiss Rules in the particular circumstances of the present case, ROSS consented to joinder at the request of RESPONDENT 2 to disputes connected to the licence granted under the Ross Agreement [see *BORN 3, 231*]. The Ross Agreement involves the provision of an exclusive licence to use the GorAdCam vector in the field of malaria and related infectious diseases [*ROSS AGREEMENT, cl 5.2*]. The extensive negotiations between ROSS and RESPONDENT 2 regarding the scope of the licence granted under the Ross Agreement indicated to ROSS that RESPONDENT 2 intended to license the use of the GorAdCam vector to other parties [see *EX R2, §5; PO2, §20*]. Given there are multiple licensees operating in similar fields, a reasonable person of the same kind as RESPONDENT 2 and ROSS would conclude that ROSS knew that the content of the Ross Agreement meant there may be disputes with third parties involving allegations of conflicting rights [see *ART 8(2) CISG; ART 4.1(2) UNIDROIT PICC*]. By adopting the Swiss Rules with knowledge of the possibility of conflicting rights, ROSS consented to join disputes involving such rights at the request of RESPONDENT 2 [see *BORN 3, 231*].
26. CLAIMANT's assertion that the adoption of the Swiss Rules cannot be consent to joinder lacks authority [cf *C MEMO, §16*]. CLAIMANT cites Professor Dr Voser, Mr Born, Mr Carrión and Professor Dr Nicklisch [*C MEMO, §16*]. However, none of these commentators adopt the position alleged by CLAIMANT. Professor Dr Voser and Mr Born both state that the question whether adoption of the Swiss Rules is anticipatory consent to joinder has not been resolved [see *VOSER, 395; BORN 2, 2600-1*]. Mr Carrión refers to jurisdictional requirements generally, rather than addressing the scenario where a third party has adopted the Swiss Rules [see *CARRIÓN, 497-8*]. Similarly, Professor Dr Nicklisch only considers identically worded arbitration agreements generally, rather than identical agreements adopting provisions like Article 4(2) Swiss Rules, that is, a provision which does not require specific consent of the parties at the time joinder is requested [see *NICKLISCH, 60, 71*]. Therefore, CLAIMANT's argument that adopting the Swiss Rules is not consent to joinder is incorrect in law.
27. For these reasons, ROSS consented to joinder by adopting the Swiss Rules. In turn, the Tribunal has jurisdiction to join ROSS.



2. ARGUENDO, THE SWISS RULES DO NOT REQUIRE THE SPECIFIC CONSENT OF CLAIMANT NOR ROSS AT THE TIME RESPONDENTS REQUESTED JOINDER

28. Although CLAIMANT and ROSS declined RESPONDENTS' request for joinder [see *LETTER TO PARTIES (17 AUGUST 2020)*; *LETTER BY LANGWEILER (2 OCTOBER 2020)*], the Tribunal has the power to join ROSS because the Swiss Rules do not require the specific consent of CLAIMANT nor ROSS at the time RESPONDENTS requested joinder.
29. Article 4(2) Swiss Rules does not require the specific consent of the initial non-requesting party (CLAIMANT) nor the third party (ROSS) at the time the requesting party (RESPONDENTS) requests joinder [*CARRIÓN, 497*; *GEISINGER, §2.2.1*; *BREKOULAKIS, 118*; *VOSER, 396*; *WAINCYMER 2, 566*; *ROOS, 424*; *SMITH, 7*]. There is no reference to the consent of the parties in Article 4(2) Swiss Rules, let alone a requirement for specific consent. 'It would seem remarkable that the drafters of the [Swiss Rules] would have inadvertently failed to refer to consent, had they wanted the decision of the tribunal to be taken exclusively by reference to consent of all the relevant parties' [*BREKOULAKIS, 118*]. Indeed, that would make the Swiss Rules the only institutional rules which require, by implication, specific consent to enliven a joinder provision [see *ART 22.1(x) LCIA RULES*; *ART 37(1) NAI RULES*; *ART 25(b) SLAC RULES*; *ART 22(1) ICAC RULES*; *RULE 56(1) JCAA RULES*; *ART 27.1 HKIAC RULES*; *ART 41 SCC RULES*]. Rather than require specific consent as an absolute rule, the drafters intended to provide the Tribunal with the 'broadest possible flexibility' in deciding joinder requests, considering the circumstances of each individual case [see *VOSER, 396*; *BREKOULAKIS, 118*; *ROOS, 424*; *BÄRTSCH/PETTI, 63*].
30. Indeed, a specific consent requirement is not necessary because the scope of joinder is sufficiently limited by two existing requirements. First, the Tribunal must have jurisdiction over the third party before joining it [see *CARRIÓN, 497*; *GEISINGER, §3.4*]. Article 4(2) Swiss Rules is not in and of itself a jurisdictional basis [*CARRIÓN, 497*; *BÄRTSCH/PETTI, 65*]. Second, the Tribunal must be satisfied that the balance of interests clearly favours joinder [see *VOSER, 396*; *GILLIÉRON/PITTET, 41*; *GEISINGER, §3.4*]. There is no reason to curtail the power of the Tribunal in advance out of mistrust for its ability to exercise its judgement appropriately [see *BREKOULAKIS 2, 17*]. That approach would undermine the cause and purpose of arbitration itself, which depends on the parties' trust in the system and the ability of arbitrators to deliver justice [*BREKOULAKIS 2, 17*].
31. For these reasons, Article 4(2) Swiss Rules does not require the specific consent of CLAIMANT nor ROSS at the time RESPONDENTS requested joinder. Therefore, the Tribunal may join ROSS even though it and CLAIMANT declined RESPONDENTS' request for joinder.



3. THE SWISS RULES DO NOT REQUIRE THAT JOINDER WAS FORESEEABLE TO CLAIMANT

32. CLAIMANT asserts that joinder is only permissible if the initial non-requesting party (CLAIMANT) ‘could have foreseen the possibility that a third person will be joined’ at the time of the contract’s formation [*C MEMO*, §18]. There is no such requirement.
33. CLAIMANT relies solely on the opinion of Dr Schramm [*C MEMO*, §18]. However, an overwhelming majority of commentators do not endorse a foreseeability requirement [see *VOSEK*, 396; *GILLIÉRON/PITTET*, 41; *CASTELLO/DIGON*, 113; *LEW/MISTELIS/KRÖLL*, 390; *PLATTE*, 69; *BLACKABY*, 91; *WAINCYMER* 2, 559; *BORN* 2, 2583]. Most notably, Professor Dr Voser concludes that, even if the third party does not consent, it is sufficient that the balance of interests clearly favours joinder [*VOSEK*, 396]. In order to promote uniformity, the Tribunal should not accept Dr Schramm’s minority view that there be an additional foreseeability requirement [see *HOLTZMANN*, 25; *ART 2A(1) DANUBIAN ARBITRATION LAW*].
34. Furthermore, CLAIMANT does not provide any justification for an additional foreseeability requirement. Indeed, no such justification exists. Article 4(2) Swiss Rules does not refer to foreseeability and the drafters of the Swiss Rules intended to provide the Tribunal with the broadest flexibility in deciding joinder requests, taking into account the circumstances of each individual case [see *VOSEK*, 396; *BREKOULAKIS*, 118; *ROOS*, 424; *supra* A.2.]. Foreseeability is merely a factor which goes to the Tribunal’s decision whether to exercise its power to order joinder [see *SCHRAMM*, 496]. Requiring foreseeability would prevent joinder in deserving cases, particularly in long-term commercial contracts where the relationships of the parties are subject to change over time.
35. For these reasons, the Tribunal has the power to order joinder irrespective of whether joinder was foreseeable to CLAIMANT.

4. IN ANY CASE, RESPONDENT 1’S INTEREST IN JOINING ROSS WAS FORESEEABLE TO CLAIMANT

36. Even if foreseeability is a requirement, this requirement is satisfied. Dr Schramm, whose scholarship forms the basis of CLAIMANT’s argument, requires that the initial non-requesting party (CLAIMANT) could have foreseen at the time of contracting that its contracting partner (RESPONDENT 1) would potentially have an interest in including the third party (ROSS) in the resolution of the subject matter of the dispute [*SCHRAMM*, 497; *C MEMO*, §18].
37. CLAIMANT could have foreseen at the time of its contracting with RESPONDENT 1 that RESPONDENT 1 may have an interest in including ROSS in the resolution of a claim that RESPONDENT 1 breached Article 42 CISG. This is for two reasons. First, it was foreseeable that



ROSS might allege an intellectual property right over the GorAdCam vectors against RESPONDENTS conflicting with that of CLAIMANT. Under the Agreement, RESPONDENT 1 grants CLAIMANT a non-exclusive licence to use the GorAdCam vector in the field of respiratory diseases [AGREEMENT, *cl* 5.2]. Consequently, a reasonable person of the same kind as RESPONDENT 1 and CLAIMANT would conclude that CLAIMANT knew that ROSS was granted an exclusive licence over the GorAdCam vectors which may conflict with CLAIMANT's licence [see ARTICLE 8(2) CISG; ARTICLE 4.1(1) PICC]. Indeed, RESPONDENT 2 announced the scope of ROSS' licence publicly [EX C1]. Although the announcement misquoted the scope of the licence as 'malaria and infectious diseases' [EX C1], this only gave CLAIMANT more reason to suspect its licence may overlap with that of ROSS because 'infectious diseases' is wider than 'related infectious diseases' [see EX R2, §6]. Consequently, it was foreseeable to CLAIMANT that ROSS might allege a conflicting right with RESPONDENTS.

38. Second, if ROSS alleged a conflicting right, it was foreseeable that RESPONDENT 1 would have an interest in including ROSS in the resolution of a dispute alleging that RESPONDENT 1 breached Article 42 CISG. A claim that Article 42 has been breached as a result of a third party's alleged right over intellectual property is inseparable from the question of whether that third party right exists [infra B.1.(i)]. Consequently, it was foreseeable that joining ROSS would enable RESPONDENT 1 to efficiently resolve its disputes and avoid the risk of conflicting awards [infra B.1.(ii)-(iii)]. Therefore, it was foreseeable to CLAIMANT that RESPONDENT 1 might have an interest in joining ROSS if ROSS alleged a conflicting right.
39. For these reasons, CLAIMANT could have foreseen that RESPONDENT 1 may have an interest in including ROSS in the resolution of the subject matter of the proceedings. Therefore, even if foreseeability is required, the Tribunal has the power to join ROSS.

