

TWENTY-EIGHTH ANNUAL

WILLEM C. VIS

INTERNATIONAL COMMERCIAL ARBITRATION MOOT

VIENNA



MEMORANDUM FOR RESPONDENTS

WESTFÄLISCHE WILHELMS-UNIVERSITÄT MÜNSTER

CHRISTOPHER KUNZMANN | YASMIN DRILL | CHARLENE OLSCHOWKA

LUKAS SCHWITTALLA | SOPHIA SHANG | TESSA VOSWINKEL

On Behalf Of

RESPONDENT NO. 1

CAMVIR LTD

112 Rue L. Pasteur

Oceanside

Equatoriana

RESPONDENT NO. 2

VECTORVIR LTD

67 Wallace Rowe Drive

Oceanside

Equatoriana

Against

CLAIMANT

RESPIVAC PLC

Rue Whittle 9

Capital City

Mediterraneo



Table of Abbreviations..... IV

Index of Authorities VI

Index of Cases and Awards..... XXXI

Statement of Facts 1

Introduction 2

Issue 1: Ross Pharma Should Be Joined to the Proceedings..... 3

A. The Tribunal Has the Power to Order a Joinder of Ross Pharma..... 3

 I. The Tribunal Has Jurisdiction Over Ross Pharma..... 4

 1. Although Ross Pharma Is Not a Signatory to the Arbitration Clause, It Is Bound by Means of Extension..... 4

 a) RESPONDENTS and Ross Pharma Have a Close Contractual Relationship..... 5

 b) The Pending Dispute Is Inextricably Intertwined With the Dispute of RESPONDENTS and Ross Pharma 5

 2. It Remains Without Consideration That the PCLA Does Not Impose Contractual Obligations on Ross Pharma..... 6

 II. All Persons Consented to Ross Pharma’s Joinder by Their Choice of Law..... 6

 1. The Choice of the Swiss Rules Constitutes the Consent to a Joinder 6

 2. By Choosing the Swiss Rules, Ross Pharma and CLAIMANT Consented to the Joinder of Ross Pharma 7

B. Considering All Relevant Circumstances, the Tribunal Should Exercise Its Discretion in Favor of Ross Pharma’s Joinder 7

 I. The Joinder Significantly Enhances the Overall Efficiency of the Proceedings..... 8

 II. Confidentiality Is Maintained in Case of the Joinder 8

 III. A Dismissal of the Joinder Request Entails the Severe Risk of Conflicting Decisions 9

Conclusion to Issue 1 10

Issue 2: The Second Hearing Should Be Conducted in Person..... 10

A. The Arbitration Clause Prescribes in-Person Hearings..... 11

B. In Any Case, Considering All Legal and Factual Arguments, an in-Person Hearing Is Indispensable 12

 I. The Procedural Law Requires the Conduct of an in-Person Hearing..... 12

 1. Art. 25(4) Swiss Rules Stipulates the General Rule of in-Person Hearings..... 12

 2. Art. 16(2) Swiss Rules Does Not Apply in the Present Case 12

 3. Art. 24(1) DAL Provides for in-Person Hearings..... 13



- II. National Jurisprudence and Law Support the in-Person Hearing.....13
 - 1. The Ruling of the Austrian Supreme Court Cannot Serve as Guidance for the Tribunal13
 - 2. Following Danubian Law the Hearing Has to Be Held in Person14
- III. All Circumstances of This Case Demand a Hearing in Person15
 - 1. A Virtual Hearing Endangers RESPONDENTS’ Right to Be Heard15
 - 2. The Right to Equal Treatment Is Threatened by a Virtual Hearing16
 - 3. Holding the Hearing in Person Will Not Violate the Tribunal’s Duty to Avoid Unnecessary Costs and Delays16
 - a) Holding the Hearing in Person Avoids Unnecessary Delays17
 - b) To Hold the Hearing in Person Does Not Lead to Unnecessary Costs17
 - 4. Only the in-Person Hearing Can Safeguard Confidentiality.....18
- Conclusion to Issue 2..... 18**

