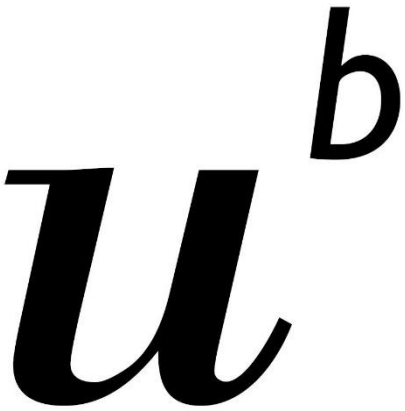
Twenty-Eighth Annual Willem C. Vis International Commercial Arbitration Moot

UNIVERSITY OF BERN



Memorandum for CLAIMANT

Case No. 300610-2020

ON BEHALF OF	**AGAINST**	**AND**
RespiVac plc Rue Whittle 9 Capital City Mediterraneo	CamVir Ltd 112 Rue L. Pasteur Oceanside Equatoriana	VectorVir Ltd 67 Wallace Rowe Drive Oceanside Equatoriana
CLAIMANT	**RESPONDENT NO. 1**	**RESPONDENT NO. 2**

COLIN A. E. FEHLMANN • RAPHAEL D. GEISSMANN • JAN HELLER
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BERN, 10 DECEMBER 2020

SWITZERLAND

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TABLE OF ABBREVIATIONS AND DEFINITIONS

§/§§	Paragraph/paragraphs
%	Percent
AG	*Aktiengesellschaft* (public limited company)
a.m.	*ante meridiem* (before midday)
ANoA	RESPONDENTS' Answer to the Notice of Arbitration of 14 August 2020
Art./Artt.	Article/Articles
A.S.	*Akciová společnost* (public limited company)
ASA	Swiss Arbitration Association
Austrian Code of Civil Procedure	Austrian Code of Civil Procedure, 1 August 1895
CCIR	Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania
CD	Compact Disk
cf.	*conferatur* (compare)
CISG	United Nations Convention on Contracts for the International Sale of Goods, 11 April 1980
CISG-AC Op.	CISG Advisory Council Opinion
Cl. Ex.	CLAIMANT's Exhibit
Co.	Company
COVID-19	Coronavirus disease 2019

DAL	Danubian Arbitration Law, verbatim adoption of the UNCITRAL Model Law on International Commercial Arbitration with the 2006 amendments (Article 7-Option 1)
DNA	Deoxyribonucleic acid
EAS	Emergency Alert System
ed./eds.	Editor/editors
e.g.	*exempli gratia* (for example)
et al.	*et alii* / *et aliae* (and others)
et seq.	*et sequens* (and the following page/paragraph)
et seqq.	*et sequentes* (and the following pages/paragraphs)
EUR	Euro
Ex.	Exhibit
FAI	The Arbitration Institute of the Finland Chamber of Commerce
GmbH	*Gesellschaft mit beschränkter Haftung* (limited liability company)
HCCH	Hague Conference on Private International Law – Conférence de La Haye de droit international privé
HEK	Human embryonic kidney
HKIAC	Hong Kong International Arbitration Centre
IAC	The International Arbitration Centre
i.e.	*id est* (that is)
ibid.	*ibidem* (in the same place)
ICC	International Chamber of Commerce

ICC Rules	Arbitration Rules of the International Chamber of Commerce, effective 1 March 2017
ICC Rules 2021	Arbitration Rules of the International Chamber of Commerce, effective as from 1 January 2021
ICSID	International Centre for Settlement of Investment Disputes
Inc.	Incorporated
infra	Below
ITA	Institute for Transnational Arbitration
KCAB	Korean Commercial Arbitration Board
LCIA Rules	Arbitration Rules of the London Court of International Arbitration, effective 1 October 2020
Ltd	Limited Company
Ltda	*Limitada* (limited liability company)
Mr	Mister
No.	Number
NoA	CLAIMANT's Notice of Arbitration of 15 July 2020
p./pp.	Page/pages
PCLA	Purchase, Collaboration and License Agreement between RespiVac plc and CamVir Ltd
PCLA Arbitration Agreement	Section 14.1 PCLA
plc	Public limited company
p.m.	*post meridiem* (after midday)
PO1	Procedural Order No. 1 of 9 October 2020

PO2	Procedural Order No. 2 of 7 November 2020
PVC	Polyvinyl chloride
R1-R2 Agreement	Licence agreement between CamVir Ltd and VectorVir Ltd
Re. Ex.	RESPONDENTS' Exhibit
Ross Agreement	Collaboration and License Agreement between Ross Pharmaceuticals and VectorVir Ltd
S.L.	*Sociedad de responsabilidad limitada* (limited liability company)
SCAI	Swiss Chambers' Arbitration Institution
Sec. Comm.	Secretariat Commentary
Srl	*Società a responsabilità limitata* (limited liability company)
supra	Above
Swiss Rules	Swiss Rules of International Arbitration, effective 1 June 2012
Swiss Rules (2004)	Swiss Rules of International Arbitration, effective 30 June 2004
U.S.	United States of America
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006
UNICEF	United Nations Children's Fund
UNIDROIT	International Institute for the Unification of Private Law
UPICC	UNIDROIT Principles of International Commercial Contracts, 2016
v.	*versus*
Vol.	Volume

STATEMENT OF FACTS

RespiVac plc ("**CLAIMANT**") is a start-up biopharmaceutical company located in Mediterraneo. The opposing parties are CamVir Ltd ("**RESPONDENT NO. 1**"), a Contract Manufacturing Organisation, and VectorVir Ltd ("**RESPONDENT NO. 2**"), the patent holder of the GorAdCam viral vectors, both located in Equatoriana (together "**RESPONDENTS**"). RESPONDENTS are subsidiaries of Roctis AG, one of the leading pharmaceutical companies in the world.

15 June 2014 Ross Pharmaceuticals, the biggest life-science company in Danubia, and RESPONDENT NO. 2 conclude a Collaboration and License Agreement ("**Ross Agreement**"). RESPONDENT NO. 2 grants Ross Pharmaceuticals an exclusive licence for the use of the GorAdCam viral vectors to develop and produce a vaccine for malaria and related infectious diseases. Mr Doherty is responsible for the negotiations on behalf of RESPONDENT NO. 2.

Summer 2018 Ross Pharmaceuticals and RESPONDENT NO. 2 find they do not agree on the scope of the exclusive licence granted by the Ross Agreement.

25 August 2018 Roctis AG acquires RESPONDENT NO. 2.

10 September 2018 RESPONDENT NO. 1 and RESPONDENT NO. 2 conclude an exclusive licence agreement about GorAdCam viral vectors for all applications with the exceptions of malaria ("**R1-R2 Agreement**"). RESPONDENT NO. 1 starts installing equipment for large-scale production of GorAdCam viral vectors and reaches out to possible companies interested in the purchase of the GorAdCam viral vectors and the necessary licences.

December 2018 Negotiations start between RESPONDENT NO. 1 and CLAIMANT. Mr Doherty acts as negotiator on behalf of RESPONDENT NO. 1. Apart from the purchase obligation in Section 16 Purchase, Collaboration and License Agreement ("**PCLA**"), the negotiations are based on the template used for the Ross Agreement. The negotiated agreement concerns GorAdCam viral vectors for research into vaccines against infectious respiratory diseases.

6 December 2018 Ross Pharmaceuticals sends an email to Mr Doherty informing him it believes it holds an exclusive licence right to use the GorAdCam viral vectors for infectious respiratory diseases.

1 January 2019	The PCLA between CLAIMANT and RESPONDENT NO. 1 becomes effective.
Beginning of 2020	Ross Pharmaceuticals starts researching on a vaccine against COVID-19.
20 April 2020	Khorana Lifescience acquires CLAIMANT.
1 May 2020	CLAIMANT receives Biopharma Science's article of 19 December 2019. It describes the dispute about the scope of the licence in the Ross Agreement.
2 May 2020	CLAIMANT notifies RESPONDENT NO. 1 about its concern regarding Ross Pharmaceuticals' exclusive licence, and asks for clarification.
4 May 2020	RESPONDENT NO. 1 downplays CLAIMANT's concerns, telling CLAIMANT not to worry about the alleged dispute even though it is still ongoing.
15 July 2020	CLAIMANT submits its Notice of Arbitration ("**NoA**") to the Swiss Chambers' Arbitration Institution ("**SCAI**") against RESPONDENTS and asks the Tribunal to declare that RESPONDENT NO. 1 breached the PCLA by delivering non-conforming GorAdCam viral vectors.
14 August 2020	RESPONDENTS submit their Answer to the Notice of Arbitration ("**ANoA**"), including a request for a joinder of Ross Pharmaceuticals. RESPONDENT NO. 2 consents to be brought into these proceedings.
17 August 2020	The Secretariat of the SCAI informs the parties that Ross Pharmaceuticals does not agree to join the proceedings.
4 September 2020	The Tribunal requests the parties' view on remote hearings if the COVID-19 pandemic makes it necessary.
2 October 2020	CLAIMANT objects to the joinder of Ross Pharmaceuticals. It agrees to remote hearings. RESPONDENTS object to remote hearings and request an in-person hearing for at least the examination of witnesses and experts.

INTRODUCTION

1 The pandemic is causing many uncertainties. However, one thing is sure: the public needs a vaccine as soon as possible. This fact has led to a race for a vaccine against COVID-19 of which CLAIMANT is one of the front-runners. The clock is ticking; yet, RESPONDENTS' conduct hinders CLAIMANT from crossing the finishing line.

2 **ISSUE 1:** The Tribunal should decline RESPONDENTS' request for joinder. Since neither CLAIMANT nor Ross Pharmaceuticals agreed to the joinder, such a joinder would conflict with the consensual nature of arbitration. The award would therefore be subject to setting aside and non-enforceability. Moreover, the joinder is incompatible with the confidentiality obligation in Section 10 PCLA. Finally, the joinder would prolong the proceedings and therefore financially harm CLAIMANT if it successfully develops a COVID-19 vaccine.

3 **ISSUE 2:** Everyday life has become unpredictable. The Tribunal should adapt to the current situation and conduct the hearing in May 2021 remotely in case an in-person hearing is not possible. First, the Tribunal holds the discretion to conduct the hearing remotely. Neither the PCLA nor the DAL limit the Tribunal's discretion. Second, the balance of interests favours a remote hearing prior to a postponement. Not only are RESPONDENTS' concerns about remote hearings unsubstantiated, but CLAIMANT also has a financial interest in avoiding any delay of the hearing.

4 **ISSUE 3:** RESPONDENT NO. 1 specifically included a purchase obligation in the PCLA. Hence, the parties intended to conclude a sales agreement. This and the higher economic value of the sales obligations show that the sales obligations make up the preponderant part of the PCLA according to Art. 3(2) CISG. Thus, the CISG applies to the PCLA.

5 **ISSUE 4:** RESPONDENT NO. 1 breached its contractual obligations under Art. 42(1) CISG in connection with Section 11 PCLA. Prior to the conclusion of the PCLA, Ross Pharmaceuticals had claimed the use of the GorAdCam viral vectors for "*infectious respiratory diseases*". Despite RESPONDENT NO. 1 knowing about this claim, it granted CLAIMANT the use of the GorAdCam viral vectors for the same applications. Thus, the delivered GorAdCam viral vectors were, and still are, encumbered with Ross Pharmaceuticals' claim.

ARGUMENTS ON PROCEDURE

ISSUE 1: THE TRIBUNAL SHOULD DECLINE THE REQUEST FOR THE JOINDER OF ROSS PHARMACEUTICALS TO THE PROCEEDINGS

1 RESPONDENTS filed a request for the joinder of Ross Pharmaceuticals to the proceedings and wants the Tribunal to resolve the dispute concerning the scope of the Ross Agreement [*ANoA, p. 28 §23(a),(b); PO2, p. 57 §33*]. The Tribunal should decline the request for joinder.