B. THE TRIBUNAL SHOULD EXERCISE ITS POWER TO JOIN ROSS BECAUSE THE BALANCE OF INTERESTS CLEARLY FAVOURS JOINDER

40. The Tribunal should join ROSS if the balance of interests clearly favours joinder [C MEMO, §20; VOSER, 396; SCHRAMM, 499]. The balance of interests clearly favours the joinder of ROSS because joinder promotes the Parties' interests in efficiency and in avoiding conflicting findings between proceedings (1), joinder was foreseeable to CLAIMANT (2), and joining ROSS does not jeopardise the confidentiality of the proceedings (3).



1. JOINDER PROMOTES THE PARTIES' INTEREST IN EFFICIENCY AND IN AVOIDING CONFLICTING FINDINGS BETWEEN PROCEEDINGS

41. RESPONDENTS' claim against ROSS and CLAIMANT's claim against RESPONDENT 1 are related **(i)**. Consequently, joinder promotes the Parties' interests in efficiency **(ii)** and in avoiding the risk of conflicting findings between proceedings **(iii)**.

(i) RESPONDENTS' CLAIM AGAINST ROSS AND CLAIMANT'S CLAIM AGAINST RESPONDENT 1 ARE RELATED

42. RESPONDENTS agree that whether claims are related is a critical interest when considering a request for joinder [*C MEMO*, §22]. However, contrary to CLAIMANT's assertion, RESPONDENTS' claim against ROSS and CLAIMANT's claim against RESPONDENT 1 are related [cf *C MEMO*, §22].

43. RESPONDENTS wish to join ROSS to conclusively determine the scope of the licence granted under the Ross Agreement [*ANSWER*, §22]. Crucially, CLAIMANT's claim also involves consideration of ROSS' alleged right over the GorAdCam vectors. CLAIMANT argues that ROSS has a claim for the purposes of Article 42 because ROSS' allegation is not 'unfounded' [*C MEMO*, §114; cf *infra* IV.A.1] and it is 'fairly likely' that ROSS will initiate proceedings against CLAIMANT [*C MEMO*, §110; cf *infra* IV.A.3]. Both arguments require a detailed consideration of the merits of ROSS' allegation.

44. Assessing the merits of ROSS' allegation requires comprehensive evidence regarding the existence of ROSS' alleged right [see *infra* IV.A.1]. Consequently, CLAIMANT's contention that its claim does not require a binding determination of the scope of ROSS' licence is correct but not relevant [cf *C MEMO*, §24]. CLAIMANT's claim still requires a detailed assessment of whether ROSS' right exists. Consequently, RESPONDENTS and CLAIMANT's claims both address a common disputed issue. Therefore, CLAIMANT and RESPONDENTS' claims are related.

(ii) JOINDER PROMOTES THE PARTIES' INTEREST IN EFFICIENCY

45. RESPONDENTS agree that efficiency is a critical interest when deciding on a joinder request [*C MEMO*, §25]. Joining ROSS best promotes this interest for two reasons.

46. First, joinder ensures that RESPONDENTS, CLAIMANT and ROSS can efficiently resolve their interrelated disputes. The resolution of these disputes requires the presentation of complex expert and lay evidence relating to viral vectors and many years of contractual relationships. As CLAIMANT accepts, this involves complex factual questions that entail '*difficult explanations as to the operating mode of viral vectors, their ways of production and the differences between the various application of the virus*' [*LETTER BY FASTTRACK (2 OCTOBER 2020)*; *C MEMO*, §28]. If the Tribunal does not order joinder, RESPONDENTS, CLAIMANT and ROSS may have to present these difficult explanations twice before different tribunals, wasting time and causing greater expense.



47. Second, contrary to CLAIMANT's argument, joining ROSS will not undermine CLAIMANT's interest in efficiency [cf *C MEMO*, §27-8]. RESPONDENTS will present evidence regarding the merit of ROSS' allegation in order to address CLAIMANT's claim regardless of whether ROSS is joined [supra B.1.(i)]. Accordingly, CLAIMANT's suggestion that joinder will alter the complexity of the case is unfounded [cf *C MEMO*, §27-8]. Therefore, joining ROSS will not undermine CLAIMANT's interest in efficiency.
48. For these reasons, the Tribunal should join ROSS because this promotes the Parties' interest in efficiency.

(iii) JOINDER PROMOTES THE PARTIES' INTEREST IN AVOIDING THE RISK OF CONFLICTING FINDINGS BETWEEN SEPARATE PROCEEDINGS

49. RESPONDENTS agree that reducing the risk of conflicting findings between separate proceedings is an important consideration in the context of joinder [*C MEMO*, §20; *BORN 3*, 228; *VOSER*, 350; *SCHWARTZ*, 343; *STRONG*, 921; *BÄRTSCH/PETTI*, 56-7; *DE LY*, 66]. Joining ROSS will reduce the risk of conflicting findings. Conflicting findings may arise without joinder because both CLAIMANT and RESPONDENTS' claims require detailed assessments of the merits of ROSS' allegation that it has a right over the GorAdCam vectors in the field of respiratory diseases [supra B.1.(i)].
50. In particular, the Tribunal in this dispute may accept RESPONDENTS' arguments that ROSS' claim is frivolous [infra IV.A.1] or that ROSS is not 'fairly likely' to initiate proceedings against CLAIMANT since, among other reasons, ROSS' claim is unlikely to succeed [infra IV.A.3]. In separate proceedings between CLAIMANT and ROSS, another tribunal may take the position that ROSS has a right over the GorAdCam vectors.
51. If this were to occur, CLAIMANT would have to bring a second set of proceedings against RESPONDENT 1 in order to receive compensation for RESPONDENT 1 for ROSS' successful claim that CLAIMANT has infringed its exclusive licence. Professor Dr Voser concludes that avoiding such an outcome is a 'good reason' for ordering joinder [*VOSER*, 350; see also *BORN 3*, 228].
52. Beyond the negative impact on the Parties' themselves, the Tribunal should also avoid the possibility of inconsistent findings as a matter of international policy. Inconsistent decisions violate the Parties' right to justice and deprive the law of its predictability, which undermines the rule of law [*LOWE*, 48; *HILDEBRANDT*, 2-3].
53. For these reasons, the Tribunal should join ROSS to avoid the possibility of inconsistent findings.

2. JOINDER WAS FORESEEABLE TO CLAIMANT

54. Whether joinder was foreseeable to CLAIMANT is a consideration going to the balance of interests [supra A.3; *SCHRAMM*, 496]. This factor is satisfied in the present case because RESPONDENT 1's interest in joining ROSS was foreseeable to CLAIMANT [supra A.4]. Therefore, the Tribunal should



join ROSS because this decision falls within the reasonable expectations of the Parties [see *BORN* 2, 2125].

3. JOINING ROSS DOES NOT JEOPARDISE THE CONFIDENTIALITY OF THE PROCEEDINGS

55. CLAIMANT argues that joining ROSS would violate the confidentiality of the proceedings [*C MEMO*, §29-31]. This argument is incorrect for three reasons. First, it is possible to extend confidentiality obligations ‘to a third party so that the main purpose of the confidential nature of arbitration, which is not to make confidential information known to the public at large, can still be upheld’ [*VOSER*, 352; *ART 3(12) IBA RULES*; *STRONG*, 923].
56. Second, it is insignificant that ROSS is a competitor of CLAIMANT’s parent company. CLAIMANT fails to point to any commercially sensitive information that the proceedings would reveal to ROSS [cf *C MEMO*, §29-31]. Although the proceedings will disclose the existence of the Parties’ dispute, ROSS is already aware of this dispute [*LETTER BY FASTTRACK (4 SEPTEMBER 2020)*]. Furthermore, to the extent that any relevant evidence is confidential or constitutes a trade secret, neither ROSS nor CLAIMANT could be required to disclose that evidence [*ART 9(2)(e) IBA RULES*]. Therefore, the Tribunal should give little weight to ROSS being a competitor of CLAIMANT [cf *C MEMO*, §31].
57. Third, CLAIMANT’s assertion that permitting joinder violates the confidentiality of an arbitration is overstated [*C MEMO*, §29]. CLAIMANT relies on Mr Born, Professor Dr Voser and Professor Dr Schramm [*C MEMO*, §29]. Mr Born’s chapter cited by CLAIMANT is silent on confidentiality or joinder [cf *BORN* 3, 222]. Elsewhere, Mr Born states that joinder of additional parties only entails a ‘limited’ loss of confidentiality [*BORN* 3, 228]. Similarly, Professor Dr Voser writes that confidentiality must not be ‘overemphasised’ [*VOSER*, 352]. Likewise, Professor Dr Schramm merely states that a tribunal should consider the parties’ interest in maintaining confidentiality in deciding whether to allow joinder [*SCHRAMM*, 496]. Therefore, CLAIMANT’s argument lacks authority.
58. For these reasons, joining ROSS does not undermine the Parties’ interest in confidentiality. Therefore, the Tribunal should exercise its power to join ROSS because the balance of interests clearly favours joinder.

In summary, the Tribunal should join ROSS. The Tribunal has the power to join ROSS because ROSS consented to joinder by adopting the Swiss Rules. The Tribunal should exercise this power because the balance of interests clearly weighs in favour of joinder. This is for three reasons. First, joinder protects the Parties’ interests in efficiency and avoiding conflicting findings since CLAIMANT and RESPONDENTS’ claims are related.



Second, joinder was foreseeable to CLAIMANT. Third, joining ROSS does not jeopardise the confidentiality of the proceedings.

ARGUMENT II

THE TRIBUNAL SHOULD NOT ORDER THAT THE SECOND HEARING BE CONDUCTED VIRTUALLY

59. The Tribunal should not hold the second hearing of 3rd - 7th May 2021 virtually if a hearing in person is not possible or considered inappropriate. Rather, the Tribunal should delay the second hearing if a hearing in person is not possible or considered inappropriate in May 2021. The Tribunal does not have the power to hold hearings virtually **(A)**. Even if the Tribunal does have the power to hold hearings virtually, it should not exercise this power **(B)**.

A. THE TRIBUNAL DOES NOT HAVE THE POWER TO HOLD HEARINGS VIRTUALLY

60. The Tribunal does not have the power to hold hearings virtually because the Parties have agreed to hold hearings in person **(1)** and, *arguendo*, this agreement binds the Tribunal **(2)**.

1. THE PARTIES HAVE AGREED TO HOLD HEARINGS IN PERSON

61. The Arbitration Clause states that ‘*hearings shall be held, at the Arbitral Tribunal’s discretion, either in Vindobona or in the city where the Respondent has its place of business*’ [AGREEMENT, cl 14.1]. As the Parties did not discuss the issue of virtual hearings [see PO2, §32], the Parties’ subjective intent is impossible to determine [cf ART 8(1) CISG; ART 4.2(1) UNIDROIT PICC; BOWLING ALLEYS CASE]. A reasonable person in the position of the Parties would have concluded that the Parties intended to hold hearings in person for two reasons [see ART 8(2) CISG; ART 4.2(2) UNIDROIT PICC].