Issue 3: The CISG Does Not Apply to the PCLA 19

- A. The PCLA Does Not Meet the Conditions Set Out by Art. 1(1) CISG as It Is Not a Contract of Sale of Goods19
 - I. The Grant of the License Is Not a Sale of Goods20
 - II. The Delivery of the GorAdCam Vectors Is Not a Sale of Goods20
 - III. The Transfer of the Know-How Is Not a Sale of Goods.....21
 - IV. The Production Option Is Not a Sale of Goods22
- B. The CISG Does Not Apply to the PCLA Pursuant to Art. 3(2) CISG.....23
 - I. The Production Option Must Be Considered in the Comprehensive Interpretation of the PCLA23
 - II. The Economic Value of the Non-Sales Elements Prevails.....24
 - III. The Parties Had No Intent to Conclude a Sales Contract25
 - 1. The Contractual Elements of the PCLA Are Inconsistent With the Character of a Sales Contract25
 - 2. The Drafting History of the PCLA Also Reflects the Parties’ Intent to Conclude a Mixed License Agreement26

Conclusion to Issue 3.....27

Issue 4: RESPONDENT NO. 1 Did Not Breach the PCLA27

- A. Ross Pharma Does Not Have a Right to the GorAdCam Vectors for Infectious Respiratory Diseases in the Sense of Art. 42(1) CISG28



B. Ross Pharma’s Assertion Does Not Qualify as a Claim in the Sense of Art. 42(1) CISG.....29

 I. Ross Pharma Did Not Raise Any Assertion Against CLAIMANT.....29

 II. Even if Raising the Assertion Against CLAIMANT Was Not Required, Still No IP-Claim
 in the Sense of Art. 42(1) CISG Would Exist.....30

C. Even if the Tribunal Found That Ross Pharma’s Assertion Fulfills the Requirements of
 Art. 42(1) CISG, RESPONDENT NO. 1 Would Not Be Liable.....31

 I. RESPONDENT NO. 1’s Liability Is Excluded as per Art. 42(2)(a) CISG as CLAIMANT Had
 to Know of Ross Pharma’s Assertion.....31

 II. In Any Event, CLAIMANT Cannot Rely on a Supposed Breach of RESPONDENT NO. 1
 as It Did Not Fulfill Its Duty to Give Notice as per Art. 43(1) CISG.....32

 1. CLAIMANT Did Not Notify RESPONDENT NO. 1 Within a Reasonable Time.....32

 2. RESPONDENT NO. 1 Can Rely on CLAIMANT’s Failure to Give Timely Notice.....33

Conclusion to Issue 4.....35

Statement of Relief Sought35

**TABLE OF ABBREVIATIONS**

ABBREVIATION	FULL TEXT
AG	Aktiengesellschaft (Stock Company)
Answer	Answer to the Notice of Arbitration
Appendix I	Appendix I to Procedural Order No. 2
Art./Artt.	Article/Articles
cf.	confer (compare)
Ch.	Chapter
CISG	UN Convention on Contracts for the International Sale of Goods 1980
CLOUT	Case Law on UNCITRAL Texts
Covid-19	Coronavirus SARS-CoV-2
DAL	Danubian Arbitration Law
DCL	Danubian Contract Law
ed./eds.	Editor/Editors
emph. add.	emphasis added
et al.	et alii/et aliae (and others)
EUR	Euro
Ex. C/Ex. R	CLAIMANT's Exhibit/RESPONDENTS' Exhibit
File	The Problem
ibid.	ibidem (in the same place)
i.e.	id est (that is)
infra	vide infra (see below)
IP	Intellectual Property
LCIA Rules	London Court of International Arbitration Rules 1998
Ltd	Limited
MfC	Memorandum for CLAIMANT
Mr.	Mister



No.	Number
Notice	Notice of Arbitration
NYC	UN Convention of the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention)
p./pp.	Page/Pages
para./paras.	Paragraph/Paragraphs
%	Percent
PICC	UNIDROIT Principles on International Commercial Contracts 2016
plc	Public limited company
PO	Procedural Order
SCAI	Swiss Chambers' Arbitration Institution
Sec./Secc.	Section/Sections
SIAC Rules	Arbitration Rules of the Singapore International Arbitration Centre 2010
supra	vide supra (see above)
Swiss Rules	Swiss Rules of International Arbitration 2012
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration with the 2006 amendments (Article 7-Option 1)
v.	Versus
VIAC	Vienna International Arbitral Centre