2 CLAIMANT and Ross Pharmaceuticals are bound to two different and separate contracts. Alongside RESPONDENT NO. 1, CLAIMANT is a party to the PCLA [*Cl. Ex. 3, pp. 11 et seqq.*], which has given rise to the pending arbitration. Meanwhile, Ross Pharmaceuticals and RESPONDENT NO. 2 are bound to the Ross Agreement [*Re. Ex. 3, pp. 32 et seqq.*]. Under Section 14.1(3) PCLA, the seat of the arbitration is Vindobona, Danubia. The *lex arbitri* is the Danubian Arbitration Law ("**DAL**"), which is a verbatim adoption of the UNCITRAL Model Law [*PO1, p. 52 §3*]. In Section 14.1 PCLA ("**PCLA Arbitration Agreement**"), the parties agreed that the Swiss Rules would govern the proceedings [*PO1, p. 51 §II*]. Contrary to the DAL [*Born I, p. 2573; Smith, p. 175*], Art. 4(2) Swiss Rules explicitly addresses requests for a joinder of third persons. This provision states that *"**the arbitral tribunal shall decide** on such request, after consulting with all of the parties, including the person or persons to be joined, **taking into account all relevant circumstances**"* (emphasis added).

3 The Tribunal should reject the request for joinder based on the following *"relevant circumstances"*: neither Ross Pharmaceuticals nor CLAIMANT consented to the joinder (**A**). Moreover, the joinder is incompatible with RESPONDENTS' duty of confidentiality under Section 10 PCLA (**B**). The joinder would furthermore slow the proceedings down severely and financially harm CLAIMANT (**C**). Finally, if Ross Pharmaceuticals were joined, the award would be subject to annulment and would be neither recognisable nor enforceable (**D**).

A. NEITHER CLAIMANT NOR ROSS PHARMACEUTICALS CONSENTED TO THE JOINDER

4 The parties' consent to arbitrate is the basis of international commercial arbitration [*Born I, p. 1406; Redfern/Hunter, §2.01*]. It establishes and limits the arbitral tribunal's jurisdiction [*Baumann/Pfitzner, §1.95; Platte I, p. 484*]. Likewise, the parties' consent represents a vital element for the joinder of third persons in pending arbitral proceedings [*cf. Engineer case*; *Choi, p. 33; Lew/Mistelis/Kröll, §16-40*].

5 RESPONDENTS contend that Ross Pharmaceuticals could be joined to the proceedings since all parties agreed to proceed under the Swiss Rules including its joinder provision [*ANoA, p. 28 §22*].

However, simply because all parties concluded an arbitration agreement providing for the Swiss Rules, Art. 4(2) cannot be a substitute for the consent of either the parties to the arbitration or the third person [*Bärtsch/Petti, Art. 4 §46; Habegger, p. 280; cf. Born I, pp. 2600 et seq.*]. This is even more true where – as in the present case [*PO2, p. 57 §32*] – the parties did not explicitly discuss Art. 4(2) Swiss Rules when negotiating the contract [*cf. Meier, pp. 106 et seq.*]. If the consent of the parties were not required, Art. 4(2) Swiss Rules would have explicitly stated so [*Astro v. Lippo; Voser, p. 397; Marzolini, p. 126*]. Although there is no published case law to joinder under the Swiss Rules, a practitioner and current president of ASA confirmed with respect to Art. 4(2) Swiss Rules (2004) that he had no knowledge of instances where a third person was ordered to join proceedings against its will or the will of the non-requesting party [*Geisinger, pp. 45 et seq.*]. Like Art. 4(2), consolidation under Art. 4(1) Swiss Rules requires the arbitral tribunal to take into account all relevant circumstances. Thus, the Tribunal should also take the practice to Art. 4(1) Swiss Rules into consideration when deciding over the joinder of Ross Pharmaceuticals. Under Art. 4(1) Swiss Rules, requests for participation of third persons are generally declined where one of the parties involved objects [*Jermini/Castiglioni, pp. 7 et seq.*]. Exceptions are only made where all parties, including the person to be joined, are bound to the same arbitration agreement [*Bärtsch/Petti, Art. 4 §47; Jermini/Castiglioni, pp. 8 et seq.*].

6 CLAIMANT and Ross Pharmaceuticals are bound to two different and separate arbitration agreements that refer to the Swiss Rules. While CLAIMANT is bound to the PCLA Arbitration Agreement, Ross Pharmaceuticals is bound to Section 14.1 Ross Agreement. Therefore, the Tribunal has to examine if all parties and the third person to be joined consented to submit the entire dispute to one arbitral tribunal [*Bärtsch/Petti, Art. 4 §47; Habegger, p. 280*]. Moreover, in case of dispute, it is the party requesting the joinder that needs to prove the parties' consent [*cf. Art. 24(1) Swiss Rules; Nater-Bass/Rouvinez, Art. 24 §§4, 10*]. Therefore, RESPONDENTS will have to prove that the parties consented to the joinder.

7 Among the major institutional rules, only the LCIA Rules and ICC Rules allow joinder when the person to be joined is not bound by the same arbitration agreement [*Art. 22.1(x) LCIA Rules; Art. 7(1) ICC Rules*]. The most prominent example is the ICC Rules. Even these rules require at least the parties' and the third person's implicit consent [*Art. 7(1) in conjunction with Art. 6(4)(i),(ii) ICC Rules*].

8 CLAIMANT submits that the Tribunal should decline RESPONDENTS' request for joinder because neither Ross Pharmaceuticals nor CLAIMANT consented to the joinder. When consulted by the Tribunal pursuant to Art. 4(2) Swiss Rules, both CLAIMANT and Ross Pharmaceuticals expressly objected to the joinder [*Letter by Sinoussi, p. 46; Letter by Langweiler, p. 48*]. RESPONDENTS might

argue that the joinder is possible due to the similarities between the PCLA and the Ross Agreement [*ANoA, p. 28 §22*]. This is however misconceived. The fact that the contracts are similar does not imply a consent to joinder. Rather, the common view assumes consent when the parties are bound to substantially identical arbitration agreements in related underlying contracts [*Born I, pp. 2583 et seq.; Bärtsch/Petti, Art. 4 §47; Habegger, p. 280*]. Contracts can be considered related in the presence of a main contract [*cf. Hanotiau, §510; Leboulanger, p. 78; Platte II, p. 73*] or an umbrella arbitration agreement [*cf. Hanotiau, §510; Kondev, p. 118*] or if they involve the same economic transaction [*Born I, p. 2584; cf. Hanotiau, §510, Leboulanger, p. 46*].

9 Consent to joinder cannot be implied since the PCLA and the Ross Agreement are different and unrelated contracts. Neither of the contracts constitutes a main contract or contains an umbrella arbitration agreement (**I**). Furthermore, they do not form part of a single economic transaction (**II**).

I. Neither the PCLA nor the Ross Agreement constitutes a main contract or contains an umbrella arbitration agreement

10 The contracts are deemed to be interrelated in the presence of a main contract or an umbrella arbitration agreement. A main contract describes the situation where a contract refers to other contracts [*cf. Karaha v. Perusahaan; Hanotiau, §510; Leboulanger, p. 81*]. Likewise, an umbrella arbitration agreement indicates that matters under subsequent contracts are covered by the same arbitration agreement [*cf. Fouchard/Gaillard/Goldman, p. 318; Hanotiau, §510*]. CLAIMANT will demonstrate that the consent to a joinder cannot be implied because neither the PCLA nor the Ross Agreement constitute a main contract (**1**) or contains an umbrella arbitration agreement (**2**).

1. The contracts do not refer to each other, were concluded independently and thus do not constitute a main contract

11 Both the PCLA and the Ross Agreement are bilateral contracts that do not share a common contracting party. While CLAIMANT and RESPONDENT NO. 1 are parties to the PCLA, Ross Pharmaceuticals and RESPONDENT NO. 2 are parties to the Ross Agreement. More importantly, neither the PCLA nor the Ross Agreement refers to other persons that could be involved in the legal relationship in addition to the contracting parties themselves. In particular, neither the PCLA nor the Ross Agreement makes any reference to the parties in the other contract. Thus, the abovementioned contracts are not connected from a *rationae personae* point of view.

12 Further, although both the PCLA and the Ross Agreement deal with GorAdCam viral vectors, they are unrelated contracts because they do not refer to each other. The PCLA primarily concerns the purchase of GorAdCam viral vectors, HEK-294 cells and the cell culture growth medium. Notably, it differs from the Ross Agreement in Section 16 PCLA, which contains a highly peculiar

purchase obligation [*NoA, p. 6 ∫14*]. On the other hand, the Ross Agreement is predominantly a licence agreement. The absence of connections between the contracts is also visible in that the PCLA and the Ross Agreement were concluded independently of each other: none of the contracts were a condition or a consequence for the conclusion of the other [*cf. Leboulanger, p. 81*]. Hence, the contracts concern two different and separate relationships and do not refer to one another from a *rationae materiae* standpoint.

13 Moreover, a decision on the scope of the exclusive licence of Ross Pharmaceuticals would not change the fact that RESPONDENTS breached the PCLA [*infra ∫∫118, 133*]. Thus, the contracts are not connected because the decision on the breach of the PCLA would not conflict with a decision on the scope of Ross Pharmaceuticals' exclusive licence.

14 In conclusion, neither the PCLA nor the Ross Agreement can be considered as a main contract since they were concluded independently and do not refer to one another.

2. The arbitration agreements do not cover matters under the other contract and consequently are not umbrella arbitration agreements

15 Section 14.1 Ross Agreement and the PCLA Arbitration Agreement are two separate arbitration agreements with the same wording. This circumstance cannot be seen as meaning CLAIMANT and Ross Pharmaceuticals consented to the joinder because neither of the arbitration agreements constitutes an umbrella arbitration agreement.

16 First, there are no indications that Section 14.1 Ross Agreement covers matters concerning the PCLA. In 2014, neither Ross Pharmaceuticals nor RESPONDENT NO. 2 knew or could have foreseen that CLAIMANT and RESPONDENT NO. 1 would conclude an agreement based on the same template and with an identical arbitration agreement [*cf. NoA, p. 6 ∫11*]. The Ross Agreement was concluded in 2014 [*Cl. Ex. 1, p. 9; Re. Ex. 3, p. 32*], five years before the PCLA came into effect [*Cl. Ex. 3, p. 11*]. At this time, RESPONDENT NO. 2 was not a subsidiary of Roctis AG [*NoA, p. 15 ∫10*]. It was not until four years later in August 2018 that RESPONDENTS became connected parties. They then started using the same template [*NoA, p. 6 ∫12; PO2 pp. 55 et seq. ∫24*]. Ross Pharmaceuticals has never established any connection with CLAIMANT. The similarities between the contracts are do not make Section 14.1 Ross Agreement to an umbrella arbitration agreement. They are rather a consequence of RESPONDENT NO. 1's own choice to use the same template that RESPONDENT NO. 2 had used several years previously [*PO2, pp. 50 et seq. ∫24*].

17 Second, contrary to what an umbrella arbitration agreement requires, there are no hints that the PCLA Arbitration Agreement covers matters under the Ross Agreement. During the negotiation of the PCLA, the PCLA Arbitration Agreement was hardly discussed [*PO2, p. 56 et seq. ∫∫25, 32*].

CLAIMANT was merely told that the PCLA Arbitration Agreement was based on a template that RESPONDENT NO. 2 had been using before being acquired by Roctis AG [*NoA, p. 8 §24*]. In particular, no discussion took place concerning the Ross Agreement or other agreements based on RESPONDENT NO. 2's template. Hence, the similarities in the PCLA and in the Ross Agreement do not imply that the PCLA Arbitration Agreement covers both matters regarding the PCLA and the Ross Agreement. The fact that RESPONDENT NO. 2 agreed to arbitrate with CLAIMANT and RESPONDENT NO. 1 at a later point in time [*ANoA, p. 28 §17*] does not change this circumstance.

18 Hence, neither the PCLA nor the Ross Agreement are related contracts because the arbitration agreements contained therein do not constitute an umbrella arbitration agreement.

II. The PCLA and the Ross Agreement do not form part of a single economic transaction

19 Since the relevant contracts do not from part of a single economic transaction, the consent to joinder cannot be implied. For contracts to be considered part of a single economic transaction, one of the contracts must impact the other one, leading to it being amended or terminated [*Hanotiau, §503*]. Further indications are that the contracts were concluded one the same day or have the same duration [*Leboulanger, pp. 52 et seq.; Platte II, p. 73*]. Finally, the same economic transaction can be said to exist if both contracts are united by a common cause or goal [*Hanotiau, §503; Leboulanger, pp. 52 et seq.; cf. Chaval v. Liebherr; FAI consolidation case*].

20 First, neither the PCLA nor the Ross Agreement include a clause that amends or terminates the other contract. Second, the contracts were not concluded on the same day. In fact, they were concluded almost five years apart [*supra §16*]. Third, the PCLA and the Ross Agreement do not share a common goal: neither of the parties contributes to the project of the other, *i.e.* they are not merely providing one piece of the puzzle that could end in the development of a vaccine against COVID-19 of the other party [*PO2, p. 55 §16*]. Thus, the contracts do not form part of a single economic transaction. Consequently, Ross Pharmaceuticals' consent to join cannot be implied.