62. First, the text of the Arbitration Clause requires hearings be held in person. The Arbitration Clause provides that the Tribunal should hold hearings in a specific location. Crucially, virtual hearings cannot be ‘*held*’ in a single location. On the contrary, a virtual hearing involves parties appearing from separate locations [SCHERER, 410]. Therefore, the text of the Arbitration Clause precludes holding hearings virtually.

63. Second, CLAIMANT incorrectly argues that the Tribunal should not follow the ordinary meaning of the Arbitration Clause because the Parties could only have reasonably contemplated situations where hearings in person would be possible [cf C MEMO, §47]. Even if CLAIMANT was correct that the Parties assumed hearings in person would be possible, this does not establish that the



Arbitration Clause permits virtual hearings. Rather, CLAIMANT would need to prove that the Parties intended to permit virtual hearings to justify departing from the Arbitration Clause's ordinary meaning [see *SCHMIDT-KESSEL*, 163; *VOGENAUER* 2, 511, 518-20; *SUN*, 68]. CLAIMANT has not succeeded in proving that this is the case because the Parties' mere assumption that in-person hearings would be possible does not imply that they contemplated holding hearings virtually.

64. Alternatively, CLAIMANT's argument is incorrect in fact because a reasonable person would conclude that the Parties did contemplate situations where hearings in person would be impossible. CLAIMANT refers to the mere fact that the Agreement was concluded 'pre-pandemic' as evidence that the Parties did not contemplate situations where in-person hearings would be impossible or inappropriate [*C MEMO*, §47]. However, the fact that the Parties did not specifically foresee the COVID-19 pandemic does not mean they did not contemplate scenarios where hearings in person may be impossible or inappropriate. On the contrary, a reasonable commercial party agreeing to a hearing location would naturally foresee that extraordinary events like a public health emergency or natural disaster could make a hearing in that location temporarily impossible or inappropriate. Accordingly, the Parties contemplated the possibility that hearings at the designated locations may be impossible or inappropriate. Even so, the Parties agreed upon an Arbitration Clause that refers only to hearings in specific places.
65. For these reasons, the Arbitration Clause requires the Tribunal to hold hearings in person.

2. ARGUENDO, THIS AGREEMENT BINDS THE TRIBUNAL

66. The principle that the Tribunal should abide by the Parties' agreement on procedural rules is outlined in many national laws and arbitral institutional rules, including the Danubian Arbitration Law and Swiss Rules [*ART 19(1) DANUBIAN ARBITRATION LAW*; *SCHERER*, 419; *BORN*, §13.04B]. The Tribunal should not conduct the arbitration against the Parties' agreement unless it violates applicable law or is otherwise unlawful [*BORN*, §13.04B; *WAINCYMER*, 393; see *SCHERER*, 420]. It is irrelevant that an agreed procedure reduces efficiency [*BORN*, §13.04B]. Accordingly, the mere fact that the Parties' agreement to hold hearings in person may delay the proceedings due to the COVID-19 pandemic is insufficient to justify departing from the agreement [see *SCHERER*, 419]. An arbitrator cannot simply conduct the arbitration in accordance with his or her own conception of what is appropriate. Instead, an arbitrator has the option to resign if an agreement on procedure was unforeseeable and is seriously oppressive to him or her [*BORN*, §13.04B; *LAZOPOULOS*, 604]. Indeed, deviating from the Parties' agreed procedure jeopardises the finality of any award [see *LAZOPOULOS*, 604; *STEIN*, 172; *DERAINS/SCHWARTZ*, 224; *ARTICLE V(1)(D) NEW YORK CONVENTION*].



67. Although Article 15(1) Swiss Rules and Articles 19 and 24 Danubian Arbitration Law allow the Tribunal to conduct the arbitration in a manner it considers appropriate, the Parties' Agreement supersedes this discretion [see *SCHERER*, 419; *ORTOLANI* 2, 665]. As CLAIMANT accepts, Article 15(1) Swiss Rules applies only in the absence of the Parties' agreement [*C MEMO*, §38]. Similarly, Articles 19 and 24 Danubian Arbitration Law expressly state that the Tribunal's discretion is subject to the Parties' agreement. Therefore, the Parties' agreement to hold hearings in person is binding on the Tribunal.

B. ALTERNATIVELY, EVEN IF THE TRIBUNAL HAS THE POWER TO HOLD HEARINGS VIRTUALLY, IT SHOULD NOT EXERCISE THIS POWER

68. Even if the Tribunal were to have the power to hold hearings virtually, it should not do so. The Tribunal should only hold hearings virtually if there are compelling justifications for doing so **(1)**. CLAIMANT has not established that there are compelling justifications for holding the second hearing virtually **(2)**.

1. THE TRIBUNAL SHOULD ONLY HOLD HEARINGS VIRTUALLY IF THERE ARE COMPELLING JUSTIFICATIONS FOR DOING SO

69. Compelling justifications are required to hold hearings because the Parties agreed that the Tribunal should hold hearings in person **(i)** or, in the alternative, the Parties expected that the Tribunal would hold hearings in person **(ii)**.

(i) THE PARTIES AGREED THAT THE TRIBUNAL SHOULD HOLD HEARINGS IN PERSON

70. Even if the Tribunal takes the view that the Parties' agreement to hold hearings in person is not binding [cf supra A.2], such an agreement dictates that there must be compelling justifications for holding hearings virtually. Overriding the Parties' procedural agreements absent compelling justifications conflicts with the central importance of party autonomy in arbitration [*BORN* 2, 2152]. This is particularly so given that the Parties are sophisticated commercial entities advised by lawyers [see *BORN* 2, 2152; *NOTICE*, §4, 6-10; *EX C2*; *NOTICE*, §2; *EX R1*; *EX R2*]. Therefore, the Tribunal should only hold hearings virtually if there are compelling justifications for such a decision.

(ii) IN THE ALTERNATIVE, THE PARTIES EXPECTED THAT THE TRIBUNAL WOULD HOLD HEARINGS IN PERSON

71. Even if the Tribunal concludes that the Parties did not intend to preclude virtual hearings in all circumstances [cf supra A.1], the Parties expected that hearings would be held in person. This expectation is accepted by CLAIMANT [*C MEMO*, §47] and is reflected by both the Arbitration Clause's ordinary meaning [cf supra A.1] and the adoption of the Swiss Rules [*AGREEMENT*, cl 14.1]. The Swiss Rules reflect the expectation to hold hearings in person through Article 25(1).



Article 25(1) Swiss Rules provides that ‘*the arbitral tribunal shall give the parties adequate advance notice of the date, time, and place of any oral hearing*’. The reference to a ‘*place*’ of ‘*any oral hearing*’ demonstrates that Article 25(1) assumes the Tribunal will hold oral hearings in person. Virtual hearings do not occur in a place but rather connect participants from multiple locations [supra A.1; *SCHERER*, 410]. Therefore, the Arbitration Clause’s ordinary meaning and adoption of the Swiss Rules both demonstrate that the Parties expected the Tribunal to hold hearings in person.

72. This expectation necessitates that, at the very least, the Parties intended the Tribunal would hold hearings in person unless this would clearly be detrimental to the Parties’ interests. Therefore, the Tribunal should only hold hearings virtually if there are compelling justifications for doing so [see *PAUKER*, 26, 65; *BORN* 2, 2125].

2. CLAIMANT HAS NOT ESTABLISHED THAT THERE ARE COMPELLING JUSTIFICATIONS FOR HOLDING THE SECOND HEARING VIRTUALLY

73. CLAIMANT has not established that there are compelling justifications for holding the second hearing virtually because doing so jeopardises the Parties’ right to be heard and right to be treated equally **(i)**, and jeopardises the confidentiality of the proceedings **(ii)**.

(i) A VIRTUAL HEARING JEOPARDISES THE PARTIES’ RIGHT TO BE HEARD AND RIGHT TO EQUAL TREATMENT

74. Article 18 Danubian Arbitration Law provides that the Parties ‘shall be treated with equality and given a full opportunity of presenting [their] case’. Article 18 Danubian Arbitration Law is non-derogable [*UNCITRAL DIGEST*, 97]. The right to be heard requires that the Tribunal provide opportunities for the Parties to present arguments on all the ‘essential building blocks of the [T]ribunal’s conclusions’ [see *UNCITRAL DIGEST*, 98; *OAO NORTHERN SHIPPING COMPANY CASE*, 1821]. The right to be treated equally requires the Tribunal to apply similar standards to all parties throughout the arbitral process [see *UNCITRAL DIGEST*, 97].

75. Holding the second hearing virtually jeopardises these rights because examining witnesses virtually is less effective than through an in-person hearing **(a)** and the time zones of the Parties differ substantially **(b)**.

(a) Examining witnesses virtually is less effective than through an in-person hearing

76. A virtual hearing jeopardises the Parties’ right to be heard and RESPONDENTS’ right to be treated equally because examining witnesses virtually is less effective than in-person witness examination.

77. Examining witnesses virtually is less effective than through an in-person hearing for three reasons. First, in-person witness testimony is widely regarded as being more effective than virtual hearings at allowing the parties to establish the facts of a case and allowing the Tribunal to weigh the



evidence before them [*NATER-BASS/PFISTERER*, 693; *BORN 2*, 2283; *STEIN*, 177; *CLAY*, 35]. Difficulties arise in processing and interacting with the witnesses' verbal and non-verbal cues during virtual hearings [*BACHMEER CAPITAL CASE*, 18; *BATESON*, 167]. Observing a witnesses' demeanour, surroundings and the real-time reactions of other participants in the room often yields useful information, which is less perceptible in a virtual hearing [*CONNERTY*, 2; *LIM/MARKERT*, 3; see *AAA-ICDR MODEL ORDER*]. Furthermore, there is a greater risk of witness coaching during virtual hearings [*MILES*, 127; *SCHERER*, 429; *STEIN*, 174]. CLAIMANT itself acknowledges that 'virtual witness or expert testimony entails additional difficulties [than legal arguments] and therefore requires more careful consideration' [*C MEMO*, §43]. Therefore, examining witnesses virtually will be less effective than through an in-person hearing.