INDEX OF AUTHORITIES

CITED AS	AUTHORITY	CITED IN PARA.
<i>Achilles</i>	Achilles, Wilhelm-Albrecht Kommentar zum UN-Kaufrechtsübereinkommen (CISG) 2 nd Edition, Köln, Carl Heymanns Verlag/Wolters Kluwer Deutschland, 2019.	184, 251
<i>Achilles, FS Schwenzler</i>	Achilles, Wilhelm-Albrecht Zur Rechtsmängelhaftung des Verkäufers bei Schutzrechtsansprüchen und Berechtigungsanfragen In: Büchler, Andrea/Müller-Chen, Markus (eds.), Festschrift für Ingeborg Schwenzler zum 60. Geburtstag, Bern, Stämpfli Verlag, 2011, pp. 1-20.	237
<i>Arroyo</i>	Arroyo, Manuel Arbitration in Switzerland: The Practitioner's Guide 2 nd Edition, Alphen aan den Rijn, Kluwer Law International, 2018.	21, 76, 101, 127, 132
<i>Bacher, FS Schwenzler</i>	Bacher, Klaus Rechte und Ansprüche aus Patenten als Rechtsmangel im Sinne von Art. 42 CISG In: Büchler, Andrea/Müller-Chen, Markus (eds.), Festschrift für Ingeborg Schwenzler zum 60. Geburtstag, Bern, Stämpfli Verlag, 2011, pp. 115-128.	251



<i>Backsmann/ Fröhlingsdorf</i>	<p>Backsmann, Till Alexander/Fröhlingsdorf, Josef Chapter IV: Science and Arbitration, The Vienna Propositions for Innovative and Scientific Methods and Tools in International Arbitration, G. Innovative Information and Communication Technology as Tools for Cost Efficient and Reasonable Conduct of International Arbitral Proceedings Cultural Challenges and Conflicts In: (2020) Austrian Yearbook on International Arbitration, Manz'sche Verlags- und Universitätsbuchhandlung, pp. 419-426.</p>	132, 146, 151
<i>Bagner</i>	<p>Bagner, Hans Confidentiality – A Fundamental Principle in International Commercial Arbitration? In: (2001) Journal of International Arbitration, Vol. 18, No. 2, pp. 243-249.</p>	151
<i>Bantekas et al.</i>	<p>Bantekas, Ilias/Ortolani, Pietro/Ali, Shahla/Gómez, Manuel A./Polkinghorne, Michael UNCITRAL Model Law on International Commercial Arbitration: A Commentary Cambridge, Cambridge University Press, 2020.</p>	105
<i>Bateson</i>	<p>Bateson, David Geoffrey Allan Virtual Arbitrations: The Impact of COVID-19 In: (2020) Indian Journal of Arbitration Law, Vol. IX, pp. 159-169.</p>	132, 151
<i>Beline</i>	<p>Beline, Thomas M. Legal Defect Protected by Article 42 of the CISG: A Wolf in Sheep's Clothing In: (2007) Pittsburgh Journal of Technology Law and Policy, Vol. 7, pp. 1-30.</p>	258



<i>Bermann</i>	Bermann, George A. International Arbitration and Private International Law Berlin/Nijhoff, The Hague Academy of International Law, 2017.	31
<i>Black's Law Dictionary</i>	Garner, Bryan A. Black's Law Dictionary 10 th Edition, St. Paul, Thomson Reuters, 2014.	179
<i>Born</i>	Born, Gary International Commercial Arbitration 2 nd Edition, Kluwer Law International, 2014.	21
<i>Brekoulakis, Consent</i>	Brekoulakis, Stavros Rethinking Consent in International Commercial Arbitration: A General Theory for Non-signatories In: (2017) Journal of International Dispute Settlement, Vol. 8, Issue 4, pp. 610-643.	34
<i>Brekoulakis, Third Party</i>	Brekoulakis, Stavros Third Parties in International Commercial Arbitration Oxford, Oxford University Press, 2012.	31, 34, 51
<i>Bridge</i>	Bridge, Michael The International Sale of Goods. Law and Practice Oxford, Oxford University Press, 1999.	191
<i>Brown/ McNeill/ Sharpe</i>	Brown, Chester/McNeill, Mark/Sharpe, Jeremy First Impressions of a Virtual Hearing at ICSID In: (2020) ICSID Review – Foreign Investment Law Journal, pp. 1-9.	132