21 In conclusion, the joinder should be declined because neither CLAIMANT nor Ross Pharmaceuticals consented to a joinder. They both objected expressly. Further, they did not consent to the joinder implicitly, as they are bound to two different and unrelated contracts.

B. THE JOINDER OF ROSS PHARMACEUTICALS IS INCOMPATIBLE WITH THE OBLIGATION OF CONFIDENTIALITY UNDER THE PCLA

22 Since a joinder of Ross Pharmaceuticals would infringe the confidentiality clause under Section 10 PCLA, the Tribunal should therefore deny a joinder of Ross Pharmaceuticals.

23 The Tribunal should consider confidentiality issues when discussing a possible joinder [*Bärtsch/Petti, Art. 4 §56; Lew/Mistelis/Kröll, §16-92; Schramm, Art. 4 §48*]. Infringements of obligations to confidentiality are a common reason to reject the request for a joinder [*Leboulanger, p. 65*]. This is even more important if competitors are involved, as in the present case. [*cf. PO2, p. 55 §16; Baumann/Pfitzner, §1.239; Lew/Mistelis/Kröll, §16-75*].

24 Section 10.2 PCLA prevents any disclosure to any third person, such as Ross Pharmaceuticals, since the parties are obligated to *"keep confidential and […] not disclose to any Third-Party […] any Confidential Information of the other Party"*. Confidential Information according to Section 10 PCLA is *"all information, data or know-how, whether technical or non-technical, […] in relation to the Compound or the Licensed Technology"* [*PO2, pp. 56 et seq. §30*]. The terms Compound and Licensed Technology are defined in Section 1.2 and 1.6 PCLA. As the parties agreed in Section 10.1 PCLA that confidentiality is of paramount importance to them, the term "*in relation to*" must be interpreted broadly. Therefore, a joinder bears the risk of infringing Section 10.2 PCLA [*Born I, pp. 2568 et seq.*].

25 A party joined to the proceedings has access to all procedural files [*Meier, p. 162*]. Consequently, if Ross Pharmaceuticals were joined, it would gain access to Confidential Information protected under Section 10.2 PCLA. In particular, it would gain knowledge of the scope of the Licensed Technology in Section 5.2 PCLA, as well as financial information, such as the royalties in Section 9.5 PCLA, the purchase Obligation in Section 16.1 PCLA and the estimated revenues of CLAIMANT [*PO2, Appendix 1, p. 59*]. This information is *"in relation to"* the Compound and the Licensed Technology. This follows from the fact that each of these Sections refer to the defined terms Compound and/or Licensed Technology, which are protected by the confidentiality clause under Section 10 PCLA [*PO2, pp. 56 et seq. §30*]. Further, information about the revenues concerns the commercialisation of the Licensed Technology and is therefore confidential.

26 While the Tribunal can order measures to protect the Confidential Information, such measures are not practicable, and would lead to much more complex proceedings [*cf. Cook/Garcia, pp. 263 et seqq.*]. In the *Archer, Tate v. Mexico*, the arbitral tribunal declined a request to consolidate as the claimants were direct competitors and thus the necessary confidential measures would have rendered the arbitration extremely difficult.

27 The joinder of Ross Pharmaceuticals bears the risk of multiple infringements of the confidentiality clause in Section 10 PCLA. The Tribunal may not support such breaches. For this reason, the Tribunal should deny the joinder of Ross Pharmaceuticals.

C. THE JOINDER WOULD SLOW DOWN THE PROCEEDINGS WHICH WOULD HARM CLAIMANT FINANCIALLY

28 The Tribunal should deny RESPONDENTS' request for joinder on the ground that it would delay the present proceedings. This would be the case should the additional dispute about the scope of the Ross Agreement be addressed in the arbitration. Delaying the proceedings would harm CLAIMANT financially as it would also delay the likely launch of a COVID-19 vaccine.

29 According to Art. 15(7) Swiss Rules, all participants in the arbitration shall make every effort to ensure the proceedings are conduct efficiently and unnecessary delays avoided. For the requesting party, arbitrating two disputes in a single proceeding, joinder is often more efficient. Nevertheless, for the opposing party, it can result in unnecessary delays as the joinder may raise additional issues [*Born II, p. 228; Meier, pp. 8 et seq.; Voser/Meier, p. 117*]. The arbitral tribunal should deny a joinder if it *"unreasonably delays the resolution of the claimant's claims"* [*Born I, p. 2595*].

30 CLAIMANT is one of several companies engaged in COVID-19 vaccine research [*ANoA, p. 25 §1*]. It is about to enter the final clinical Phase-III-trial [*PO2, p. 55 §16*]. A successful completion of this trial is likely [*Agrawal et al.*]. In case CLAIMANT will be able to launch its COVID-19 vaccine in the near future, the purchase obligation of Section 16.1 PCLA will become due. If the GorAdCam viral vectors were non-conforming, CLAIMANT could not produce a vaccine against COVID-19 without concern [*infra §133*]. Its interest in resolving the dispute with RESPONDENTS about the non-conformity of the goods before launching its vaccine is therefore legitimate.

31 The competition between pharmaceutical companies, such as CLAIMANT, to launch a top-selling COVID-19 vaccine is intense [*ANoA, p. 25 §1*]. In such economic circumstances, time-to-market can have a major impact on the commercial success of a market participant [*Cha/Yu, Ex. 1*]. In the present case, this is particularly true as the demand for COVID-19 vaccines is very high and low supplies are anticipated [*ANoA, p. 25 §1; cf. UNICEF, p. 10*]. It follows that, if CLAIMANT launches its vaccine early, it will be able to market them at its full production capacity of 100 million dosages per year [*PO2, pp. 53 et seq. §6*]. Since each dosage will probably be sold for EUR 20 to 40 [*Re. Ex. 2, p. 31 §12*], the turnover for one year will be between EUR 2,000 and 4,000 million. Calculated per day, the turnover will be between EUR 5.5 and 11 million. Should there be a delay, CLAIMANT

would lose the turnover for the period of the delay. Thus, if the launch of the vaccine were delayed, CLAIMANT would suffer a major financial loss.

32 Regarding the financial loss, the same holds true for RESPONDENT NO. 1. Section 16.1 PCLA contains a purchase obligation, which comes into effect when CLAIMANT launches a COVID-19 vaccine. In this event, CLAIMANT would have to purchase the supply of HEK-294 it needs from RESPONDENT NO. 1 [*Section 16.1 PCLA*]. It follows that RESPONDENT NO. 1 would benefit from an early launch of CLAIMANT's vaccine as well. Moreover, it is in the interest of the general public to combat COVID-19 as quickly as possible.

33 Unlike CLAIMANT, RESPONDENTS are not under such time pressure to resolve their dispute with Ross Pharmaceuticals. RESPONDENTS were repeatedly contacted by Ross Pharmaceuticals in summer 2018 and on 6 December 2018 about their different understanding of the Ross Agreement [*ANoA, p. 27 §§11 et seq.; PO2, p. 58 §43(c)*]. However, RESPONDENTS never took any legal steps to resolve these differences. RESPONDENTS now intend to benefit from the pending proceedings to rapidly resolve their dispute with Ross Pharmaceuticals at low cost [*PO2, p. 57 §33*]. It was RESPONDENTS' own decision not to take any legal action against Ross Pharmaceuticals for almost two years. Thus, it seems unfair for RESPONDENTS to use the pending proceedings to settle this other dispute at the expense of CLAIMANT.

34 The joinder would in all likelihood delay the proceedings because the scope of the Ross Agreement would then need to be addressed. The Tribunal shall deny the joinder on the grounds that CLAIMANT's interest in the proceedings being as efficient as possible outweighs RESPONDENTS' interest in joining Ross Pharmaceuticals, because the joinder could cause CLAIMANT financial harm.

D. IF ROSS PHARMACEUTICALS WERE JOINED, THE AWARD WOULD BE SUBJECT TO ANNULMENT AND WOULD BE NEITHER RECOGNISABLE NOR ENFORCEABLE

35 The Tribunal shall make every effort to render an enforceable award [*Redfern/Hunter, §§9.14, 11.11; Waincymer I, p. 102; Voser, p. 396*]. The countries involved in the present case have adopted the UNCITRAL Model Law [*PO1, p. 52 §3; PO2, p. 58 §41*]. The UNCITRAL Model Law does not explicitly addresses joinder of third persons [*supra §2*]. However, it provides grounds for annulment and non-recognition of an award when third persons, *i.e.* persons not bound to the same arbitration agreement, are joined without their or the parties' consent [*Art. 36(1)(a)(i),(iii) UNCITRAL Model Law*].

36 The Court of Appeal of the Republic of Singapore refused to recognise parts of an award because the arbitral tribunal ordered the joinder of third persons, which were not party to the same

arbitration agreement, over the objections of the non-requesting party [*Astro v. Lippo*]. The applicable arbitration rules did not explicitly require the consent to joinder of the non-requesting party. Nevertheless, the Court held that there was no valid arbitration agreement between the parties and the third persons pursuant to Art. 36(1)(a)(i),(iii) UNCITRAL Model Law. Likewise, following an award declining a request for joinder, the Madrid Court of Appeal dismissed an application to set aside the award pursuant to Art. 41(1)(f) Spanish Arbitration Act (2003). The latter is an adoption of Art. 34 UNCITRAL Model Law [*UNCITRAL Contracting States*]. The ground for dismissal was that the party to be joined was not a party to the arbitration agreement and did not consent to join [*Stauffer v. Paula*].

37 Furthermore, legal authorities confirm a risk of the setting aside and non-enforceability of the award in the absence of the parties' or the third person's consent to joinder [*Choi, pp. 32, 36; Lew/Mistelis/Kröll, pp. 408 et seq.; Schramm, Art. 4 §57; Kleinschmidt, p. 148; Gómez Carrión, pp. 497 et seq.*]. In the present case, no mutual arbitration agreement exists and neither CLAIMANT nor Ross Pharmaceuticals consented to the joinder [*supra §21*]. Thus, if the joinder were ordered, a future award would be subject to annulment and non-enforceability.

* * *

38 In conclusion to **Issue 1**, the Tribunal should deny the request for joinder of Ross Pharmaceuticals as neither CLAIMANT nor Ross Pharmaceuticals consented to the joinder. Additionally, the joinder would infringe the confidentiality clause under Section 10 PCLA. Moreover, the joinder would cause an unreasonable delay, and thus harm CLAIMANT financially. Finally, if Ross Pharmaceuticals were joined against its and CLAIMANT's objections, the arbitral award would be subject to annulment and would neither be recognisable nor enforceable.

ISSUE 2: THE HEARING IN MAY SHOULD BE CONDUCTED REMOTELY IF A HEARING IN-PERSON IS NOT POSSIBLE OR INAPPROPRIATE

39 The COVID-19 pandemic is affecting the entire world and no one knows how long it will continue. Many businesses are struggling with the economic consequences. In these difficult times, finding ways to adapt to the impact of the pandemic and get on with business as well as possible is essential. Therefore, the Tribunal should conduct the evidentiary hearing planned for 3 to 7 May 2021 remotely if an in-person hearing cannot be held or is considered inappropriate. First, the Tribunal holds the discretionary power, notwithstanding RESPONDENTS' objections, to order a remote hearing (**A**). Second, CLAIMANT's interest in conducting the hearing remotely outweighs RESPONDENTS' interest in postponing it (**B**).

A. THE TRIBUNAL HOLDS THE DISCRETIONARY POWER TO ORDER A REMOTE HEARING

40 It lies within the Tribunal's discretion to examine witnesses and experts remotely. First, Art. 15(1) Swiss Rules and Art. 19(2) DAL give the arbitral tribunal the discretionary power to order the evidentiary hearing to be held remotely (**I**). Second, neither the PCLA Arbitration Agreement nor the DAL limits the Tribunal's discretion to conduct the hearing remotely (**II**).

I. Art. 15(1) Swiss Rules and Art. 19(2) DAL give the Tribunal the discretionary power to conduct the hearing remotely

41 The Tribunal has the discretion to decide how the hearing will be conducted according to Art. 15(1) Swiss Rules and Art. 19(2) DAL. The Tribunal is thereby also empowered to conduct evidentiary hearings remotely. In fact, Art. 25(4) Swiss Rules specifically vests the Tribunal with the discretion to examine witnesses and experts remotely.