78. Second, the complex subject matter of the evidentiary proceedings in the present case compounds these intrinsic difficulties. Virtual hearings are inappropriate in the context of arbitrations which involve factual and technical complexity, large amounts of evidence and the existence of multiple claims [*WETMORE/ELLIOT*, 229; *WELSH*, §29; *D'AVINO/EZZELERAB*]. Long and complex multiparty hearings 'benefit from having participants in the same room, without distraction' [*WETMORE/ELLIOT*, 229; *WELSH*, §29]. Here, the examination of witnesses will involve factual and technical complexity and large amounts of evidence since it requires '*difficult explanations as to the operating mode of the viral vectors, their ways of production and the differences between the various application[s] of the virus*' [*LETTER BY FASTTRACK (2 OCTOBER 2020)*]. Furthermore, the proceedings potentially involve three legal teams and multiple claims. Therefore, the complex subject matter of the proceedings compounds the challenges of virtual witness examination.
79. Third, CLAIMANT's argument that technology can resolve these difficulties should be rejected [cf *C MEMO*, §55]. CLAIMANT proposes that the Tribunal can capture non-verbal signals and avoid the influencing or coaching of witnesses by using 'multiple cameras and different angles', a 'zoom-in function' and 'large screens' [*C MEMO*, §55-6]. Regardless of whether the Parties implement the latest technological developments, virtual examination of witnesses is inferior to in-person examination [*BACHMEER CAPITAL*, 18; *STUKE V ROST*, 19; see *KHODYKIN/MULCAHY/FLETCHER*, 379-381]. Furthermore, the measures suggested by CLAIMANT are unreasonable. RESPONDENTS may not have access to any or all of the measures available to CLAIMANT because CLAIMANT has better technical equipment [*PO2*, §38]. Consequently, the Tribunal may make adverse inferences against the credibility of RESPONDENTS' witnesses relative to CLAIMANT's witnesses. Accordingly, allowing CLAIMANT to use this technology when RESPONDENTS cannot jeopardises RESPONDENTS' right to be treated equally such that it may be better not to proceed with a virtual



hearing at all [see *STEIN*, 176]. Therefore, CLAIMANT's suggestions do not resolve the issue of inadequate assessment of witnesses and expert credibility.

80. These difficulties with examining witnesses virtually jeopardise the Parties' right to be heard. Expert evidence plays a significant and determinative role in deciding a dispute [*NATER-BASS/PFISTERER*, 693]. Accordingly, the Parties may not have a reasonable opportunity to present their case due to the difficulties cited [see *UNCITRAL DIGEST*, 98].
81. CLAIMANT's reliance on a decision by the Supreme Court of Austria does not affect this conclusion [cf *C MEMO*, §51; *CASE NO. 18 ONC 3/20s*]. The Supreme Court of Austria only held that, as a general rule, a virtual hearing does not in and of itself breach the parties' right to be heard [*SCHERER/SCHWARTZ*]. Accordingly, the Austrian case is not inconsistent with the possibility that a virtual hearing will breach the Parties' right to be heard.
82. Further, the case is distinguishable from the present proceedings because the Austrian legislature had expressly promoted the use of videoconferencing technology [*SCHERER/SCHWARTZ*]. By contrast, the Danubian legislature has authorised videoconference hearings only when both parties agree or 'if required by public interest' [*PO2*, §37]. The highest court in Danubia confirmed that no virtual hearings could be conducted beyond those circumstances because 'an express empowerment was missing' [*PO2*, §37]. In the present case, holding a virtual hearing for the taking of evidence is not 'required by public interest'. The public interest does not require that complex commercial disputes be resolved in a sub-optimal manner that jeopardises the Parties' right to be heard and treated equally. Moreover, delaying the proceedings will not necessarily inhibit CLAIMANT or ROSS' vaccine development given that both have been able to continue their research [*PO2*, §16]. Until there is evidence that the length of the proceedings affects CLAIMANT and ROSS' development of a vaccine, it is not in the public interest that the dispute be resolved by a virtual hearing. Accordingly, the Supreme Court of Austria's decision is not inconsistent with RESPONDENTS' case that virtual hearings will breach the Parties' right to be heard in an arbitration with its seat in Danubia.
83. RESPONDENTS' right to be treated equally is also jeopardised by the possible impact of ineffective witness examination. RESPONDENTS are most dependent on the examination of witnesses and experts [cf *LETTER BY FASTTRACK (2 OCTOBER 2020)*; *LETTER BY LANGWEILER (2 OCTOBER 2020)*]. Indeed, RESPONDENTS intend to present expert evidence in relation to the scope of the licence granted under the Ross Agreement [*LETTER BY LANGWEILER (2 OCTOBER 2020)*]. By contrast, CLAIMANT does not intend to present such evidence [see *LETTER BY FASTTRACK (2 OCTOBER 2020)*]. Therefore, virtual hearings jeopardise RESPONDENTS' right to equal treatment [see *SCHERER*, 444].



(b) The time zones of the Parties differ substantially

84. In addition, a virtual hearing will always jeopardise one of the Parties' right to be heard and treated equally because the time zones of the Parties differ substantially. The time difference between CLAIMANT's place of business (Mediterraneo) and RESPONDENTS' place of business (Equatoriana) is 11 hours [PO2, §36]. This time difference will produce substantial disparities between the Parties' start and finish times [ICC GUIDANCE NOTE, §28]. For example, a hearing starting at 9am in Mediterraneo is 8pm in Equatoriana. This would require RESPONDENTS, their counsel and their experts to participate well beyond normal work hours, potentially into the early morning. At these unreasonable hours, RESPONDENTS' witnesses may not even be available. Even if RESPONDENTS started at 3pm, this would entail CLAIMANT beginning well before normal work hours at 4am. The effect of the Parties' differing time-zones is compounded by the organisational difficulties of conducting 'complex, document-heavy cases' virtually if multiple witnesses and experts are needed [D'AVINO/EZZELERAB; WETMORE/ELLIOT, 228]. Consequently, the time differences will negatively affect one Parties' ability to present its case disproportionately over the other [see STEIN, 174]. Therefore, virtual hearings will jeopardise one of the Parties' right to be heard and treated equally.
85. Overall, the Tribunal should not hold hearings virtually when this jeopardises the Parties' right to be heard and treated equally.

(ii) A VIRTUAL HEARING JEOPARDISES THE CONFIDENTIALITY OF THE PROCEEDINGS

86. It is an agreed fact that third parties could interfere and gain access to a virtual hearing [PO2, §35]. Given the Parties' interest in avoiding the disclosure of confidential information, upon which CLAIMANT places weight in the context of its arguments on joinder [C MEMO, §30], the possibility of a data security breach weighs against ordering a virtual hearing.
87. None of CLAIMANT's arguments resolve this issue. First, CLAIMANT asserts that data will be secure because cybersecurity protocols can be implemented [C MEMO, §59]. CLAIMANT characterises the possibility of a data breach as RESPONDENTS' opinion [C MEMO, §58]. On the contrary, it is an agreed fact that data breaches are possible and that the Parties cannot prevent that possibility [PO2, §35]. Accordingly, CLAIMANT's suggestion of implementing possible cybersecurity protocols does not resolve the possibility of a data breach.
88. Second, CLAIMANT argues that the possibility of a data breach should be ignored because in-person hearings also do not ensure that data is 100% protected [C MEMO, §60]. CLAIMANT cites examples in which an attendee places a recording device in a suit pocket or provides confidential documents to a third party after the hearing [C MEMO, §60]. However, the Parties can address the former example by preventing third parties from attending the hearing or using security protocols to



prevent such devices from entering the room. Furthermore, the Tribunal should disregard the latter example because the Parties would not provide confidential documents to an attendee who is not bound by confidentiality obligations. In any event, the possibility of these bizarre circumstances is more remote than that of a data breach in a virtual hearing.

89. Third, CLAIMANT argues that data security is insignificant because RESPONDENTS agreed to communicate by email [*C MEMO*, §60]. CLAIMANT implies that because email is not 100% secure, RESPONDENTS have accepted the possibility of data breaches [*C MEMO*, §60]. However, RESPONDENTS have discretion regarding what information they disclose by email. By contrast, the Tribunal, CLAIMANT and ROSS may require RESPONDENTS to disclose a variety of information in a virtual hearing. Furthermore, communication by email is not a waiver of the importance of data security in arbitration since commercial reality dictates RESPONDENTS' decision to communicate by email.
90. For these reasons, the risk of a data breach weighs against the Tribunal holding hearings virtually.

In summary, the Tribunal should not hold the second hearing virtually. The Tribunal does not have the power to hold hearings virtually. The Parties agreed to hold hearings in person and this agreement is binding on the Tribunal. Alternatively, the Tribunal should not exercise any power to hold hearings virtually because there are not compelling justifications for doing so. Compelling justifications are required because the Parties agreed or expected that the Tribunal would hold hearings in person. CLAIMANT has not established that there are compelling justifications for two reasons. First, holding hearings virtually jeopardises the Parties' right to be heard and treated equally. Second, holding hearings virtually jeopardises the confidentiality of the proceedings.

ARGUMENT III

THE CISG DOES NOT APPLY TO THE AGREEMENT

91. The purpose of the Agreement is to '*engage in collaborative activities with respect to the GorAdCam vectors*' [*AGREEMENT*, *cl* 2]. Under the Agreement, RESPONDENT 1 licenses the use of the GorAdCam vector in the field of respiratory diseases to CLAIMANT [*AGREEMENT*, *cl* 5.1, 5.2]. If CLAIMANT develops a vaccine and produces the vaccine itself, RESPONDENT 1 transfers know-how to CLAIMANT about the best procedures to amplify the GorAdCam viral vector using the Base Materials [*PO2*, §17].



92. The Agreement also contains sales aspects. RESPONDENT 1 delivered a batch of GorAdCam vectors to CLAIMANT [*AGREEMENT*, cl 9.2; *NOTICE*, §30]. If CLAIMANT develops a vaccine and produces the vaccine itself, it purchases the required Base Materials from RESPONDENT 1 [*AGREEMENT*, cl 16.1; see *PO2*, *APP. 1*]. If CLAIMANT develops a vaccine and exercises the Production Option, it purchases the vaccine from RESPONDENT 1 [*AGREEMENT*, cl 16.2].
93. CLAIMANT argues that the CISG applies to the Agreement [*C MEMO*, §67]. On the contrary, Article 3(2) CISG excludes the application of the CISG. Article 3(2) provides that the CISG does not apply to contracts in which the ‘preponderant part’ of the seller’s obligations consists in the ‘supply of labour or other services’ [*CISG AC No 4*, §3.1, 3.2]. Article 3(2) excludes the application of the CISG to the Agreement because, *arguendo*, RESPONDENT 1’s licence and transfer of know-how are ‘labour and other services’ under Article 3(2) CISG **(A)**, and this supply of ‘labour and other services’ is the preponderant part of RESPONDENT 1’s obligations **(B)**.