<i>Brunner/Gottlieb</i>	Brunner, Christoph/Gottlieb, Benjamin Commentary on the UN Sales Law (CISG) Alphen aan den Rijn, Kluwer Law International, 2019.	184, 237, 258, 264
<i>Cachard</i>	Cachard, Olivier Dispute Settlement. International Commercial Arbitration. 5.9 Electronic Arbitration United Nations Conference on Trade and Development, New York/Geneva, 2003.	132
<i>Castello/Digón</i>	Castello, James E./Digón, Rocío Maximizing Possibilities for Joinder in International Arbitration In: Rovine, Arthur W. (ed.), Contemporary Issues in International Arbitration and Mediation: The Fordham Papers, 2011, pp. 104-120.	22, 51
<i>CISG AC No. 4</i>	CISG Advisory Council CISG Advisory Council Opinion No. 4. Contracts for the Sale of Goods to Be Manufactured or Produced and Mixed Contracts (Article 3 CISG) Madrid, 2004.	184, 191, 194
<i>Conejero Roos</i>	Conejero Roos, Cristián Multi-party Arbitration and Rule-making: Same Issues, Contrasting Approaches In: Van den Berg, Albert Jan (ed.), 50 Years of the New York Convention: ICCA International Arbitration Conference, ICCA Congress Series/ICCA/Kluwer Law International, Vol. 14, 2009, pp. 411-433.	22, 51



<i>Czerwenka</i>	Czerwenka, Beate Rechtsanwendungsprobleme im internationalen Kaufrecht. Das Kollisionsrecht bei grenzüberschreitenden Kaufverträgen und der Anwendungsbereich der internationalen Kaufrechtsübereinkommen Berlin, Duncker Humblot, 1988.	163
<i>de Westgaver, Kluwer Arbitration Blog, Oct. 6, 2017</i>	de Westgaver, Claire Morel Cybersecurity in International Arbitration – A Necessity and an Opportunity for Arbitral Institutions In: Kluwer Arbitration Blog, October 6, 2017 Available at: http://arbitrationblog.kluwerarbitration.com/2017/10/ 06/cyber-security/?print=pdf	151
<i>Dieners/ Dietzel/ Gasteyer</i>	Dieners, Peter/Dietzel, Andreas/Gasteyer, Thomas Liber Amicorum Dolf Weber Baden-Baden, Nomos Verlagsgesellschaft, 2016.	27
<i>Díez-Picazo</i>	Díez-Picazo y Ponce de León, Luis La Compraventa Internacional de Mercaderías. Comentario de la Convencion de Viena Madrid, Editorial Civitas, S.A., 1998.	198
<i>Drličková</i>	Drličková, Klára Arbitrability and Public Interest in International Commercial Arbitration In: (2017) International and Comparative Law Review, Vol. 17, No. 2, pp. 55-71.	119



<i>Eggen</i>	Eggen, Mirjam Digitale Inhalte unter dem CISG. Eine Rundschau über Herausforderungen und mögliche Lösungen In: (2017) Internationales Handelsrecht. Zeitschrift für das Recht des internationalen Warenkaufs und Warenvertriebs, Vol. 6, pp. 229-272.	179
<i>Eiselen</i>	Eiselen, Sieg Chapter 5: Scope of CISG In: DiMatteo, Larry A./Janssen, André/Magnus, Ulrich/Schulze, Reiner (eds.), International Sales Law. Contract, Principles & Practice, Baden-Baden, Nomos Verlagsgesellschaft, 2016, pp. 91-118.	172
<i>Endler/Daub</i>	Endler, Maximilian/Daub, Jan Internationale Softwareüberlassung und UN-Kaufrecht In: (1993) Computer und Recht, Vol. 9, pp. 601-606.	172
<i>Engels/Ilzhöfer</i>	Engels, Rainer/Ilzhöfer, Volker Patent-, Marken- und Urheberrecht 10 th Edition, München, Verlag Franz Vahlen, 2018.	227
<i>Ensthaler</i>	Ensthaler, Jürgen Gemeinschaftskommentar zum HGB 8 th Edition, Köln, Wolters Kluwer Deutschland GmbH, 2015.	172, 191