42 RESPONDENTS might contend that, since Art. 25(4) Swiss Rules does not explicitly address full remote hearings, it precludes such a hearing. This is misconceived. Since neither the PCLA Arbitration Agreement and the DAL [*infra §§44 et seqq.*], nor the Swiss Rules address full remote hearings, the Tribunal holds the discretionary power to order a full remote hearing [*cf. Art. 15(1) Swiss Rules and Art. 19(2) DAL; Lazopoulos, Art. 15 §§8, 20*]. When the Swiss Rules were published in 2012, *i.e.* prior to the COVID-19 pandemic, remote hearings were very rare and in-person-hearings were almost taken for granted [*cf. Born/Day/Virjee, p. 140 figure 7.1; Friedland, p. 33 chart 35; Hunter; Lefter, Section 1*]. The fact that under the Swiss Rules remote hearings are permitted for the examination of witnesses and experts does not imply that full remote hearings are prohibited [*cf. Scherer I, pp. 73 et seq.*]. This interpretation is also in line with rules similar to the Swiss Rules. An examination of the ICC Rules, both in their 2017 version and the version in force as of 2021, further supports CLAIMANT's view that Art. 25(4) Swiss Rules should be interpreted to allow full remote hearings. The ICC is one of the world's leading arbitration institutions [*Redfern/Hunter, §1.166*]. As the ICC addresses the pandemic situation expressly in their Guidance Note, its view should be considered. The wording of Art. 25(2) ICC Rules is narrower than that of Art. 25(4) Swiss Rules, giving a party the right to an in-person hearing upon such a request. However, on 6 October 2020, the ICC released a Guidance Note clarifying that the term *"in-person"* does not exclude remote hearings [*ICC Guidance Note, §23*]. Furthermore, Art. 26(1) ICC Rules 2021 now explicitly states that *"[t]he arbitral tribunal may decide, after consulting the parties, and on the basis of the relevant facts and circumstances of the case,* ***that any hearing will be conducted*** *by physical attendance or* ***remotely by videoconference****, telephone or other appropriate means of communication"* (emphasis

added). Similarly, Art. 19.2 of the newly revised LCIA Rules grants the arbitral tribunal the same discretion.

43 Considering the newly published ICC guidance note and that the aforementioned new arbitration rules explicitly address the possibility of full remote hearings, it is currently a standard that institutional rules – including the Swiss Rules – should be interpreted as permitting such remote hearings [*supra §42*]. Thus, according to Art. 15(1) Swiss Rules, the Tribunal *"may conduct the arbitration in such manner as it considers appropriate"* [*cf. Art. 19(2) DAL*]. Its broad discretion is only limited by the fundamental procedural principles [*Jermini/Gamba, Art. 15 §§2 et seq.; Lazopoulos, Art. 15 §15*]. As CLAIMANT will demonstrate, these fundamental principles would not be violated if the hearing were held remotely [*infra §§53 et seqq.*].

II. Neither the PCLA Arbitration Agreement nor the DAL limit the Tribunal in its discretion to conduct the hearing remotely

44 The Tribunal's discretion to conduct the hearing of 3 to 7 May 2021 remotely is neither limited by the PCLA Arbitration Agreement nor by the DAL. The relevant Section 14.1(3) PCLA does not exclude conducting remote hearings (**1**). Further, Art. 24(1) DAL does not grant RESPONDENTS the right to an in-person hearing (**2**).

1. Section 14.1(3) PCLA does not preclude remote hearings

45 RESPONDENTS argue that Section 14.1(3) PCLA provides for an in-person hearing [*Letter Fasttrack, p. 49*]. The abovementioned provision provides that *"[h]earings shall be held, at the Tribunal's discretion, either in Vindobona or in the city where the Respondent has its place of business"* [*Section 14.1(3) PCLA*]. CLAIMANT submits that Section 14.1(3) PCLA does not limit the Tribunal in its discretion to hold remote hearings.

46 Arbitration agreements are interpreted in accordance with the ordinary rules of contractual interpretation [*Born I, pp. 1321 et seq.*]. In the case at hand, the law for the interpretation of the PCLA Arbitration Agreement is Danubia's contract law. This follows from the fact that Danubian law is the law applicable to the substance of the dispute and the law of the seat of arbitration [*Section 14.1(3) PCLA; supra §2*]. Danubia is a Contracting State of the CISG [*PO1, p. 52 §3*]. The PCLA is a sales agreement governed by the CISG [*infra §95*]. According to the consistent jurisprudence in all the countries concerned, the CISG also applies to the conclusion and interpretation of the PCLA Arbitration Agreement [*PO1, p. 52 §4*]. The general contract law of Danubia is a verbatim adoption of the UPICC [*PO1, p. 52 §3*]. In case the Tribunal finds that the CISG is not applicable to the PLCA (*quod non*), the interpretation of the PCLA Arbitration Agreement would thus be governed by the UPICC. Art. 8 CISG and Artt. 4.1 et seqq. UPICC

provide for similar methods of interpretation [*Rosengren, pp. 11 et seq.*]. A contract shall primarily be interpreted according to the common intention of the parties at the time of its conclusion [*Art. 8(1) CISG; Art. 4.1(1) UPICC; UNIDROIT, Art. 4.1 p. 137; Vogenauer, Art. 4.1 §3; Yildirim, pp. 135 et seq.*].

47 In the present case, the content of Section 14.1(3) PCLA cannot be determined through the parties' common intention. When negotiating the PCLA, the parties did not address the issue of remote hearings [*PO2, p. 57 §32*]. In the absence of a discussion, the parties did not have a common intention regarding the question of remote hearings at the relevant point in time. Rather, Section 14.1(3) PCLA was seen as a standard clause [*cf. NoA, p. 8 §24*]. Consequentially, Section 14.1(3) PCLA must be interpreted according to Art. 8(2) CISG and Art. 4.1(2) UPICC.

48 If a common intent cannot be determined, a contract should be interpreted as a reasonable third person of the same kind and in the same circumstances as the contracting parties would have understood it [*Art. 8(2) CISG; Art. 4.1(2) UPICC*]. Pursuant to both Art. 8(3) CISG and Art. 4.3 UPICC, all relevant circumstances of the case have to be taken into consideration when interpreting the contract.

49 A reasonable third person in the circumstances of CLAIMANT would not have understood Section 14.1(3) PCLA as excluding remote hearings. First, Section 14.1(3) PCLA does not expressly require in-person hearings. Further, it only establishes mandatory hearing venues for cases where the hearing is to be conducted in person. In late 2018, the time of conclusion of the PCLA, remote hearings were very rarely used [*supra §42*]. Before the COVID-19 pandemic, it was rarely necessary to conduct remote hearings. Accordingly, CLAIMANT and RESPONDENT NO. 1 did not discuss the issue of remote hearings [*PO2, p. 57 §32*]. Section 14.1(3) PCLA has to be interpreted in light of the pre-pandemic background. Since, in 2018, the parties could assume that a hearing would be conducted in person, Section 14.1(3) PCLA has to be understood in such way that it sets forth mandatory hearing venues only for the case that the hearing is to be held in person.

50 Therefore, a reasonable third person in the position of CLAIMANT would not have understood Section 14.1(3) PCLA as excluding remote hearings. Section 14.1(3) PCLA only regulates the hearing venue if the hearing is conducted in person.

2. Art. 24(1) DAL does not limit the Tribunal's discretion to order the hearing to be conducted remotely

51 The DAL does not limit the Tribunal in its discretion to conduct the hearing of 3 to 7 May 2021 remotely. RESPONDENTS' assertion that Art. 24(1) DAL allows only in-person hearings is unfounded. Art. 24(1) DAL provides for the right to an oral hearing if the parties did not agree

upon a documents-only arbitration. The right to an oral hearing grants the right to instantly react to spoken arguments and statements of the other party [*Kaufmann-Kohler/Schultz, p. 207; Waincymer II, pp. 6 et seq.*], which is also how *Black's Law Dictionary* defines the word oral: *"Spoken or uttered; not expressed in writing"* [*Garner, "oral"*]. This is, however, also assured in a remote hearing [*Kaufmann-Kohler/Schultz, p. 207; Waincymer II, pp. 6 et seq.*] because videoconferences enable instant oral communication. It follows that the right to an oral hearing does not grant the right to an in-person hearing [*Bateson, pp. 160 et seq.*]. Thus, the DAL does not limit the Tribunal's discretion to order remote hearings.

B. THE BALANCE OF INTERESTS IS IN FAVOUR OF CONDUCTING THE HEARING REMOTELY RATHER THAN POSTPONEMENT

52 Should an in-person hearing be impracticable in May 2021, the balance of interests provides for a remote hearing rather than postponement. RESPONDENTS' concerns regarding remote hearings are unsubstantiated: first, the parties' right to be heard and to equal treatment do not conflict with conducting a hearing remotely rather than in-person (**I**). Second, remote hearings are secure and are a valid alternative to in-person hearings (**II**). In addition, CLAIMANT has a legitimate interest in conducting the hearing remotely to prevent any delay, which would probably result in financial harm for its business (**III**). Therefore, CLAIMANT's interest in having the evidentiary hearing in May 2021 conducted remotely outweighs RESPONDENTS' general concerns about remote hearings.

I. A remote hearing would be in line with the parties' right to be heard and to equal treatment

53 RESPONDENTS might argue that a remote hearing would contravene to the parties' right to be heard and to equal treatment. This is misconceived. The parties' right to be heard and to equal treatment do not impede a hearing being conducted remotely.

54 Art. 15(1) Swiss Rules and Art. 18 DAL require compliance with the parties' right to be heard and the right to equal treatment. In the *Vienna remote case,* the Austrian Supreme Court concluded that holding hearings remotely does not violate fundamental procedural principles. Since Austria has adopted the UNCITRAL Model Law [*UNCITRAL Contracting States*], the considerations in the *Vienna remote case* are relevant for the present case. Notably, fair treatment under §594(2) Austrian Code of Civil Procedure is broader than the right to equal treatment under the Art. 18 DAL [*Schwarz/Konrad, Art. 20 §20-019*]. The Austrian Supreme Court dismissed any claim of violation of the parties' right to be heard and to fair treatment. It also dismissed the allegation that remote hearings lead to the hearing being potentially unlawfully influenced through, *e.g.* manipulation of witnesses and experts. The Austrian Supreme Court took into consideration the fact that even in

an in-person hearing, unlawful influence on witnesses and experts cannot be entirely eliminated [*Vienna remote case*]. Concerns about unlawful influence on an evidentiary remote hearing that do not refer to a particular and concrete incident in the proceedings do not violate the right to be heard [*ibid.*].

55 RESPONDENTS might argue that the situation in the present case substantially differs from the *Vienna remote case*. They might allege that a remote hearing would violate their fundamental procedural rights because: the present case raises concerns with regard to the time difference between the countries and the fact that CLAIMANT has better technical equipment. CLAIMANT will demonstrate that the particularities of the present case do not justify a deviation from the Austrian Supreme Court's considerations.

56 Although the time difference between Mediterraneo and Equatoriana is 11 hours [*PO2, p. 57 §36*], the parties can still be treated equally. In the present case, the Tribunal has scheduled five days for the examination of witnesses and experts [*PO2, p. 51 §III(1)(b)*]. This furnishes the Tribunal with enough time to schedule the hearing in such a way that each session will not be too long. For example, hearing sessions could be held from 7 *a.m.* until 11 *a.m.* Mediterraneo time, *i.e.* from 6 *p.m.* until 10 *p.m.* Equatoriana time. This time slot takes into account, as far as is feasible, both parties' interest in holding the hearing during reasonable hours. It provides an acceptable compromise and would therefore not constitute unequal treatment. Accordingly, the Austrian Supreme Court considered that a hearing can take place at a time that begins or ends outside of business hours for one or other party. This would not constitute a violation of equal treatment, as it would be less burdensome for that party than having to travel to the other party's seat [*Vienna remote case*].

57 Further, the fact that CLAIMANT has better technical infrastructure [*PO2, p. 58 §38*] does not constitute an infringement of RESPONDENTS' right to be heard and treated equally. Both parties have sufficient bandwidth and technical equipment to participate in a remote hearing [*ibid.*]. Therefore, both CLAIMANT and RESPONDENTS essentially have the same opportunity to present their case [*cf. Born I, pp. 2174 et seq.*]. Moreover, should the Tribunal use the same platform for the hearing in May 2021 as in March 2021, both parties would already have become familiar with how to use the platform technically. Thus, general concerns regarding the technical equipment would not lead to a breach of the parties' right to be heard and to equal treatment.