A. ARGUENDO, RESPONDENT 1’S LICENCE AND TRANSFER OF KNOW-HOW ARE ‘LABOUR AND OTHER SERVICES’ UNDER ARTICLE 3(2) CISG

94. CLAIMANT accepts that RESPONDENT 1’s licence and transfer of know-how are services [*C MEMO*, §90]. CLAIMANT was correct to take this position. The term ‘labour and other services’ in Article 3(2) CISG must be construed to capture all aspects of a contract which do not involve the sale of goods [*SONO*, 519; *RECYCLING MACHINE CASE*]. This interpretation is consistent with the purpose of Article 3(2) CISG, which is to exclude contracts where such ‘non-sales’ obligations are the preponderant part [*SONO*, 519; see *BRUNNER/FEIT*, 37; *SCHWENZER/HACHEM*, 71; *ENDERLEIN/MASKOW*, 37]. RESPONDENT 1’s licence and transfer of know-how are ‘non-sales’ aspects [see *SONO*, 519; *SCHWENZER/HACHEM* 3, 35; *SCHLECTRIEM*, 27]. Indeed, both obligations are characterised by ‘the right to utilize an intellectual product of work’ rather than a ‘transfer of property and possession of goods’ [*MARKET RESEARCH STUDY CASE*]. Therefore, RESPONDENT 1’s licence and transfer of know-how are ‘labour and other services’ under Article 3(2) CISG.
95. Even if the Tribunal construes the phrase ‘labour and other services’ in Article 3(2) CISG more narrowly than all non-sales aspects, such as in accordance with its ordinary meaning, RESPONDENT 1’s obligations are still ‘labour and other services’ for two reasons. First, licences are widely defined as services. Professor Dr Sono, member of the CISG Advisory Council, characterises licences as ‘services’ for the purposes of Article 3(2) CISG [*SONO*, 519]. Furthermore, there is an emerging ‘degree of consensus’ between the domestic law of several legal systems, including France, Germany and the United States, that licences are services [*SCHWENZER/RANTUNGE*, 178; *LAWRENCE*, §2-105:81; *HUNTER*, §9:12]. Therefore, this Tribunal should conclude that licences are services for the purpose of Article 3(2) in accordance with the CISG’s international character and



the need to promote uniformity between legal systems [see *ART 7(1) CISG; HONNOLD 2, 15; PETRZELOVA, 7; QUINN, 8*].

96. Second, the transfer of know-how under the Agreement is analogous to a contract for the provision of training services. Under the Agreement, RESPONDENT 1 transfers know-how to CLAIMANT regarding the best procedures for amplification of the GorAdCam vector [PO2, §17]. Under the Ross Agreement, RESPONDENT 2 transferred know-how to ROSS by having two leading researchers attend weekly research meetings in accordance with the Research Plan [PO2, §21]. Without a copy of the Agreement's Research Plan [cf *AGREEMENT, cl 3.2*] and considering the similarities between the content and purpose of the Agreement and the Ross Agreement [PO2, §25], the Tribunal should infer that RESPONDENT 1 will also transfer know-how to CLAIMANT by attending research sessions.
97. Attending meetings to transfer know-how is analogous to training because it involves the transfer of knowledge through the supply of labour. It is widely accepted that providing training to a buyer's employees amounts to a supply of 'services' under Article 3(2) CISG [see *CISG AC No 4, §3.1; SCHWENZER/HACHEM, 68; TURNKEY PLANT CASE; GENERAL DYNAMICS V LIBYA §17; INSURER (CZECH) V BUYER (RUSSIA) 4; PACKAGING MACHINE CASE; COMPUTER HARDWARE CASE II*]. Therefore, RESPONDENT 1's transfer of know-how is also a service under Article 3(2) CISG.

B. THE SUPPLY OF LABOUR AND OTHER SERVICES IS THE PREPONDERANT PART OF RESPONDENT 1'S OBLIGATIONS

98. RESPONDENTS agree that the two criteria applied to decide whether obligations are preponderant are the 'economic value' and 'essential' criteria [C MEMO, §86; *CISG AC No 4, §3.4*]. The economic value criterion compares the individual economic value of the goods and services by assessing the prices that CLAIMANT would have paid for those goods and services if they were in separate contracts [*SCHWENZER/HACHEM, 69; MISTELIS/RAYMOND, 59; BRUNNER/FEIT, 40-1; SPINNING PLANT CASE*]. The essential criterion considers the Parties' intent in light of the contract's purpose and the circumstances surrounding its formation [see *C MEMO, §86; RECYCLING MACHINE CASE; CYLINDER CASE; BRIDGE, 484*].
99. Contrary to CLAIMANT's argument [C MEMO, §88], the supply of labour and other services is the preponderant part of the Agreement because the Tribunal should apply the essential criterion (1) and RESPONDENT 1's service obligations are preponderant under the essential criterion (2).



1. THE TRIBUNAL SHOULD APPLY THE ESSENTIAL CRITERION

100. The Tribunal should apply the essential criterion if the economic value criterion is impossible or inappropriate to apply [*CISG AC No 4*, §3.3; *RECYCLING MACHINE CASE*; *CYLINDER CASE*; *MISTELIS/RAYMOND*, 59; *ORINTIX CASE*; *AIRBAG PARTS CASE*].

101. Here, the Tribunal should apply the essential criterion because the economic value criterion is impossible to apply **(i)** or, in the alternative, inappropriate to apply **(ii)**.

(i) THE ECONOMIC VALUE CRITERION IS IMPOSSIBLE TO APPLY

102. The economic value criterion is impossible to apply when the relative contribution of goods and services to the contract's prices are impossible to determine [*SCHWENZER/HACHEM*, 70; *CYLINDER CASE*; *CISG AC No 4*, §3.4]. The Tribunal must assess prices at the time of the Agreement's formation when applying the economic value criterion [see *SCHWENZER/HACHEM*, 70; *BRUNNER/FEIT*, 40-1]. Where the Agreement's prices are ambiguous, the Tribunal should apply the essential criterion, rather than apply the economic value criterion using its own estimates as a substitute for defined prices [see *CYLINDER CASE*].

103. Here, the relative contribution of goods and services to the Agreement's price is impossible to determine because the prices for the goods and services are inseparable **(a)** and the prices for the goods and services are uncertain **(b)**.

(a) The prices for the goods and services are inseparable

104. The relative contribution of the goods and services to the Agreement's price is impossible to determine where the prices for the goods and services are inseparable [see *CYLINDER CASE*]. The price for goods is inseparable from the price for services under the Agreement in two ways.

105. First, the prices for the initial batch of GorAdCam vectors and the licence are inseparable from one another. Contrary to CLAIMANT's assumption that the €2.5 million upfront payment is solely attributable to the GorAdCam vector [*C MEMO*, §93], this payment is also in consideration of 'non-exclusive access to [Respondent 1's] Licensed Technology' [*AGREEMENT*, cl 9.2]. In this manner, the Agreement does not differentiate between the individual price of the initial goods and the licence [*AGREEMENT*, cl 9.2]. Therefore, the individual prices for the initial batch of vectors and licence are inseparable.

106. Second, the prices for the HEK-294 cells, growth medium and transfer of know-how are inseparable from one another. Contrary to CLAIMANT's assumption, the listed price for the Base Materials is not solely attributable to these goods [cf *C MEMO*, §95]. Rather, this price also includes the value of the know-how transferred by RESPONDENT 1. This can be inferred from the fact that the transfer of know-how is limited to the production of a vaccine by CLAIMANT [*C MEMO*, §94] and the purchase of Base Materials is the only payment conditional on CLAIMANT producing a



vaccine itself [*AGREEMENT*, cl 16.1]. Therefore, the individual prices of the Base Materials and transfer of know-how are inseparable.

107. For these reasons, the individual prices for goods and services are inseparable. In turn, these prices are impossible to determine.

(b) The prices for the goods and services are uncertain

108. The relative contribution of the goods and services to the Agreement's price is impossible to determine where the prices for the goods and services are uncertain. The prices for the goods and services under the Agreement are uncertain for three reasons.

109. First, the probability of CLAIMANT developing a vaccine was uncertain at the time of the Agreement's formation. The Agreement's Purchase Obligation, Production Option, milestone payments and royalty payments are all contingent on vaccine production [see *AGREEMENT*, cl 9.4, 9.5.1, 16.1, 16.2]. CLAIMANT assumes that a vaccine will be produced by either CLAIMANT or RESPONDENT 1 [*C MEMO*, §90]. However, at the time of the Agreement's formation it was impossible to know whether CLAIMANT would produce a vaccine. Furthermore, the Parties did not attribute a probability to the development of a vaccine at the time of the Agreement's formation. Therefore, the prices of the Parties' obligations that are contingent on the production of a vaccine are uncertain.

110. Second, the prices of the licence, Base Materials and vaccines are uncertain because the quantity and price of the vaccine that CLAIMANT would sell was unknown at the time of the Agreement's formation. The Parties could not have known the market price, or quantity to be sold, of a future vaccine on 1 January 2019. Even nearing Phase-III trials of its vaccine in December 2020, CLAIMANT's estimate of the vaccine price was anywhere between €20 to €40 [*PO2*, §6]. The ambiguity in price and quantity of the vaccine makes the price of the licence ambiguous because the Agreement's royalty payments, which increase with sales, are consideration for the licence [*AGREEMENT*, cl 9.5.1; *C MEMO*, §90; *NOTICE*, §14]. The ambiguity in the quantity of the licence also affects the overall price of the Base Materials because the more vaccine that is produced, the more Base Materials CLAIMANT will be required to purchase. Therefore, the prices of the licence, Base Materials, and vaccines are uncertain.

111. Third, the price of the vaccines purchased under the Production Option is also uncertain because it is subject to negotiation. CLAIMANT can choose whether to have RESPONDENT 1 produce vaccines [*AGREEMENT*, cl 16.2]. Furthermore, the cost of vaccine production is at a price to be agreed by the Parties [*AGREEMENT*, cl 16.2]. Therefore, the Production Option price is uncertain.