<i>Fan, Kluwer Arbitration Blog, July 10, 2020</i>	Fan, Kun The Impact of COVID-19 on the Administration of Justice In: Kluwer Arbitration Blog, July 10, 2020 Available at: http://arbitrationblog.kluwerarbitration.com/2020/07/10/the-impact-of-covid-19-on-the-administration-of-justice/	128
<i>Favre-Bulle</i>	Favre-Bulle, Xaver Swiss Rules on International Arbitration (Swiss Rules): From 2004 to the (Light) 2012 Revision In: (2013) International Business Law Journal, No. 1, pp. 21-40.	51
<i>Ferrari et al., Due Process</i>	Ferrari, Franco/Rosenfeld, Friedrich/Czernich, Dietmar Due Process as a Limit to Discretion in International Commercial Arbitration Alphen aan den Rijn, Kluwer Law International, 2020.	127, 128
<i>Ferrari, Law and Commerce</i>	Ferrari, Franco Specific Topics of the CISG in the Light of Judicial Application and Scholarly Writing In: (1995) Journal of Law and Commerce, Vol. 15, pp. 1-126.	198
<i>Fogt</i>	Fogt, Morten M. The Knowledge Test under the CISG – A Global Threefold Distinction of Negligence, Gross Negligence and de facto Knowledge In: (2015) Journal of Law and Commerce, Vol. 34, No. 1, pp. 23-111.	251, 258



- Gabler, Know-How* Lackes, Richard/Siepermann, Markus 179
 Grundlagen der Wirtschaftsinformatik. Software.
 Ausführliche Definition im Online Lexikon
 Gabler Wirtschaftslexikon, Springer Gabler Verlag, 2018
 Available at:
<https://wirtschaftslexikon.gabler.de/definition/software-45585/version-268877>.
- Gielen/
Wahnschaffe* Gielen, Nico/Wahnschaffe, Christian Johannes 86, 127
 Die virtuelle Verhandlung im Schiedsverfahren
 In: (2020) SchiedsVZ. Zeitschrift für Schiedsverfahren,
 Vol. 18, No. 6, pp. 257-265.
- Girsberger/
Schramm* Girsberger, Daniel/Schramm, Dorothee 127
 Cyber-Arbitration
 In: (2002) European Business Organization Law Review,
 No. 3, pp. 611-628.
- Girsberger/Voser* Girsberger, Daniel/Voser, Nathalie 31
 International Arbitration: Comparative and Swiss
 Perspectives
 3rd Edition, Zürich, Schulthess Juristische Medien AG,
 2016.
- Gómez Carrión* Gómez Carrión, Manuel 27, 51
 Joinder of Third Parties: New Institutional
 Developments
 In: Park, William W. (ed.), Arbitration International,
 Oxford University Press, 2015, pp. 479-505.
- Green/Saidov* Green, Sarah/Saidov, Djakhongir 172
 Software as Goods
 In: (2007) Journal of Business Law, pp. 161-181.



<i>Grieser</i>	Grieser, Simon Gottlieb Die Behandlung von atypischen Kaufverträgen im UN-Kaufrecht Frankfurt am Main, Peter Lang Europäischer Verlag der Wissenschaften, 2004.	163
<i>Gsell et al.</i>	Gsell, Beate/Krüger, Wolfgang/Lorenz, Stephan/Reymann, Christoph beck-online.Grosskommentar CISG Lastly updated August 2020, München, C.H. Beck, 2020.	191, 237, 258
<i>Hau/Poseck</i>	Hau, Wolfgang/Poseck, Roman Beck'scher Online-Kommentar 55 th Edition, München, C.H. Beck, 2020.	163, 237, 264
<i>Herber/ Czerwenka</i>	Herber, Rolf/Czerwenka, Beate Internationales Kaufrecht. Kommentar zu dem Übereinkommen der Vereinten Nationen vom 11. April 1980 über Verträge über den internationalen Warenkauf München, C.H. Beck'sche Verlagsbuchhandlung, 1991.	191
<i>Herberger et al.</i>	Herberger, Maximilian/Martinek, Michael/Rüßmann, Helmut/Weth, Stephan/Würdinger, Markus Juris Praxis Kommentar BGB. Band 6 Internationales Privatrecht und UN-Kaufrecht 9 th Edition, Juris, 2020.	264
<i>Hill</i>	Hill, Richard Online Arbitration: Issues and Solutions In: (1999) Arbitration International, Vol. 15, No. 2, pp. 199-207.	86