58 In conclusion, RESPONDENTS' right to be heard and to equal treatment do not impede to hold the hearing remotely. Neither the difference in time nor in the parties' technical equipment provide for a violation of RESPONDENTS' right to be heard and to equal treatment.

II. A remote hearing is secure and a valid alternative to an in-person hearing

59 RESPONDENTS raise the general concern that a remote hearing would influence the effectiveness of evidence presentation and the data may not be 100 % protected [*PO2, pp. 57 et seq. §§35, 38*]. However, the Tribunal should not exclude the conduct of a remote hearing.

60 First, RESPONDENTS' concern that a remote hearing would not ensure 100 % data protection is misconceived since such a level of security is not possible even in in-person hearings. More importantly, under the current COVID-19 pandemic, arbitration institutions and organisations have developed a best practice standard that ensures the effectiveness and security of remote evidentiary hearings [*cf. Bateson, pp. 161 et seq.*]. In particular, this best practice standard prevents the possibility of witnesses and experts being unlawfully influenced. Accordingly, conducting the examination of witnesses and experts remotely is nowadays widely spread and broadly accepted in international arbitration [*Vienna remote case*]. Best practice notably involves the use of cyber-protocols [*ICC Guidance Note, §24*], 360-degree viewing to confirm the integrity of the room [*ICC Guidance Note, p. 7 Annex I(A)(iii); HKIAC Guidelines, p. 3 §11(b); Stein, p. 174*] and the identification of the witness, experts and parties [*HCCH Guide, p. 42 §§106 et seqq.; HKIAC Guidelines, p. 2 §9(b),(c); Art. 3.1 Seoul Protocol*]. Moreover, best practice also has standards for the use of licenced video-sharing platforms [*HCCH Guide, p. 62 §§195 et seq.; ICC Guidance Note, §31*], such as IAC Online, the International Arbitration Centre's online platform, which offers a secure virtual portal [*IAC online*]. Additionally, it is common practice in international arbitration for each of the parties to send a representative to monitor the opposing party to prevent the possibility of witnesses and experts being unlawfully influenced [*Scherer II, p. 429*].

61 In conclusion, a remote evidentiary hearing held according to the best practice standard would grant a secure and valid alternative to in-person hearings. Thus, the Tribunal should not see effectiveness and security concerns as reasons to exclude conducting the hearing remotely.

III. The postponement of the hearing would harm CLAIMANT financially

62 Everyone, including CLAIMANT, RESPONDENTS and the general public are interested in a COVID-19 vaccine being developed as soon as possible. Should CLAIMANT develop a successful vaccine, it would not only help the world in its combat against COVID-19 but would also generate high income for both CLAIMANT and RESPONDENTS. As a postponement of the hearing would endanger these benefits, it is in CLAIMANT's interest to hold the hearings remotely. This interest – as well as the interest of the general public – must prevail over RESPONDENTS' raised unsubstantiated concerns about remote hearings.

63 The Tribunal shall conduct hearings in an efficient manner pursuant to Art. 15(7) Swiss Rules. In doing so, it should consider both time and the financial interests of the parties [*supra §29*]. Should CLAIMANT develop a successful vaccine, each day's delay in launching CLAIMANT's vaccine would result in a turnover loss of between EUR 5.5 and 11 million [*supra §31*]. As the postponement of the hearing would delay the proceedings for at least four months [*PO2, p. 58 §42(a)*], the financial loss would be severe. Four months equal roughly 120 days. Therefore, if the postponement of the hearings delayed the launch of CLAIMANT's vaccine for 120 days, it would result in a turnover loss of up to EUR 1,315.1 million for that period alone.

64 RESPONDENT would benefit from an early vaccine launch because the purchase obligation under Section 16.1 PCLA falls due when CLAIMANT's COVID-19 vaccine is launched. Thus, an earlier launch of CLAIMANT's vaccine would be beneficial not only for the general public, but for all parties.

65 In conclusion, the balance of interests is in favour of a remote hearing. First, the parties' right to be heard and to equal treatment are respected. Second, remote hearings are secure. Therefore, RESPONDENTS concerns are unfounded. Finally, CLAIMANT has a strong financial interest in conducting the hearing in May on time and thus, if need be, remotely.

* * *

66 Concluding **Issue 2**, the Tribunal should order the hearings of 3 to 7 May 2021 to be conducted remotely if an in-person hearing is impossible or difficult to hold. Such an order lies within the Tribunal's discretion and does not conflict with the PCLA or the DAL. Further, the balance of interests is in favour of conducting the hearing remotely rather than postponing it. Not only are RESPONDENTS' concerns about remote hearings unfounded, but CLAIMANT also has a legitimate financial interest in the hearing being held remotely should an in-person hearing in May 2021 be impracticable.

ARGUMENTS ON SUBSTANCE

ISSUE 3: THE CISG APPLIES TO THE PCLA BETWEEN CLAIMANT AND RESPONDENT NO. 1

67 The PCLA concerns the delivery and use of GorAdCam viral vectors, including the necessary licence, as well as the purchase of HEK-294 cells and a cell culture growth medium [*cf. NoA, p. 6 §11*]. CLAIMANT will show that the PCLA should be characterised as a sales agreement governed by the CISG (**A**). Alternatively, should the Tribunal find that the CISG is not applicable to the entire PCLA, the CISG applies at least to the sales elements (**B**).

A. THE PCLA AS A WHOLE IS GOVERNED BY THE CISG

68 The CISG applies to the entire PCLA as it is a unity. If an agreement can be seen as a unity, the CISG applies to the whole agreement [*CISG-AC Op. No. 4, §3.1; Schwenzer/Hachem, Art. 3 §18; Magnus, Art. 3 §11*]. A single document covering all contractual obligations can indicate a uniform agreement [*Huber, p. 46*]. The various obligations are all listed in the PCLA. The goods and the corresponding licence are intertwined. Therefore, the PCLA is a unity.

69 RESPONDENTS argue that the PCLA falls outside the scope of application of the CISG as defined by Artt. 1-6 CISG [*ANoA, p. 28 §19*]. All parties have their place of business in contracting states [*Art. 1(1) CISG; PO1, p. 52 §4*]. Moreover, CLAIMANT will show that the PCLA is governed by the CISG as the GorAdCam viral vectors, HEK-294 cells and cell culture growth medium are sales elements (**I**). These sales elements make up the preponderant part of RESPONDENT NO. 1's obligations under the PCLA, as required by Art. 3(2) CISG (**II**).

I. The GorAdCam viral vectors, HEK-294 cells and cell culture growth medium are sales elements and subject to the CISG

70 According to Art. 1(1) CISG, the CISG applies to an agreement if the respective sale involves goods. A good under the CISG is a moveable and tangible item [*Chinchilla furs case; PVC light panel case; Czerwenka, p. 147; Schwenzer/Kee/Hachem §7.03*]. The goods are GorAdCam viral vectors [*Section 9.2 PCLA*], HEK-294 cells and a cell culture growth medium [*Section 16.1 PCLA*].

71 In *Genpharm v. Pliva-Lachema*, the U.S. District Court for the Eastern District of New York considered warfarin, a chemical compound, a good. Similarly, the GorAdCam viral vectors and the HEK-294 cells are to be considered as goods. The GorAdCam viral vectors, containing modified DNA of an adenovirus, are moveable and tangible goods, despite being microscopically small. At the same time, the non-exclusive licence is an intellectual property right, and the consequent royalty

and milestone payments are not goods in the sense of the CISG [*cf. Brunner/Meier/Stacher, Art. 2 §3; Mankowski, Art. 1 §13*]. They are neither moveable nor tangible.

72 According to Art. 30 and Art. 53 CISG, a sales agreement must not only regulate the delivery of goods but also stipulate a price [*Schwenzer/Hachem, Art. 1 §8; Mankowski, Art. 1 §2; Mistelis, Art. 1 §25*]. Section 9.2 PCLA sets the price for the first batch of GorAdCam viral vectors at EUR 2.5 million, while the price for the HEK-294 cells and the cell culture growth medium is fixed at EUR 2 million per 2000-litre batch [*Section 16.1 PCLA*]. The PCLA stipulates the delivery of GorAdCam viral vectors [*NoA, p. 6 §11*]. According to Section 16.2 PCLA, CLAIMANT can – for an additional price – choose to have the vaccine produced by RESPONDENT NO. 1. The vaccine would also classify as a good under the CISG.

II. The preponderant part of the PCLA consists of sales elements pursuant to Art. 3(2) CISG

73 The PCLA is a mixed agreement, containing sales and licence elements, of which the sales elements are preponderant. Art. 3(2) CISG typically regulates mixed agreements that include sales elements as well as elements concerning the supply of labour and/or other services. This provision can likewise be applied to any mixed agreement [*Schwenzer/Hachem, Art. 3 §22; Ferrari, Art. 3 §19; Herber/Czerwenka, Art. 3 §6*]. The inclusion of non-sales elements does not impede the application of the CISG [*Schlechtriem/Schroeter, §75*]. According to Art. 3(2) CISG, for the CISG to apply to mixed agreements, the sales elements need to be preponderant [*ibid.*].

74 The parties' subjective will indicated a sales agreement (**1**), while the granted licence is merely a means for using the GorAdCam viral vectors and therefore not the preponderant part (**2**). CLAIMANT will subsequently show that, in the event of the vaccine development being successful, the sales elements will have a higher economic value than the non-sales elements (**3**).

1. The parties' subjective will indicated a sales agreement

75 The intentions of the parties constitute suitable criteria for determining whether the sales elements make up the preponderant part of an agreement [*Cylinder case; Schwenzer/Hachem, Art. 3 §19*]. To understand the parties' subjective will, their intentions and interests must be interpreted [*Potato chip plant case; CISG-AC Op. No. 4, §3.4; Huber, Art. 3 §14; Magnus, Art. 3 §21*]. Which obligation represents the focus of the agreement for the parties is decisive [*Huber, Art. 3 §14*]. CLAIMANT will show that the parties' subjective will was to enter into a sales agreement. This is demonstrated by the negotiations that led to the PCLA (**a**) and RESPONDENT NO. 1's own outward portrayal (**b**).

a) The negotiations indicated a sales agreement

76 An entire agreement clause, such as Section 15.3 PCLA, does not hinder a tribunal from interpreting an agreement on the basis of such factors as the parties' intentions or the circumstances that led to the conclusion of an agreement [*CISG-AC Op. No. 3, §4.6; Vogenauer, Art. 2.1.17 §6; Murray, p. 45*]. Thus, Art. 8(2),(3) CISG can be applied. According to Art. 8(2) CISG, statements are to be interpreted in the way a reasonable third person of the same kind could have understood them in the same circumstances [*cf. Letters of credit case; Schmidt-Kessel, Art. 8 §20*]. Due consideration is given to all relevant circumstances according to Art. 8(3) CISG, including negotiations [*cf. Packaging machine case; Farnsworth, Art. 8 §2.6; Lookofsky, §86*].

77 RESPONDENT NO. 1 was interested in a sales agreement and explicitly added Section 16 PCLA during the negotiations [*cf. NoA, p. 6 §13*]. It wanted to ensure its production facilities would be used [*PO2, p. 56 §26*]. This is why RESPONDENT NO. 1 included a production option in Section 16.2 PCLA, in which it offered to produce the vaccine. It even went as far as significantly lowering the royalty payment percentages in Section 16.3 PCLA to make it a more desirable option for CLAIMANT.

78 Moreover, by including an additional purchase obligation, the PCLA deviates from normal contracts in the sector of the development and production of vaccines based on viral vectors [*cf. NoA, p. 6 §14*]. RESPONDENT NO. 1 can also provide not only the GorAdCam viral vectors, but also HEK-294 cells and the cell culture growth medium. The GorAdCam viral vectors can only be amplified in HEK-294 cells [*Cl. Ex. 2, p 10; PO2, p. 55 §19*]. At the time of conclusion of the PCLA, RESPONDENT NO. 1 was one of only two producers able to deliver the HEK-294 cells and the cell culture growth medium. For CLAIMANT, being able to purchase these HEK-294 cells from RESPONDENT NO. 1 directly was a decisive factor for entering into the PCLA [*NoA, p. 6 §15; cf. Genpharm v. Pliva-Lachema*].