112. Contrary to CLAIMANT's argument [cf *C MEMO*, §89], these ambiguities are not resolved by the Parties' assumptions in their internal profitability index assessments [see *PO2*, §7]. Rather, these



assessments merely provide a hypothetical illustration of the Agreement's profitability. The Parties did not intend to make predictions when doing so was practically impossible. At the time of the Agreement's formation, the Parties did not know what disease the vaccine would target, let alone the spread of that infectious disease or the number of competitor vaccines. Indeed, the actual production required is five times that of the Parties' assumption [PO2, §5]. Instead, it is more likely the Parties made their assumption that 20 batches would be produced based on this being RESPONDENT 1's 2019 production capacity rather than an estimate of demand [see PO2, §5]. Therefore, the Parties' assumption does not resolve the ambiguity in the price of the Base Materials and vaccines. In turn, these prices are uncertain.

113. For these reasons, the relative contribution of goods and services to the Agreement's price is uncertain. In turn, these prices are impossible to determine. Consequently, the economic value criterion is impossible to apply. Therefore, the Tribunal should apply the essential criterion to determine the preponderant part of the Agreement.

(ii) ALTERNATIVELY, THE ECONOMIC VALUE CRITERION IS INAPPROPRIATE TO APPLY

114. Even if the economic value criterion is not impossible to apply, the Tribunal should apply the essential criterion because the economic value criterion is inappropriate. The economic value criterion is inappropriate where it undermines the Parties' intent that the provision of services is the preponderant part of the Agreement [RECYCLING MACHINE CASE; WINDOW PRODUCTION PLANT CASE; MISTELIS/RAYMOND, 59; ORINTIX CASE]. Party intent should always prevail, even if it conflicts with the economic value criterion [SCHWENZER/HACHEM, 70; ORINTIX CASE].

115. Here, the Parties intended that the provision of services should be the preponderant part of the Agreement for the same reasons that the essential criterion is satisfied [infra B.2]. In particular, the Parties have prioritised RESPONDENT 1's service obligations over the sale of goods [infra B.2.(i)] and the Agreement's purpose is most dependent on the provision of services [infra B.2.(ii)].

116. Therefore, even if the economic value criterion is not impossible to apply, the Tribunal should apply the essential criterion.

2. RESPONDENT 1'S SERVICE OBLIGATIONS ARE PREPONDERANT UNDER THE ESSENTIAL CRITERION

117. The essential criterion considers the intent of the parties in light of the contract's purpose and the circumstances surrounding its formation [see C MEMO, §86; RECYCLING MACHINE CASE; CYLINDER CASE; BRIDGE, 484]. Here, the essential criterion is satisfied because the Parties prioritised the provision of services over the sale of goods **(i)** and the Agreement's purpose is most dependent on the provision of services **(ii)**.



(i) THE PARTIES PRIORITISED RESPONDENT 1'S SERVICE OBLIGATIONS OVER THE SALE OF GOODS

118. RESPONDENTS agree that the Parties' intent is reflected by the priority placed on RESPONDENT 1's obligations [see *C MEMO*, §98; *CISG AC OPINION No. 4*, §3.4]. The priority the Parties placed on RESPONDENT 1's obligations demonstrates that the supply of services is the preponderant part of the Agreement. The Parties prioritised RESPONDENT 1's service obligations **(a)** and did not prioritise RESPONDENT 1's sale of goods **(b)**.

(a) The Parties prioritised RESPONDENT 1's service obligations

119. The Parties prioritised RESPONDENT 1's service obligations for two reasons. First, the Parties prioritised RESPONDENT 1's service obligations during negotiations. Contrary to CLAIMANT's argument, the governing contract law applies when determining intent for the purposes of Article 3(2) CISG [see *STANIVUKOVIC*, 330; *SCHMIDT-KESSEL*, 144; *ZUPPI*, 147; cf *C MEMO*, §99]. The Parties' correspondence during negotiations is a relevant circumstance in establishing the Parties' intent under Article 4.3(a) PICC [*BONNELL*, 234-5; *VOGENAUER*, 588; *PO1*, §3].

120. During negotiations, the Parties selected a contract template prioritising the licence rather than the sales obligations [*EX R2*, §7; *PO2*, §24; *NOTICE*, §12; *ANSWER*, §10]. Initially, the Parties used a template 'based on the model used by Respondent No. 1 for its contract manufacturing' [*EX R2*, §7]. However, CLAIMANT had 'serious objections' about the 'standard model contract' and complained that the initial draft 'would not sufficiently take into account the IP-element involved' [*EX R2*, §7]. If the Parties did not consider the licence a priority, they would have simply amended the standard model contract. Instead, the Parties adopted a new contract template focused on licensing, namely a template titled 'Collaboration and Licensing Agreement' [*EX R2*, §3, 8]. The Parties merely added the Purchase Obligation and Production Option to this template. Therefore, the Parties' negotiations prioritised RESPONDENT 1's service obligations.

121. Second, the Parties prioritised RESPONDENT 1's service obligations through the Parties' short titles. The Agreement refers to CLAIMANT as 'licensee' and RESPONDENT 1 as 'licensor'. This suggests the Parties considered RESPONDENT 1's licence was most characteristic of RESPONDENT 1's role in the Agreement. In turn, the short titles evince the Parties' intention that RESPONDENT 1's licence was its most important obligation. If the sale of goods was more important, the Agreement would have referred to CLAIMANT as the 'buyer' and RESPONDENT 1 as the 'seller'. Therefore, the Parties' short titles prioritised RESPONDENT 1's provision of services.

(b) The Parties did not prioritise RESPONDENT 1's sale of goods

122. CLAIMANT's arguments that the Parties prioritised the sale of goods are incorrect for four reasons. First, CLAIMANT incorrectly argues that the order of the Agreement's title places a 'special



emphasis' on the sale of goods [cf *C MEMO*, §100]. CLAIMANT argues that putting the word 'purchase' at the beginning of the Agreement's title evinces RESPONDENT 1's 'main intentions' to sell goods [*C MEMO*, §100]. On the contrary, Article 4.4 PICC provides that it is not possible to infer a term's importance from the order in which it appears in a provision's title [*BRODERMANN*, 115]. Therefore, the order of the Agreement's title is neutral.

123. Even if the order of the Agreement's title could reflect intention, the Parties' intent was not to prioritise the sale of goods. Rather, the addition of 'purchase' is explicable by the Parties' intention to merely describe the Agreement relative to other existing contracts. 'Purchase' is a useful descriptor because the Purchase Obligation is a '*peculiar*' aspect of the Agreement compared to industry practice [see *NOTICE*, §15, 17]. Furthermore, the argument that the Parties intended to prioritise the sale of goods through the Agreement's title conflicts with the title itself. Two-thirds of the Agreement's title, '*Purchase, Collaboration and Licensing Agreement*', refer to non-sales aspects. Therefore, the order of the Agreement's title does not prioritise the sale of goods.
124. Second, CLAIMANT incorrectly argues that RESPONDENT 1's interest in using its production facilities to sell Base Materials evinces the Parties' intent to emphasise the sale of goods [cf *C MEMO*, §101]. One party's interest in selling goods does not suggest that both parties intended the sale of goods to be preponderant. For example, a mechanic's interest in selling a car air-refresher to a customer does not change the fact that both the mechanic and customer intend to prioritise the importance of the mechanic's labour and other services. Therefore, RESPONDENT 1's interest in using its production facilities does not reflect the Parties' intention to prioritise particular obligations.
125. Third, CLAIMANT incorrectly argues that the Parties specifically negotiating the Purchase Obligation demonstrates a 'special emphasis' on the purchase of goods [*C MEMO*, §100]. This clause was specifically negotiated only because it differs from the initial licence template [see *PO2*, §24-5].
126. Fourth, CLAIMANT incorrectly argues that RESPONDENT 1 including a Purchase Obligation in all its subsequent contracts prioritises the sale of goods [cf *C MEMO*, §101]. CLAIMANT has not substantiated how the Tribunal can infer the Parties' intent at the time of the Agreement's formation from RESPONDENT 1's subsequent contractual terms with other licensees [cf *ART 8(3) CISG*; *ART 4.3(C) PICC*]. Regardless, the decision to include Purchase Obligations in all subsequent contracts merely reflects RESPONDENT 1's interest in using its production facilities [*PO2*, §26]. Therefore, RESPONDENT 1's inclusion of a Purchase Obligation in subsequent contracts is irrelevant.



127. For these reasons, the Parties prioritised RESPONDENT 1's supply of services rather than the sale of goods. This suggests RESPONDENT 1's service obligations are preponderant under the essential criterion.

(ii) THE AGREEMENT'S PURPOSE IS MOST DEPENDENT ON THE PROVISION OF SERVICES

128. The Parties' intent is also reflected by the importance of RESPONDENT 1's obligations to the purpose of the Agreement [see *ORINTIX; ALFRED DUNHILL V TIVOLI*]. The purpose of the Agreement is to '*engage in collaborative activities with respect to the GorAdCam vectors*' [AGREEMENT, cl 2].
129. The Parties cannot achieve the Agreement's purpose without a licence for intellectual property rights over the GorAdCam vector. Without its licence, CLAIMANT could not research, develop, manufacture or use any products using GorAdCam vectors [AGREEMENT, cl 5.2].
130. By contrast, the Agreement's purpose is not dependent on the sale of goods other than the initial batch of GorAdCam vectors. The purchase of Base Materials and vaccines are not essential to the Agreement's purpose to '*engage in collaborative activities with respect to the GorAdCam vectors*' [AGREEMENT, cl 2]. Rather, the Purchase Obligation and Production Option were merely included to incentivise CLAIMANT to request RESPONDENT 1 to produce any vaccine developed [EX R2, §11]. Indeed, the Ross Agreement has the same purpose as the Agreement [ROSS AGREEMENT, cl 2] and yet does not involve the purchase of Base Materials and vaccines [cf ROSS AGREEMENT]. Similarly, standard industry practice in the development and production of vaccines based on viral vectors does not require these purchases [see NOTICE, §14, 17]. Therefore, the initial batch of GorAdCam vectors are the only goods on which the Agreement's purpose is dependent.
131. Although the Agreement's purpose is dependent on both the licence and initial batch of GorAdCam vectors, it is most dependent on the licence. The licence is required throughout the entirety of the Agreement's duration to achieve the Agreement's purpose [cf AGREEMENT, cl 5.2, 13.1]. By contrast, the delivery of the initial batch of GorAdCam vectors only occurs once at the beginning of the Agreement [PO2, §4]. By analogy with the *Orintix Case*, the Agreement's purpose is most dependent on the provision of services. In the *Orintix Case*, the contract's purpose was to create a computer software system for the buyer and make it operational [ORINTIX CASE; MISTELIS/RAYMOND, 59]. To achieve this purpose, the seller needed to adjust repeatedly the software contained within delivered hardware. Although the delivered hardware was also essential to the contract's purpose and was a higher price than the software, the seller's service obligations were preponderant in accordance with the essential criterion. This was because services were required throughout the contract term to achieve the contract's purpose. The *Orintix Case* is analogous to the present circumstances because the licence is a service [supra A] that is also required throughout the duration of the Agreement to achieve the Agreement's purpose [see



AGREEMENT, cl 13.1]. Therefore, the Agreement's purpose is most dependent on RESPONDENT 1's service obligations.