<i>Holtzmann/ Neuhaus</i>	Holtzmann, Howard M./Neuhaus, Joseph E. A Guide to the UNCITRAL Model Law on International Commercial Arbitration. Legislative History and Commentary Alphen aan den Rijn, Kluwer Law International, 1995.	105
<i>Honnold</i>	Honnold, John O. Uniform Law for International Sales under the 1980 United Nations Convention 4 th Edition, Alphen aan den Rijn, Kluwer Law International, 2009.	178, 237, 258
<i>Honsell</i>	Honsell, Heinrich Kommentar zum UN-Kaufrecht 2 nd Edition, Berlin/Heidelberg, Springer, 2010.	198
<i>Hörnle</i>	Hörnle, Julia Cross-border Internet Dispute Resolution Cambridge, Cambridge University Press, 2009.	127
<i>Hosking</i>	Hosking, James M. The Third Party Non-Signatory's Ability to Compel International Commercial Arbitration: Doing Justice without Destroying Consent In: (2004) Pepperdine Dispute Resolution Law Journal, Vol. 4, No. 3, pp. 472-584.	31
<i>Huber/Mullis</i>	Huber, Peter/Mullis, Alastair The CISG. A new textbook for students and practitioners 1 st Edition, Mainz/Norwich, Sellier. European Law Publishers, 2007.	191



<i>IEEE Glossary Software</i>	Standards Coordinating Committee of the Computer Society of the IEEE IEEE Standard Glossary of Software Engineering Terminology New York, 1990.	179
<i>Janal</i>	Janal, Ruth The Seller's Responsibility for Third Party Intellectual Property Rights under the Vienna Sales Convention In: Andersen, Camilla B./Schroeter, Ulrich G. (eds.), Sharing International Commercial Law across National Boundaries. Festschrift for Albert H. Kritzer on the Occasion of his Eightieth Birthday, London, Wildy Simmonds & Hill Publishing, 2008, pp. 203-231.	227, 251
<i>Karner/Karziol</i>	Karner, Ernst/Karziol, Helmut Zur Anwendbarkeit des UN-Kaufrechts bei Werk- und Dienstleistungen. Am Beispiel der Maschinen- und Industrieanlagenlieferungsverträge Vienna, Jan Sramek Verlag KG, 2015.	191
<i>Karollus</i>	Karollus, Martin UN-Kaufrecht. Eine systematische Darstellung für Studium und Praxis Vienna, Springer Verlag, 1991.	163, 167
<i>Kaufmann-Kohler/ Schultz</i>	Kaufmann-Kohler, Gabrielle/Schultz, Thomas The Use of Information Technology in Arbitration No. 5, Jusletter, 2005.	127, 132
<i>Kleinschmidt</i>	Kleinschmidt, Jens Die Widerklage gegen einen Dritten im Schiedsverfahren In: (2006) SchiedsVZ. Zeitschrift für Schiedsverfahren, Vol. 4, No. 3, pp. 142-150.	22