79 In conclusion, a reasonable third person of the same kind as CLAIMANT, according to Art. 8(2),(3) CISG, would, in these circumstances, believe it was RESPONDENT NO. 1's intent to conclude a sales agreement.

b) RESPONDENT NO. 1 portrayed itself as a producer and seller

80 In the Recitals of the PCLA, RESPONDENT NO. 1 is described as a Contract Manufacturing Organization that *"produces and sells"*. Using sales-specific definitions in an agreement can be an indicator of the agreement's nature [*cf. Car Trim v. KeySafety*].

81 CLAIMANT could rely on the existence of a sales agreement as it buys the GorAdCam viral vectors from RESPONDENT No. 1, a Contract Manufacturing Organization [*Cl. Ex. 3, p. 11*]. RESPONDENT

No. 1 stated in a scientific journal, published on 29 November 2018, that it sees its own potential to become *"one of the leading production companies"* [*Cl. Ex. 2, p. 10*]. Therefore, RESPONDENT No. 1 has put forth the narrative that it sees itself as a production company.

82 After RESPONDENT NO. 1 received an exclusive licence for the use of the GorAdCam viral vectors, it went ahead and increased its production capacities for the HEK-294 cells as well as the cell culture growth medium [*ANoA, p. 26 §8*]. RESPONDENT NO. 1 opened a new perfusion bioreactor to produce viral vectors in larger quantities. The idea was to produce and sell at least the base materials for vaccine production [*Cl. Ex. 2, p. 10*]. In other words, RESPONDENT NO. 1 went to serious monetary expense to position itself as a leading production company.

2. The licence granted to CLAIMANT is only a means to be able to use the GorAdCam viral vectors

83 CLAIMANT wants to use the GorAdCam viral vectors to conduct research on vaccines. Without the GorAdCam viral vectors, the licence would have been of no use to CLAIMANT. It therefore took out the licence mainly to ensure it could obtain the GorAdCam viral vectors. Thus, the licence is not the main obligation.

84 A contract element needs to be the main element of a contract to be preponderant [*Intraval v. Econ*]. If the costs of an obligation are not mentioned in the cost accounting, they are generally not the preponderant part of an agreement [*cf. Pizzeria restaurant equipment case*]. RESPONDENT NO. 1's internal profit and loss calculation broke down the upfront payment of Section 9.2 PCLA and did not once include any mention of a price for a licence [*cf. PO2, Appendix 1, p. 59*]. RESPONDENTS have stated that the transfer of know-how is *"by far the most important obligation"* for RESPONDENT NO. 1, which is why RESPONDENTS characterise the PCLA as a licence agreement [*ANoA, p. 28 §19*]. However, RESPONDENT NO. 1's know-how is only transferred regarding the base materials [*PO2, p. 55 §17*]. This means that the transfer of know-how is dependent on the purchase of HEK-294 cells and cell culture growth medium. Without these, no transfer of know-how would be needed. Thus, while the transfer of know-how may be one of RESPONDENT NO. 1's obligations, it cannot be its most important obligation.

3. In the event of successful vaccine development, the purchase obligation has more economic value than the royalty payments

85 If CLAIMANT were to successfully develop and produce a vaccine, the purchase obligation in Section 16 PCLA would represent the preponderant part under Art. 3(2) CISG. The threshold of preponderance is met if the sales elements make up more than 50 % of an agreement [*Waste recycling plant case; Brunner/Feit, Art. 3 §8; Mistelis/Raymond, Art. 3 §18; Ferrari, Art. 3 §15*]. This can be

evaluated when looking at the cost accounting of both parties [*Lüderitz/Fenge, Art. 3 §4*]. The ratio of the values as agreed at the time of the conclusion of the contract is decisive [*Schwenzer/Hachem, Art. 3 §7; Magnus, Art. 3 §18; Saenger, Art. 3 §6*]. Most contractual obligations of the PCLA are conditional, as the end goal of the research in this case is, after all, a successful vaccine development. CLAIMANT is about to start the Phase-III-trial in mid-December 2020 [*PO2, p. 55 §16*]. RESPONDENT NO. 1 specifically wanted to add Section 16 PCLA, a purchase obligation, resulting in an amendment of the contract draft [*supra §7*]. Said purchase obligation was solely based on the future development of a vaccine. Hence, the conditional sales obligations need to be seen as an indicator to determine the nature of the contract.

86 The relevance of using conditional obligations as an indicator for the 50 % requirement can be shown by the comparison of all present and future costs. During the research phase, CLAIMANT is obliged to pay for one batch of GorAdCam viral vectors and milestone payments as they occur [*Sections 9.2 and 9.4 PCLA*]. These costs amount to, at most, EUR 4.5 million (EUR 2.5 million upfront payment + EUR 2 million milestone payments 1-3). Should the vaccine development be successful, the lowest price CLAIMANT would then have to pay to RESPONDENT NO. 1 would be EUR 301.25 million annually (*infra* §88, Table 1: D2 + D3), which is significantly higher than the EUR 4.5 million.

87 The value of the purchase obligation under Section 16.1 PCLA in any quantity of batches exceeds the respective royalty payments under Sections 9.5 and 16.3 PCLA. For every batch of HEK-294 cells purchased, CLAIMANT is obliged to pay EUR 2 million [*Section 16.1 PCLA*]. At the same time, the royalty payment would be, at an average price of EUR 25 per dosage, at most EUR 1.5 million (Table 1: A3) per batch [*PO2, Appendix 1, p. 59*]. If CLAIMANT is able to develop a vaccine successfully, it is certain to sell at least 100 million dosages per year [*PO2, p. 53 §6*]. For CLAIMANT to produce that number of dosages itself, CLAIMANT would, again, need to buy at least 100 batches of HEK-294 cells a year at a price of EUR 2 million per batch, which amounts to an annual purchase price of EUR 200 million (Table 1: D2) [*Section 16.1 PCLA; PO2, p. 58 §43(a)*]. For the same 100 batches of HEK-294 cells, CLAIMANT would need to pay EUR 101.25 million (Table 1: D3) royalties per year. These royalties of EUR 101.25 million, are considerably lower than the costs of the sales elements in Section 16 PCLA, namely EUR 200 million (Table 1: D2).

88

		A	B	C	D
	Amount of batches	**Batch 1**	**Batch 2-4**	**Batch 5-100**	**Total**
1	Purchase Obligation (Section 16.1 PCLA)	EUR 2 million	EUR 6 million	EUR 192 million	EUR 200 million
2	Royalty percentages based on annual Net Sales (Section 9.5.1 PCLA)	6 %	5 %	4 %	
3	Royalties to pay with annual revenue of EUR 25 million per batch	EUR 1.5 million	EUR 3.75 million	EUR 96 million	EUR 101.25 million

Table 1: Cost of CLAIMANT's own vaccine production assuming a price per dosage of EUR 25 [based on PO2, Appendix 1, p. 59]

89 If CLAIMANT develops the highly sought-after vaccine and the price of one dosage reaches EUR 40, CLAIMANT is expected to have a net revenue of EUR 4,000 million per year (100 batches x 1 million dosage/batch x EUR 40 price/dosage) [*cf. Re. Ex. 2, p. 31 §12; PO2, p. 58 §43(a)*]. The royalty payments would stand at EUR 161.25 million ((6 % of EUR 25 million) + (5 % of EUR 75 million) + (4 % of EUR 3,900 million)). Compared to EUR 200 million for the purchase of the HEK-294 cells and the cell culture growth medium, the licence element's value is lower than the sales element.

90 The case gets even more straightforward if CLAIMANT decides to have the vaccines produced by RESPONDENT NO. 1, which is a possibility in Section 16.2 PCLA. If CLAIMANT makes use of this option, RESPONDENT NO. 1 would use the purchased HEK-294 cells and the cell culture growth medium to produce the vaccines. The price of the HEK-294 cells batch would then be raised to EUR 4 million per batch because the vaccines are included in said price [*cf. PO2, Appendix 1, p. 59*]. This amount, multiplied by the 100 batches needed, results in an annual purchase price of EUR 400 million (*infra* §91, Table 2: D2). Since RESPONDENT NO. 1 lowered the royalty payments to make it a more desirable option for CLAIMANT [*supra §77*], the annual royalty payments drop to EUR 64.25 million (Table 2: D3). That gap widens even more if one considers that CLAIMANT is certain to sell 100 million vaccine dosages annually for the entirety of the royalty term of ten years [*PO2, p. 53 §6*].

91

		A	B	C	D
	Amount of batches	**Batch 1**	**Batch 2-4**	**Batch 5-100**	**Total**
1	Purchase Obligation (Section 16.2 PCLA)	EUR 4 million	EUR 12 million	EUR 384 million	EUR 400 million
2	Royalty percentages based on annual Net Sales (Section 16.3 PCLA)	5 %	4 %	2.5 %	
3	Royalties to pay with annual revenue of EUR 25 million	EUR 1.25 million	EUR 3 million	EUR 60 million	EUR 64.25 million

Table 2: Cost of vaccine production by RESPONDENT No. 1 assuming a price per dosage of EUR 25 [based on PO2, Appendix 1, p. 59]

92 Regardless of whether CLAIMANT decides to have the vaccines produced or produces them itself, the economic value of the sales elements [*Section 16 PCLA*] is substantially higher than the royalty payments. The sales elements therefore make up the preponderant part of the PCLA.

B. IN ANY EVENT, THE CISG APPLIES TO THE SALES ELEMENTS OF THE PCLA

93 The sales elements can be treated separately from the non-sales elements of the PCLA. If an agreement with various obligations can be seen as an economic unit, the CISG applies to the entire agreement [*CISG-AC Op. No. 4, §3.1; Magnus, Art. 3 §11*]. Were the Tribunal to find the connection between the various obligations in the PCLA and the parties' intention to conclude a sole agreement insufficient and saw no unity in it, the CISG may, alternatively only be applied to the sales elements [*cf. Sec. Comm., Art. 3 §3; Schwenzer/Hachem, Art. 3 §16; Ferrari, Art. 3 §12*]. According to Section 15.2 PCLA, Danubian law then governs the remainder of the agreement.

94 RESPONDENT NO. 1 has breached its contractual obligations to deliver conforming GorAdCam viral vectors due to the existence of a third-party claim [*infra §133*]. Thus, it is irrelevant for the Tribunal whether the licence elements are governed by the CISG or not. Applying the CISG partially to the sales elements would therefore still be feasible with respect to the dispute at hand.

* * *

95 In conclusion to **Issue 3**, the CISG applies to the PCLA because the intentions of the parties show a preponderant subjective will to enter into a sales agreement, rather than any other type of contract, and because the economic value of the sales elements outweighs the non-sales elements.

ISSUE 4: RESPONDENT NO. 1 BREACHED ITS OBLIGATION TO DELIVER GORADCAM VIRAL VECTORS FREE FROM THIRD-PARTY CLAIMS

96 RESPONDENT NO. 1 was obliged to deliver GorAdCam viral vectors fit to produce vaccines against respiratory diseases. RESPONDENT NO. 1 failed to comply with this obligation. The GorAdCam viral vectors are encumbered with a claim of Ross Pharmaceuticals, which prevents CLAIMANT from using the GorAdCam viral vectors to freely research and produce vaccines.

97 RESPONDENT NO. 2 holds the patent on the GorAdCam viral vector [*NoA, p. 4 §3*]. In June 2014, it concluded the Ross Agreement with Ross Pharmaceuticals [*NoA, p. 5 §8*], granting the latter an exclusive licence to use the GorAdCam viral vectors to develop vaccines. The scope of the exclusive licence was negotiated and finally settled on *"malaria and related infectious diseases"* [*Section 2 Ross Agreement; Re. Ex. 2 §5*]. In summer 2018, Ross Pharmaceuticals raised a discussion about the scope of its exclusive licence and alleged that infectious respiratory diseases would be covered as well [*ANoA, p. 27 §12*].

98 Shortly afterwards, RESPONDENT NO. 2 became part of the Roctis Group and concluded the R1-R2 Agreement with RESPONDENT NO. 1 [*ANoA, p. 26 §8*]. Therein, RESPONDENT NO. 2 granted RESPONDENT NO. 1 an exclusive licence to sublicence the GorAdCam viral vectors for *"all applications with the exceptions of malaria"* [*NoA, p. 6 §10*]. Based on the R1-R2 Agreement, at the beginning of December 2018 RESPONDENT NO. 1 entered into negotiations of the PCLA with CLAIMANT to sublicence the use of the GorAdCam viral vectors [*NoA, p. 6 §12; ANoA, p. 26 §9*]. The PCLA granted CLAIMANT the right to use the GorAdCam viral vectors for researching and producing vaccines for *"infectious and non-infectious respiratory diseases"* [*Section 2 PCLA*]. Thereby, the PCLA infringes on the scope, Ross Pharmaceuticals had previously claimed to have an exclusive licence for. Consequently, the GorAdCam viral vectors were not free from third-party intellectual property claims.