132. For these reasons, RESPONDENT 1's provision of services is the preponderant part of its obligations under the essential criterion.

In summary, the Tribunal should not apply the CISG to the Agreement. Article 3(2) excludes the application of the CISG because RESPONDENT 1's service obligations, namely its licence and transfer of know-how, are the preponderant part of the Agreement. The Tribunal should apply the 'essential' criterion because it is impossible or inappropriate to apply the 'economic value' criterion. The economic value criterion is impossible to apply because the prices for the goods and services are inseparable and the prices for the goods and services are uncertain. The economic value criterion is inappropriate, and the essential criterion is satisfied, because the Parties prioritised RESPONDENT 1's service obligations and the Agreement's purpose is most dependant on these service obligations.

ARGUMENT IV

RESPONDENT 1 HAS NOT BREACHED ARTICLE 42 OF THE CISG

133. Even if the Tribunal finds that the CISG governs the Agreement, RESPONDENT 1 has not breached Article 42 of the CISG.
134. On 15 June 2014, ROSS obtained an exclusive licence from RESPONDENT 2 to use the GorAdCam vector in the field of '*malaria and related infectious disease*' [*ROSS AGREEMENT*, §1.3]. On 1 January 2019, CLAIMANT obtained a non-exclusive licence from RESPONDENT 1 under the Agreement to use the GorAdCam viral vectors in the field of respiratory diseases [see *AGREEMENT*, cl 5]. ROSS has suggested to RESPONDENT 2, but not CLAIMANT, that its licence may extend to respiratory diseases [see *EX R4; ANSWER*, §11-2].
135. Article 42 CISG requires the seller to deliver goods which are free from any third-party industrial property or other intellectual property rights or claims. CLAIMANT bears the burden of proving that RESPONDENT 1 has breached Article 42 [see *SCHWENZER*, 706; *CD MEDIA CASE*; *SAIDOV*, 231].
136. RESPONDENT 1 has not breached Article 42 CISG because ROSS do not have a claim for the purposes of Article 42 **(A)** or, alternatively, RESPONDENT 1 did not have sufficient knowledge of ROSS' claim at the time of the Agreement's formation **(B)**.



A. ROSS DO NOT HAVE A CLAIM FOR THE PURPOSES OF ARTICLE 42

137. Article 42 CISG requires that a third party has a right or claim over the goods [see *SCHWENZER*, 694-6; *HONNOLD*, 294]. CLAIMANT asserts that ROSS has a claim over the GorAdCam vectors [*C MEMO*, §108]. On the contrary, ROSS do not have a claim for the purposes of Article 42 for any of three reasons. First, ROSS' allegation against RESPONDENT 2 is frivolous (1). Second, ROSS has not asserted its allegation against CLAIMANT (2). Third, it is not 'fairly likely' that ROSS will initiate proceedings against CLAIMANT (3).

1. ROSS' ALLEGATION AGAINST RESPONDENT 2 IS FRIVOLOUS

138. CLAIMANT incorrectly argues that frivolous allegations can found claims under Article 42 [*C MEMO*, §109]. A seller's liability would be unreasonably wide if frivolous claims could give rise to a breach of Article 42 [*SCHWERHA*, 457; see *SCHWENZER* 2, 685]. There are three reasons the Tribunal should adopt this view.
139. First, it accords with the intention of the CISG's drafters. The drafters provided that Article 41 'would not be breached every time a third party makes a frivolous claim in respect of his goods' [*SECRETARIAT COMMENTARY ARTICLE 39(1)*, §4; *HONNOLD* 3, 107]. The only material difference between Articles 41 and 42 is that the former deals with third party rights or claims not relating to intellectual property [*SCHWENZER* 2, 684]. By extension, frivolous claims also do not breach Article 42.
140. Second, excluding frivolous and bad faith claims accords with the CISG's international character and the need to promote uniformity [see *ART 7(1) CISG*; *HONNOLD* 2, 15; *PETRZELOVA*, 7; *QUINN*, 8]. At the international level, the DCFR and CESL only require the seller to ensure that goods are free from third-party claims which are 'reasonably well founded' and 'not obviously unfounded', respectively [*SAIDOV*, 194; *ART 2:305 DCFR*; *ART 102(2) CESL*; *SCHWENZER* 2, 685]. Similarly, a consensus of domestic legal systems, including the United Kingdom, the United States, Germany and Canada, provide that frivolous claims do not breach a seller's warranty that goods will not be encumbered by third party claims [*SCHWENZER/HACHEM/KEE*, 410; *SAIDOV*, 194; *ATTYAH*, 116; *PACIFIC SUNWEAR CASE*, 481; *FRIDMAN*, 115; *GERMAN HIV DRUG CASE*; *SCHWENZER/TEBEL*, 153].
141. Third, CLAIMANT overstates its argument that requiring the buyer to defend a frivolous claim is 'unreasonable' [cf *C MEMO*, §109]. Once the seller proves that the third-party claim is frivolous, it will not be difficult for the buyer to defend itself against the third party [see *KRÖLL* 2, 630]. Therefore, it is reasonable to require the buyer to defend itself against frivolous claims.
142. For these reasons, a third-party allegation is not a claim for the purposes of Article 42 if it is frivolous.



143. Here, ROSS' claim against RESPONDENT 2 is frivolous because there is little merit to its allegation that the '*field of malaria and related infectious diseases*' extends to COVID-19 [see *ROSS AGREEMENT; EX R5*; cf *C MEMO*, §114]. The intention of ROSS and RESPONDENT 2 in extending the field of the Ross Agreement to '*related infectious diseases*' was to enable ROSS' research in the field of malaria to be applied in other related fields, particularly '*infectious diseases in developing countries*' such as cholera [PO2, §20]. In light of this intent, COVID-19 is not a '*related infectious disease*' for two reasons. First, there is no evidence that the Parties believed in 2014 that ROSS' research in the field of malaria would have any application to respiratory diseases like COVID-19. Indeed, CLAIMANT refers to the general expectation in 2012 that the GorAdCam vector would not be applicable to respiratory diseases [see *NOTICE*, §6]. It was not until after conducting research under the Ross Agreement that ROSS realised the GorAdCam vector might also be useful for vaccination and treatment of respiratory diseases [*NOTICE*, §9]. Second, concluding that COVID-19 is a related disease is not consistent with ROSS' intention to capture infectious diseases like cholera that are prevalent in some developing countries. Unlike cholera, COVID-19 is a worldwide pandemic prevalent in most countries [see *WORLD HEALTH ORGANISATION 1*; *WORLD HEALTH ORGANISATION 2*].
144. CLAIMANT argues that ROSS' claim is not 'completely baseless' because malaria is an infectious disease which sometimes involves respiratory symptoms [*C MEMO*, §116]. This argument fails to acknowledge that ROSS and RESPONDENT 2's intention was not to include infectious diseases or diseases with respiratory symptoms, but rather 'related' diseases like cholera which would use ROSS' malaria research and affect developing countries [PO2, §20].
145. Therefore, ROSS' allegation that COVID-19 is a '*related infectious disease*' for the purposes of the Ross Agreement is frivolous. In turn, ROSS has not made a 'claim' as required under Article 42 CISG.

2. ALTERNATIVELY, ROSS HAS NOT ASSERTED ITS ALLEGATION AGAINST CLAIMANT

146. ROSS has not asserted its allegation against CLAIMANT [*ANSWER*, §20]. CLAIMANT argues that it is sufficient that ROSS merely claims it has an exclusive licence [*C MEMO*, §109]. However, the proper interpretation of Article 42 is that a claim only arises once the third party (ROSS) asserts its allegation against the buyer (CLAIMANT) [*CD MEDIA CASE*; *JANAL*, 211; *RAUDA/ETIER*, 36; *SAIDOV*, 215]. The Tribunal should adopt this interpretation of Article 42 for four reasons.
147. First, where a third party has not asserted its rights directly against the buyer, the seller would be overly burdened if it had to warrant the absence of mere assertions of claims by third parties [*JANAL*, 211; *RAUDA/ETIER*, 36; *SAIDOV*, 215]. Such a warranty would involve accepting responsibility for an indeterminate number of hypothetical claims that may or may not actually affect the buyer's use of the goods. Extending liability in this way conflicts with the fact that the drafters based Article 42 on the need to limit the seller's liability [*SAIDOV*, 215; see *SCHWENZER*,



- 693; *UNCITRAL WORKING GROUP 10TH SESSION*, 40]. This is particularly so if the Tribunal accepts CLAIMANT's argument that the seller is liable under Article 42 for frivolous claims [*SAIDOV*, 215; *C MEMO*, §109].
148. Second, the only normative justification provided by CLAIMANT for its contrary interpretation of Article 42 is flawed. CLAIMANT argues that the mere possibility of a claim being asserted in the future already prevents the unfettered use of the goods, even without an assertion against CLAIMANT [*C MEMO*, §110]. On the contrary, CLAIMANT's freedom to use the goods is not restricted where ROSS has not asserted its rights [see *RAUDA/ETIER*, 36]. CLAIMANT can always seek damages from the seller if ROSS ultimately asserts its allegation or if CLAIMANT can prove the existence of ROSS' alleged right [see *SCHWERHA*, 458; *CD MEDIA CASE*; *JANAL*, 211; *RAUDA/ETIER*, 36].
149. Indeed, CLAIMANT's use of the goods is not in fact fettered. Rather, it has continued its research into a vaccine against COVID-19 and even announced phase-III trials for mid-December 2020 [*PO2*, §16]. CLAIMANT's initiation of these proceedings is actually an effort to prepare for the termination or renegotiation of a contract which no longer appears favourable following its acquisition by KHORANA LIFESCIENCE [*ANSWER*, §2-3]. Likewise, the companies other than CLAIMANT affected by the scope of ROSS' licence have not had their use of the GorAdCam vectors restricted. In the view of ROSS' CEO, the dispute '*present[s] no obstacle to the continuation of the research activities of ROSS into ... infectious respiratory diseases*' [*EX C2*]. Similarly, the two other parties to which RESPONDENT 1 has granted non-exclusive licences over the GorAdCam vectors have not claimed for breach of contract [*PO2*, §18]. For these reasons, CLAIMANT is not restricted in its freedom to use the GorAdCam vectors where ROSS has not asserted its allegation. Therefore, including allegations that ROSS has not asserted against CLAIMANT within the meaning of 'claim' does not satisfy the underlying rationale of Article 42 [see *SAIDOV*, 209].
150. Third, it is not unreasonable to require the buyer to prove the existence of a right because Article 42 still protects buyers who are not in a position to assess whether a right exists. 'Principles of equity' require a shifting of the burden of proof where the evidence of the intellectual property right 'rests within the seller's sphere' [*SCHWENZER*, 706; *JANAL*, 211]. For example, in the *CD Media Case*, the Court shifted the burden to the seller to show that a valid licensing agreement permitted the production and distribution of the goods [*JANAL*, 211].
151. Fourth, any argument by CLAIMANT that the warranties under the Agreement require a wider interpretation of Article 42 is incorrect. CLAIMANT states that its interpretation of Article 42 that no assertion against the buyer is required is 'consistent' with RESPONDENT 1's warranty that no '*claims, judgements or settlements are threatened*' or '*pending with respect to the Licensed Technology*' [*C MEMO*,