<i>Kröll et al.</i>	Kröll, Stefan/Mistelis, Loukas/Perales Viscasillas, Pilar UN Convention on Contracts for the International Sale of Goods (CISG). A Commentary 2 nd Edition, München, C.H. Beck, 2018.	172, 184, 198, 237, 242, 251
<i>Kronke/ Melis/ Kuhn</i>	Kronke, Herbert/Melis, Werner/Kuhn, Hans Handbuch Internationales Wirtschaftsrecht 2 nd Edition, Köln, Verlag Dr. Otto Schmidt, 2017.	191
<i>Krüger/Rauscher</i>	Krüger, Wolfgang/Rauscher, Thomas Münchener Kommentar zur Zivilprozessordnung mit Gerichtsverfassungsgesetz und Nebengesetzen. Band 3 5 th Edition, C.H. Beck, 2017.	105
<i>Kulkarni, Kluwer Arbitration Blog, Aug. 9, 2018</i>	Kulkarni, Ritvik India's Treatment of Interconnected Agreements to Arbitrate In: Kluwer Arbitration Blog, August 9, 2018 Available at: http://arbitrationblog.kluwerarbitration.com/2018/08/ 09/indias-treatment-interconnected-agreements- arbitrate/	31
<i>Langenecker</i>	Langenecker, Josef UN-Einheitskaufrecht und Immaterialgüterrechte. Die Rechtsmängelhaftung bei internationalen Kaufverträgen nach dem UN-Kaufrechtsübereinkommen unter besonderer Berücksichtigung von Immaterialgüterrechten München, utz-Verlag, 1993.	227



<i>Lasprogata</i>	Lasprogata, Gail Virtual Arbitration: Contract Law and Alternative Dispute Resolution Meet in Cyberspace In: (2001) Journal of Legal Studies Education, Vol. 19, No. 1, pp. 107-140.	151
<i>Leboulanger</i>	Leboulanger, Philippe Multi-Contract Arbitration In: (1996) Journal of International Arbitration, Vol. 13, No. 4, pp. 43-99.	64
<i>Lew/Mistelis/Kröll</i>	Lew, Julian D. M./Mistelis, Loukas/Kröll, Stefan Comparative International Commercial Arbitration The Hague, Kluwer Law International, 2003.	151
<i>Lo</i>	Lo, Alex Virtual Hearings and Alternative Arbitral Procedures in the COVID-19 Era: Efficiency, Due Process, and Other Considerations In: (2020) Contemporary Asia Arbitration Journal, Vol. 13, No. 1, pp. 85-97.	128, 141, 146
<i>Loban</i>	Loban, Karyna Extension of the Arbitration Agreement to Third Parties LL.M. Short Thesis, Budapest, Central European University, 2009 Available at: https://www.international-arbitration-attorney.com/wp- content/uploads/arbitrationlawloban_karyna.pdf	27



- Lookofsky* Lookofsky, Joseph 163
The 1980 United Nations Convention on Contracts for
the International Sale of Goods
In: Herbots, Jacques/Blainpain, Roger (eds.),
International Encyclopaedia of Laws – Contracts,
Alphen aan den Rijn, reproduced with permission of
Kluwer Law International, 2000, pp. 1-192.
- Magnus, Problem* Magnus, Ulrich 184
Borderline Problems of the CISG
In: UNIDROIT. International Institute for the
Unification of Private Law (ed.), Eppur si muove: The
Age of Uniform Law. Essays in honour of Michael
Joachim Bonell to celebrate his 70th birthday
Vol. 2, Rome, 2016, pp. 1771-1792.
- Magnus, ZEuP* Magnus, Ulrich 178
1995 Stand und Entwicklung des UN-Kaufrechts
In: (1995) Zeitschrift für Europäisches Privatrecht,
Vol. 3, No. 2, pp. 202-215.
- Magnus, ZEuP* Magnus, Ulrich 172
2017 UN-Kaufrecht – Aktuelles zum CISG
In: (2017) Zeitschrift für Europäisches Privatrecht,
Vol. 25, No. 1, pp. 140-164.
- Maley* Maley, Kristian 178
The Limits to the Conformity of Goods in the United
Nations Convention on Contracts for the International
Sale of Goods (CISG)
In: (2009) International Trade and Business Review,
Vol. XII, pp. 82-126.