99 RESPONDENT NO. 1 became aware of Ross Pharmaceutical's claim during these negotiations and exposed CLAIMANT to the risk of being sued by Ross Pharmaceuticals. CLAIMANT's access to the GorAdCam viral vectors is endangered, and it can no longer continue its vaccine research unburdened [*cf. Cl. Ex. 5, p. 19*]. In Section 11 PCLA, RESPONDENT NO. 1 made various commitments regarding the absence of third-party intellectual property claims on the GorAdCam viral vectors.

100 CLAIMANT will set out the different legal bases it relies on, namely Sections 11.1.2 to 11.1.4 PCLA and Art. 42 CISG (**A**). It will then show that the third-party claim that Ross Pharmaceuticals holds, meets the relevant liability requirements of all legal bases relied upon (**B**). Further, RESPONDENT

NO. 1's knowledge about Ross Pharmaceuticals' claim will be established to the extent required by the Sections 11.1.3, 11.1.4 PCLA and Art. 42(1) CISG, and in any event, knowledge is not required under Section 11.1.2 PCLA (**C**). Lastly, CLAIMANT will demonstrate that it is entitled to rely on the breach of RESPONDENT NO. 1's contractual obligations regarding Ross Pharmaceuticals' claim, as no exclusion of liability applies pursuant to Art. 42(2)(a) and Art. 43 CISG (**D**).

A. CLAIMANT CAN RELY ON SECTIONS 11.1.2 TO 11.1.4 PCLA AND ART. 42 CISG FOR A BREACH OF RESPONDENT NO. 1'S CONTRACTUAL OBLIGATIONS

101 RESPONDENT NO. 1 breached its contractual obligations under Section 11 PCLA in connection with Art. 42(1) CISG to deliver GorAdCam viral vectors free from any third-party intellectual property claims. Pursuant to Art. 6 CISG, the parties are free to derogate from or modify provisions of the CISG [*Gillette/Walt, p. 257; Mistelis, Art. 6 §7*]. Section 11 PCLA was not discussed during the negotiations [*PO2, p. 56 §27*]. Therefore, a subjective intent of the parties according to Art. 8(1) CISG cannot be determined which is why analysing whether the parties modified the liability requirements of Art. 42(1) CISG requires an interpretation according to Art. 8(2) CISG [*CISG-AC Op. No. 16, §5.17; Farnsworth, Art. 8 §2.4; Schlechtriem/Schroeter, §57a*]. Hence, Section 11 PCLA must be examined from the understanding of a reasonable third person.

102 According to Art. 7.1.6 UPICC a party's liability for intentional or grossly negligent conduct cannot be excluded [*UNIDROIT, Art. 7.1.6 p. 239; CISG-AC Op. No. 17, §2.11; Schelhaas, Art. 7.1.6 §14*]. Hence, the seller's contractual liability pursuant to Art. 42(1) CISG cannot be excluded since this provision requires the seller to know or be unable to be unaware of the third party intellectual property claim. Moreover, a reasonable third person would expect the parties to expressly and clearly exclude Art. 42 CISG [*cf. Gilbert-Ash v. Modern Engineering; McMeel, §7.23*]. Beyond the commercial details, there were only little discussions about the individual clauses [*PO2, p. 56 §25*], which is why it can be assumed that the parties did not exclude the applicability of Art. 42 CISG. Thus, Art. 42(1) CISG applies in addition to Sections 11.1.2 to 11.1.4 PCLA unless the latter includes a more stringent standard [*cf. Schwenzer, Art. 35 §13; Kröll, Art. 35 §65*]. If no prevailing contractual provision exists, Art. 42 CISG applies [*cf. Schwenzer/Hachem, Art. 6 §23; Manner/Schmitt, Art. 6 §8*]. A comparison of the liability requirements of Sections 11.1.2 to 11.1.4 PCLA and Art. 42(1) CISG shows that Section 11.1.2 PCLA contains a more stringent standard in that it does not provide for a knowledge requirement. In the other Sections the requirements overlap, which is why Section 11.1.3 and 11.1.4 PCLA should prevail over the default standard of Art. 42(1) CISG.

103 The liability requirements of Art. 42(1) CISG are: the existence of a third-party intellectual property claim (**B.I**), which is sufficient to affect the use of the goods (**B.II**) and which the seller knew or

could not have been unaware of at the time of the conclusion of the contract (**C**). The liability is excluded if, at the time of the conclusion of the contract, the buyer knew or could not have been unaware of the third-party claim [*Art. 42(2)(a) CISG*]. CLAIMANT is entitled to rely on the breach of RESPONDENT NO. 1's contractual obligations as it was neither aware of the dispute between Ross Pharmaceuticals nor could it have been aware of said dispute (**D.I**). Furthermore, the seller's liability is excluded if the buyer fails to give timely notice [*Art. 43(1) CISG*] and the seller was not aware of the third-party claim [*Art. 43(2) CISG*]. CLAIMANT was not obliged to give notice to RESPONDENT NO. 1 since it knew about Ross Pharmaceuticals' claim at the time of the conclusion of the PCLA (**D.II**).

B. ROSS PHARMACEUTICALS HOLDS A CLAIM ON THE GORADCAM VIRAL VECTORS BASED ON INTELLECTUAL PROPERTY

104 CLAIMANT submits that Ross Pharmaceuticals' exclusive licence is an intellectual property right (**I**). The mere threat of a claim of Ross Pharmaceuticals against CLAIMANT is sufficient to render the GorAdCam viral vectors non-conforming under Art. 42(1) CISG, as it affects CLAIMANT's intended use (**II**).

I. Ross Pharmaceuticals' claim is based on its exclusive licence, which is an intellectual property right

105 Ross Pharmaceuticals' claim is based on an intellectual property right as it derives from an exclusive licence on the GorAdCam viral vectors [*Re. Ex. 4, p. 35*]. Patents fall within the scope of Art. 42(1) CISG [*CD media case; Tebel, Art. 42 §5*]. Art. 42(1) CISG covers licences if they enable the licensee to act against infringements independently [*Tebel, Art. 42 §5; Achilles, Art. 42 §2; Benicke, Art. 42 §2*].

106 The claim of Ross Pharmaceuticals derives from an exclusive licence granted by RESPONDENT NO. 2. In the jurisdictions concerned, as an exclusive licensee, Ross Pharmaceuticals is allowed to enforce its licence rights against any infringer [*PO2, p. 58 §40*]. The parties further specified that the intellectual property right forming the basis of the claim needs to be either potentially infringed by conducting the Research Plan [*Section 11.1.3 PCLA*] (**1**) or related to the Licensed Technology [*Section 11.1.4 PCLA*] (**2**).

1. Conducting the Research Plan might infringe Ross Pharmaceuticals' licence rights

107 In the PCLA, CLAIMANT and RESPONDENT NO. 1 agreed on a Research Plan outlining the research activities with respect to the GorAdCam viral vectors [*cf. Sections 2 and 3.1 PCLA*]. Section 11.1.3 PCLA is violated if, by conducting the research, any third party's intellectual property right might

be infringed. By conducting research on infectious respiratory diseases according to the Research Plan of the PCLA, CLAIMANT would possibly infringe Ross Pharmaceuticals' alleged exclusive rights to research on a vaccine against infectious respiratory diseases [*Re. Ex. 4, p. 35*].

2. Ross Pharmaceuticals' claim concerns the Licensed Technology

108 RESPONDENT NO. 1 warrants in Section 11.1.4 PCLA that no claims with respect to the Licensed Technology are threatened as of 1 January 2019, PCLA's effective date. Ross Pharmaceuticals' claim derives from an exclusive licence on the GorAdCam viral vectors [*Re. Ex. 3, pp. 32 et seq.; Re. Ex. 4, p. 35*]. The GorAdCam viral vectors fall under the term of Licensed Technology because they are Compounds according to Section 1.2 PCLA in connection with Section 1.6 PCLA. Thus, Ross Pharmaceuticals' claim concerns the Licensed Technology.

II. The mere threat of a claim of Ross Pharmaceuticals against CLAIMANT is sufficient to render the GorAdCam viral vectors non-conforming

109 RESPONDENTS assert that there is no contractual breach because Ross Pharmaceuticals' claim is unjustified [*ANoA, p. 28 §20*]. However, it is irrelevant whether the claim is justified or not; Ross Pharmaceuticals' claim is not frivolous (**1**). Moreover, the mere threat of a lawsuit against CLAIMANT suffices to render the GorAdCam viral vectors non-conforming, as it affects CLAIMANT's intended use of them (**2**).

1. Ross Pharmaceuticals' claim is not frivolous

110 It is not relevant whether a claim is justified or not [*CD media case; EAS tags case; Kröll, Art. 42 §9; Metzger, p. 846 et seq.*]. Even frivolous claims trigger the seller's liability [*Beline, p. 9; Langenecker, p. 67; Piltz, §5-121; Rauda/Etier, p. 38*]. As the Austrian Supreme Court held, third-party claims are part of the seller's sphere of risk [*CD media case; cf. Schwenzer, Art. 42 §16; Kröll, Art. 42 §9*]. The buyer can expect to receive undisturbed ownership of the goods [*Kröll, Art. 42 §9*]. The aim of Art. 42(1) CISG is to avoid that the buyer has to deal with third-party claims [*Honnold/Flechtner, §265; Rauda/Etier, p. 38*]. Fending off a third-party claim – frivolous or not – is costly and time-consuming [*Sec. Comm., Art. 39 §3; Honnold/Flechtner, §265; Rauda/Etier, p. 39*].

111 For RESPONDENT NO. 1's liability under Sections 11.1.2 to 11.1.4 PCLA and Art. 42(1) CISG, it is irrelevant whether Ross Pharmaceuticals actually holds an exclusive licence for infectious respiratory diseases. During the negotiations of the Ross Agreement, Ross Pharmaceuticals tried to widen the scope of the exclusive licence as much as possible [*PO2, p. 55 §20*], and was willing to pay an additional EUR 600,000 to extend the scope of the licence [*Re. Ex. 2, p. 30 §5; Re. Ex. 4, p. 35*]. Asserting that Ross Pharmaceuticals' exclusive licence, which covers *"malaria and related infectious diseases"* [*Section 2 Ross Agreement*] might also cover *"infectious respiratory diseases"* [*cf. Section 2*

PCLA], is therefore not unreasonable. Hence, Ross Pharmaceuticals' claim cannot be deemed frivolous. Consequently, even if the Tribunal were to exclude frivolous claims from RESPONDENT NO. 1's liability, this would not apply to Ross Pharmaceuticals' reasonable claim.

2. The mere threat of a lawsuit against CLAIMANT suffices to render the GorAdCam viral vectors non-conforming

112 CLAIMANT is worried that a lawsuit may take place and that it consequently cannot use the GorAdCam viral vectors unconcerned. Ross Pharmaceuticals has already claimed against RESPONDENTS that it is entitled to use the GorAdCam viral vectors to research on a vaccine against infectious respiratory diseases (**a**). RESPONDENT NO. 1 is bound to the R1-R2 Agreement, resulting in Ross Pharmaceuticals likely asserting a claim (**b**).

a) Ross Pharmaceuticals has already claimed the use of the GorAdCam viral vectors for infectious respiratory diseases against RESPONDENTS

113 RESPONDENTS point out that Ross Pharmaceuticals has never raised a claim against CLAIMANT. However, the threat of a lawsuit, irrespective of its final outcome, prevents CLAIMANT from using the GorAdCam viral vectors without any concerns. Whether the third party has already claimed its right against the buyer is irrelevant [*Kröll, Art. 42 §10; Janal, p. 208*]. Under Art. 42(1) CISG it is sufficient that a claim could impair the buyer's use of the goods in the future as long as a claim can be potentially made [*Schwenzer, Art. 42 §6*; *Kröll, Art. 42 §10; Magnus, Art. 42 §9; Achilles, p. 3*]. In the *CD media case,* the liability was triggered in a situation where the parent company of the seller was sued by a third party. It was likely that the third party might also bring an action against the buyer. It was held that no buyer can be expected to purchase the risk of a lawsuit [*cf. Sec. Comm., Art. 39 §3; Honnold/Flechtner §265*].