§111; *AGREEMENT*, cl 11.1.4]. It is not clear whether CLAIMANT argues that this warranty modifies the proper interpretation of Article 42, namely, that an assertion against the buyer is required. To the extent that CLAIMANT makes this argument, it is incorrect. The words of the Parties' contractual warranties cannot affect the interpretation of Article 42 CISG [see *SMYTHE*, 512, 514; *SCHWENZER/HACHEM 2*, 115; *BONELL*, 56; *MISTELIS*, 110; *MANNER/SCHMIDT*, 80; *VEGETABLES CASE*; *TELEPHONE CASE*; *TEXTILES CASE*]. Therefore, the Agreement's warranties do not inform the interpretation of Article 42 CISG.

152. For these reasons, no claim arises for the purposes of Article 42 unless the third party (ROSS) asserts its allegation against the buyer (CLAIMANT). As ROSS has not asserted its alleged right over the GorAdCam vectors against CLAIMANT, it has not made a claim as required under Article 42.

3. IN THE FURTHER ALTERNATIVE, IT IS NOT 'FAIRLY LIKELY' THAT ROSS WILL INITIATE PROCEEDINGS AGAINST CLAIMANT

153. Even if the Tribunal concludes that allegations which the third party has not asserted against the buyer can be 'claims' for the purposes of Article 42 CISG, ROSS has still not made such a claim. This is because it is not 'fairly likely' that ROSS will initiate proceedings against CLAIMANT.

154. CLAIMANT accepts that where there is no assertion against the buyer, there must have been some probability of proceedings against the buyer occurring [*C MEMO*, §110]. CLAIMANT misstates Professor Dr Kröll's test as requiring that proceedings be 'likely' [*C MEMO*, §110]. In fact, Professor Dr Kröll requires that the probability of proceedings meet a higher threshold by being 'fairly likely' [*KRÖLL*, 641].

155. Here, it is not 'fairly likely' that ROSS will bring proceedings against CLAIMANT for three reasons. First, ROSS' claim is frivolous [supra A.1]. Consequently, it would not make commercial sense for ROSS to waste time and resources initiating proceedings against CLAIMANT. This is particularly so given the likelihood of ROSS bearing the costs of the proceedings [see *SWISS RULES ART 40(1)*; *KARRER*, 400-1].

156. Furthermore, the frivolous nature of ROSS' allegation makes it distinguishable from the only example cited by Professor Dr Kröll as possibly satisfying the 'fairly likely' standard. Professor Dr Kröll states that the 'fairly likely' standard may be satisfied in circumstances where the seller delivers goods despite the fact that its licence agreement with a third party has been terminated [*KRÖLL*, 641]. If the third party terminates the seller's licence, the buyer will infringe the third party's right over the goods. Accordingly, the third party's claim will be successful as long as it validly terminated the licence agreement. Therefore, it is unlikely that Professor Dr Kröll intended his 'fairly likely' standard to capture a frivolous allegation like that of ROSS.



157. Second, ROSS' intention in raising its interpretation of its licence with RESPONDENT 2 was not to enforce its right against CLAIMANT but rather negotiate for a wider GorAdCam vector licence [ANSWER, §13]. ROSS' conduct supports this conclusion. On 6 December 2018, Ms Bordet (ROSS' Head of Contract and IP) offered to accept RESPONDENT 2's interpretation of the Ross Agreement in return for a '*non-exclusive no royalty bearing license for the use of the GorAdCam virus for respiratory diseases*' [EX R4]. As emphasised by CLAIMANT, ROSS has a '*practice of vigorously enforcing its IP rights*' [CMEMO, §113]. Accordingly, ROSS would not have offered to accept RESPONDENT 2's interpretation against the grant of a non-exclusive license if it truly believed RESPONDENT 2 had granted it an exclusive licence. Therefore, ROSS does not intend to raise its interpretation of its licence with CLAIMANT.
158. Third, ROSS has not initiated proceedings against CLAIMANT despite being aware of CLAIMANT's possible infringement. It can be inferred that ROSS is aware of CLAIMANT's possible infringement from the fact that ROSS has a specific business unit which monitors publications for such infringements [EX C7, §7], CLAIMANT's licence was mentioned in a *Biopharma Science* Article on 21 April 2020 [EX R1], and ROSS was informed of the pending arbitration between CLAIMANT and RESPONDENTS [LETTER BY SINOUSI (4 SEPTEMBER 2020)]. If ROSS intended to bring a claim, it would make commercial sense to do so as soon as possible given that it is in the pre-clinical phase of research for a vaccine against COVID-19 [PO2, §16] and this research will breach RESPONDENT 1's licence to the GorAdCam vector unless ROSS' interpretation is adopted [see EX R5]. Therefore, if ROSS wished to determine conclusively the scope of its licence it would have done so already.
159. For these reasons, it is not 'fairly likely' that ROSS will initiate proceedings against CLAIMANT. Therefore, even if the Tribunal decides that an assertion against the buyer is not a pre-condition to a claim for the purposes of Article 42 CISG, ROSS has not made a claim. In turn, RESPONDENT 1 has not breached Article 42.

B. ALTERNATIVELY, RESPONDENT 1 DID NOT HAVE SUFFICIENT KNOWLEDGE OF ROSS' CLAIM AT THE TIME OF THE AGREEMENT'S FORMATION

160. Even if the Tribunal is of the opinion that ROSS made a claim, liability under Article 42 CISG is limited to cases where the seller knew or could not have been unaware of the third-party right or claim [CMEMO, §118]. Under Article 42 CISG, knowledge of a claim translates to reasonable foreseeability of a third party's assertion of its intellectual property rights against the buyer at the time of the contract's formation [KRÖLL, 645; JANAL, 217]. It is not sufficient that the seller only knows of the facts, without awareness of the risk that a third party may assert its rights [JANAL, 216]. 'Could not have been unaware' indicates a standard close to actual knowledge, referring to instances where the seller 'closes its eyes to the facts before its face' [JANAL, 213; HONNOLD, 270; SHINN, 126].



161. CLAIMANT makes two arguments that RESPONDENT 1 had sufficient knowledge of a claim by ROSS. First, it argues that RESPONDENT 1 was ‘positively aware’ of ROSS’ claim through Mr Doherty [C MEMO, §120]. CLAIMANT relies on the email by Ms Bordet on 6 December 2018 [see EX R4]. While it is true that this email informed Mr Doherty of ROSS’ opinion that there is an ambiguity in the Ross Agreement, it does not demonstrate that it was reasonably foreseeable to Mr Doherty that ROSS would bring a claim against a licensee such as CLAIMANT. On the contrary, ROSS’ raising of its differing interpretation did not make it reasonably foreseeable that ROSS would assert its rights against CLAIMANT. This is for the same reasons that ROSS raising its allegation did not suggest it is ‘fairly likely’ ROSS will initiate proceedings against CLAIMANT [supra A.3]. In particular, ROSS’ claim is frivolous, ROSS’ true intention was to obtain a settlement, and ROSS would have already initiated proceedings if it intended to do so [supra A.3].
162. Furthermore, despite Ms Bordet’s email, RESPONDENT 1 saw no reason to stop negotiations with potential licensees and had the impression that ROSS had realised the limited success of its negotiation tactics [ANSWER, §14]. CLAIMANT accepts that this was in fact the belief of RESPONDENT 1 [C MEMO, §121]. Crucially, RESPONDENT 1 could not have held this view if Mr Doherty had reasonable foresight that ROSS would bring a claim against CLAIMANT. Moreover, it would make no commercial sense for RESPONDENT 1 to have reasonable foresight of a claim by ROSS while at the same time exposing itself to damages claims by warranting that it is ‘not aware of any Third Party’s Intellectual Property that might be infringed by conducting the Research Plan’ [AGREEMENT, cl 11.1.3]. Therefore, RESPONDENT 1 did not have knowledge of ROSS’ claim through Mr Doherty.
163. Second, CLAIMANT argues that RESPONDENT 1 ‘admitted’ it knew of ROSS’ claim in its Answer [C MEMO, §121]. CLAIMANT suggests this admission arises from the fact that RESPONDENT 1 saw no reason to stop production nor negotiations with potential licensees [see ANSWER, §14]. However, this opinion actually points against knowledge of ROSS’ claim because it contradicts reasonable foresight of a claim being brought against CLAIMANT [supra §162]. Therefore, RESPONDENT 1 did not admit that it had knowledge of ROSS’ claim.
164. For these reasons, CLAIMANT has not established that RESPONDENT 1 had sufficient knowledge of any claim by ROSS. Therefore, even if ROSS did make a claim [cf Supra A], RESPONDENT 1 has not breached Article 42 CISG.

In summary, even if the CISG is applicable, RESPONDENT 1 has not breached Article 42 CISG. ROSS has not made a claim as required under Article 42 because ROSS’ allegation is frivolous, ROSS has not asserted its allegation against CLAIMANT, or it is not ‘fairly likely’



that ROSS will initiate proceedings against CLAIMANT. In the alternative, RESPONDENT 1 did not have sufficient knowledge of any claim by ROSS.

PRAYER FOR RELIEF

For the reasons provided in this Memorandum, RESPONDENTS requests the Tribunal find that:

- I. ROSS should be joined to the proceedings.
- II. The second hearing for the examination of witnesses should not be held virtually.
- III. The CISG does not apply to the Agreement.
- IV. In any case, RESPONDENT 1 has not breached Article 42 CISG.