114 Ross Pharmaceuticals threatened to claim against RESPONDENTS during the negotiations of the PCLA [*Re. Ex. 4, p. 35*]. In its email of the 6 December 2018, Ross Pharmaceuticals affirmed its view that its exclusive licence would cover *"infectious respiratory diseases"* [*ibid.*]. Even though Ross Pharmaceuticals offered a settlement, RESPONDENTS knew about Ross Pharmaceuticals' policy of vigorously defending its intellectual property rights [*Cl. Ex. 7, p. 21 §7; PO2, p. 54 §15*]. They knew that, if they did not comply with Ross Pharmaceuticals' suggestions, it would not shy away from court proceedings. RESPONDENTS must have understood such suggestions as a threat. RESPONDENT NO. 1 breached its contractual obligations under Section 11.1.4 PCLA. While discussions between Ross Pharmaceuticals and RESPONDENTS are still ongoing [*Cl. Ex. 7, p. 21 §6*], CLAIMANT has to expect a claim from Ross Pharmaceuticals anytime.

b) RESPONDENT NO. 1 is bound to the R1-R2 Agreement resulting in Ross Pharmaceuticals likely asserting a claim

115 Art. 42(1) CISG does not require a third party to have already raised a claim against CLAIMANT [*cf. Schwenzer, Art. 42 §6*; *Kröll, Art. 42 §10; Janal, p. 208; Schwerha, p. 458*]. In particular, Section 11.1.2 PCLA is already breached if RESPONDENT NO. 1 is bound to an *"agreement that will result in any person or entity obtaining any interest […] to assert any claim in or with respect to, any of Licensee's rights granted under this Agreement"*.

116 The R1-R2 Agreement grants RESPONDENT NO. 1 the right to produce, sell and sublicence the GorAdCam viral vectors for *"all applications with the exceptions of malaria"* [*NoA, p. 6 §10*]. RESPONDENT NO. 1 concluded the PCLA, relying on the scope of the R1-R2 Agreement. The PCLA grants CLAIMANT a sublicence based on the R1-R2 Agreement for *"infectious and non-infectious respiratory diseases"* [*Section 2 PCLA*].

117 Meanwhile, Ross Pharmaceuticals holds an exclusive licence for the use of the GorAdCam viral vectors for the application *"malaria and related infectious diseases"* [*Section 2 Ross Agreement*]. Ross Pharmaceuticals started developing a vaccine against COVID-19 early in 2020 [*PO2, pp. 54 et seq. §§14, 16*]. This conduct indicates Ross Pharmaceuticals' conviction that infectious respiratory diseases, like COVID-19 [*PO2, p. 55 §23*], are covered by the scope of its exclusive licence [*Cl. Ex. 4, p. 18; ANoA, p. 27 §§11 et seq.; Re. Ex. 4, p. 35*]. The R1-R2 Agreement caused this overlap between the scopes of the Ross Agreement and the PCLA. Thus, Ross Pharmaceuticals could assert that CLAIMANT is illegitimately using the GorAdCam viral vectors.

118 RESPONDENT NO. 1 is bound to the R1-R2 Agreement, wherein RESPONDENT NO. 2 grants them an exclusive licence [*ANoA, p. 26 §8*]. According to Ross Pharmaceuticals, this exclusive licence infringes the exclusive licence under the Ross Agreement. The R1-R2 Agreement thus results in Ross Pharmaceuticals obtaining an interest in asserting a claim against CLAIMANT according to Section 11.1.2 PCLA. It does not matter whether Ross Pharmaceuticals' claim is well-founded or not. Ross Pharmaceuticals is certain of its position and the mere possibility of such an interest arising in the future is sufficient to establish a breach under Section 11.1.2 PCLA.

C. RESPONDENT NO. 1 HAD KNOWLEDGE ABOUT ROSS PHARMACEUTICALS' CLAIM

119 Under Art. 42(1) CISG, the seller is liable for third-party claims it knew about or could not have been unaware of. Section 11 PCLA contains several specific knowledge requirements. CLAIMANT will show that the knowledge requirements on RESPONDENT NO. 1's side are met.

120 First, RESPONDENT NO. 1 received notice from Ross Pharmaceuticals threatening a claim before the PCLA was concluded [*ANoA, pp. 26 et seq. §§9 et seqq.; Re. Ex. 4, p. 35*] as required under Section 11.1.4 PCLA (**I**). Second, RESPONDENT NO. 1 was aware that, if CLAIMANT conducts the Research Plan of the PCLA, this might infringe Ross Pharmaceuticals' rights. Thereby it violated its warranty under Section 11.1.3 PCLA (**II**).

121 Under Section 11.1.2 PCLA no knowledge requirement exists. Therefore, even if the Tribunal were to find that RESPONDENT NO. 1 had no actual knowledge about the claim (*quod non*), the liability would still be triggered since Section 11.1.2 PCLA is breached [*supra §118*].

I. RESPONDENT NO. 1 had received a notice from Ross Pharmaceuticals threatening a claim before the PCLA was concluded

122 RESPONDENT NO. 1 warrants that, to its knowledge, it had not received notice that any claims with respect to the Licensed Technology are threatened [*Section 11.1.4 PCLA*]. However, RESPONDENT NO. 1 had actual knowledge of Ross Pharmaceuticals' claim because the knowledge of Mr Doherty must be imputed to it.

123 Art. 79(1),(2) CISG is based on the principle that a party is liable for any person it engages [*Schwenzer, Art. 79 §§10, 21; Brunner, Art. 79 §9; Dornis, Art. 79 §18*]. As a general principle of the CISG, any knowledge of such people must be imputed to the engaging party [*Art. 7(2) CISG; Schwenzer, Art. 79 §10; Mankowski, Art. 79 §54*]. Employees and people otherwise integrated into the business organisation are included in this group [*Schwenzer, Art. 79 §41; Magnus, Art. 79 §43*].

124 Mr Doherty officially started working for RESPONDENT NO. 1 on 1 January 2019 [*NoA, p. 6 §12; Re. Ex. 2, p. 30*]. As negotiator of the PCLA during December 2018, he was a person integrated into the business organisation of RESPONDENT NO. 1 [*NoA, p. 6 §12*]. Therefore, Mr Doherty's knowledge at the time of conclusion of the agreement is imputed to RESPONDENT NO. 1. Mr Doherty served as both a negotiator of the PCLA and the Director Legal of RESPONDENT NO. 2 [*ANoA, p. 26 §9; Re. Ex. 2, p. 30 §1*]. During his term in office as Director Legal, he concluded the Ross Agreement and the subsequent dispute with Ross Pharmaceuticals began in summer 2018 [*ANoA, p. 27 §§11 et seq.; Re. Ex. 4, p. 35*].

125 As Mr Doherty's knowledge must be imputed to RESPONDENT NO. 1, it was aware that Ross Pharmaceuticals claimed the use of the GorAdCam viral vectors to research on a vaccine against infectious respiratory diseases at the time of conclusion of the PCLA. Thus the knowledge requirement under Section 11.1.4 PCLA is met.

II. RESPONDENT NO. 1 was aware that, if CLAIMANT conducts the Research Plan of the PCLA, this might infringe Ross Pharmaceuticals' licence rights

126 RESPONDENT NO. 1 warranted that, to the best of its knowledge, it was not aware of any third party's intellectual property rights that might be infringed by conducting the Research Plan [*Section 11.1.3 PCLA*]. If actual knowledge is established, the threshold of best knowledge is reached as well.

127 RESPONDENT NO. 1 breached Section 11.1.3 PCLA because it did know about Ross Pharmaceuticals' licence right. RESPONDENT NO. 1 knew about the scope of both the PCLA and the Ross Agreement, and thus knew that CLAIMANT's research for a vaccine against COVID-19 could lead to an infringement of Ross Pharmaceuticals' exclusive licence.

D. CLAIMANT CAN SUCCESSFULLY RELY ON THE ESTABLISHED BREACH OF RESPONDENT NO. 1'S CONTRACTUAL OBLIGATIONS

128 Section 11 PCLA contains no clauses about an exclusion of liability. Thus, the exclusion of liability is governed by Art. 42(2)(a) and Art. 43 CISG. CLAIMANT can rely on the established breach of the PCLA as no case of Art. 42(2)(a) CISG applies (**I**). Claimant was also not obligated to give notice pursuant to Art. 43(2) CISG (**II**).

I. When concluding the PCLA, CLAIMANT was not, and could not have been, aware of Ross Pharmaceuticals' claim on the GorAdCam viral vectors

129 Under Art. 42(2)(a) CISG, the obligation of the seller under Art. 42(1) CISG does not extend to cases where, at the time of the conclusion of the contract, the buyer knew or could not have been unaware of the claim. CLAIMANT had no actual knowledge because it was not aware of the first discussions reported on 14 December 2018 [*PO2, p. 54 §8*]. CLAIMANT as a buyer was under no further duty to investigate potential intellectual property rights on the GorAdCam viral vectors [*cf. Kröll, Art. 42 §38; Brunner/Schifferli, Art. 42 §20; Benicke, Art. 42 §13*].

130 RESPONDENT NO. 1 had, as producer and part of the Roctis Group, superior access to information regarding the intellectual property situation of the GorAdCam viral vectors. CLAIMANT could not be expected to inquire about potential intellectual property rights of third parties. In particular, RESPONDENT NO. 1 assured CLAIMANT that, to the best of its knowledge, there were no third-party

claims according to Sections 11.1.3 and 11.1.4 PCLA [*supra §§125, 127*]. CLAIMANT could therefore reasonably have been unaware of Ross Pharmaceuticals' claim.

II. CLAIMANT was not obliged to give notice to RESPONDENT NO. 1

131 RESPONDENTS may argue that CLAIMANT did not give timely notice. However, due to RESPONDENT NO. 1's actual knowledge of Ross Pharmaceuticals' claim, CLAIMANT was not obliged to give notice. According to Art. 43(2) CISG, the seller is not entitled to rely on the buyer's failure to give timely notice within a reasonable time if it knew of the third-party claim and its nature pursuant to Art. 43(1) CISG [*CD media case*]. RESPONDENT NO. 1 did already know about Ross Pharmaceuticals' claim at the time of the conclusion of the PCLA [*supra §§125, 127*].

132 In January 2019, after the conclusion of the PCLA, RESPONDENT NO. 1 – once again – made its view regarding the licence on the GorAdCam viral vectors clear to Ross Pharmaceuticals [*ANoA, p. 27 §14*]. RESPONDENTS were aware of Ross Pharmaceuticals' claim several months before CLAIMANT became aware of it on 1 May 2020 [*Cl. Ex. 5, p. 19*]. Hence, RESPONDENT NO. 1 is not entitled to rely on the lack of a timely notice pursuant to Art. 43 CISG.

* * *

133 In conclusion to **Issue 4**, RESPONDENT NO. 1 breached its contractual obligations under the PCLA and Art. 42 CISG. At the time of the conclusion of the PCLA, RESPONDENT NO. 1 knew Ross Pharmaceuticals had asserted an exclusive licence covering infectious respiratory diseases. Thus, the GorAdCam viral vectors delivered to CLAIMANT were not free from third-party claims. With a potential lawsuit ahead, CLAIMANT cannot use the GorAdCam vector without concern.

PRAYER FOR RELIEF

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

(1) RESPONDENTS' request for joinder of Ross Pharmaceuticals shall be declined;

(2) The hearing of 3 to 7 May 2021 shall be conducted remotely if a hearing in person is not possible or inappropriate;

(3) The CISG is applicable to the PCLA;

(4) RESPONDENT No. 1 breached its contractual obligations to deliver goods free from any third-party claims; and

(5) RESPONDENTS shall bear the cost of these arbitral proceedings.

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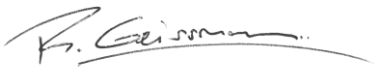
CERTIFICATE OF INDEPENDENCE

We hereby confirm that this Memorandum was written only by the persons whose names are listed below and who signed this certificate.

COLIN A. E. FEHLMANN



RAPHAEL D. GEISSMANN

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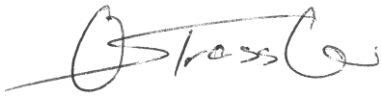
ELENA C. KONVALINA

LENA LANG



OLIVER F. STRÄSSLER

BERN, 10 DECEMBER 2020

SWITZERLAND