<i>Mankowski</i>	Mankowski, Peter Commercial Law. Article-by-Article Commentary Baden-Baden, Nomos Verlagsgesellschaft, 2019.	204
<i>Noussia</i>	Noussia, Kyriaki Confidentiality in International Commercial Arbitration. A Comparative Analysis of the Position under English, US, German and French Law Berlin/Heidelberg, Springer, 2010.	151
<i>Ostendorf/Kluth</i>	Ostendorf, Patrick/Kluth, Peter Internationale Wirtschaftsverträge 2 nd Edition, München, C.H. Beck, 2017.	179
<i>Park</i>	Park, William W. Private Adjudicators and the Public Interest: The Expanding Scope of International Arbitration In: (1986) Brooklyn Journal of International Law, Vol. 12, No. 3, pp. 629-674.	119
<i>Peter</i>	Peter, Wolfgang Die neue Schweizerische Schiedsordnung - Anmerkungen für die Praxis In: (2004) SchiedsVZ. Zeitschrift für Schiedsverfahren, Vol. 2, No. 2, pp. 57-65.	22
<i>Piltz, Handbook</i>	Piltz, Burghard Internationales Wirtschaftsrecht. Münchener Anwaltshandbuch München, C.H. Beck, 2017.	163
<i>Piltz, International</i>	Piltz, Burghard Internationales Kaufrecht 2 nd Edition, München, C.H. Beck, 2008.	184, 227



<i>Platte</i>	Platte, Martin When Should an Arbitrator Join Cases? In: (2002) <i>Arbitration International</i> , Vol. 18, No. 1, pp. 67-81.	64
<i>Pust</i>	Pust, Jonas How to Join Third Parties to Arbitration Proceedings In: (2020) <i>SAA Series on International Arbitration</i> , Vol. 5, pp. 53-88.	51, 76
<i>Rauda/Etier</i>	Rauda, Christian/Etier, Guillaume Warranty for Intellectual Property Rights in the International Sale of Goods In: (2000) <i>Vindobona Journal of International Commercial Law and Arbitration</i> , Vol. 4, pp. 30-61.	227
<i>Redfern/Hunter</i>	Blackaby, Nigel/Partasides, Constantine/Redfern, Alan/Hunter, Martin Redfern and Hunter on International Arbitration 6 th Edition, Oxford, Oxford University Press, 2015.	64, 86
<i>Reinhart</i>	Reinhart, Gert UN-Kaufrecht. Kommentar zum Übereinkommen der Vereinten Nationen vom 11. April 1980 über Verträge über den internationalen Warenkauf Heidelberg, C.F. Müller Juristischer Verlag GmbH, 1991.	167
<i>Reithmann/ Martiny</i>	Reithmann, Christoph/Martiny, Dieter Internationales Vertragsrecht 8 th Edition, Verlag Dr. Otto Schmidt, 2015.	163, 184



<i>Risse/Oehm</i>	Risse, Jörg/Oehm, Max Vertraulichkeit und Nicht-Öffentlichkeit in Schiedsverfahren. Rechtsvergleichende und verfassungsrechtliche Überlegungen In: (2015) Zeitschrift für Vergleichende Rechtswissenschaft, Vol. 114, pp. 407-430.	151
<i>Säcker et al.</i>	Säcker, Franz Jürgen/Rixecker, Roland/Oetker, Hartmut/Limberg, Bettina Münchener Kommentar zum Bürgerlichen Gesetzbuch 8 th Edition, München, C.H. Beck, 2019.	172, 184, 194
<i>Saenger et al.</i>	Saenger, Ingo/Aderhold, Lutz/Lenkaitis, Karlheinz/ Speckmann, Gerhard Handels- und Gesellschaftsrecht. Praxishandbuch 2 nd Edition, Nomos, 2011.	178
<i>Saunders</i>	Saunders, Matthew Chapter 7: COVID-19 and the Embracing of Technology: A 'New Normal' for International Arbitration In: (2020) Stockholm Arbitration Yearbook, Kluwer Law International, pp. 99-114.	114, 151
<i>Scherer, Remote Hearings</i>	Scherer, Maxi Remote Hearings in International Arbitration: An Analytical Framework In: (2020) Journal of International Arbitration, pp. 407-447.	117, 132



<i>Scherer, Revolution</i>	Scherer, Maxi Chapter 4: The Legal Framework of Remote Hearings, In: Scherer, Maxi/Bassiri, Niuscha/Wahab, Mohamed S. Abdel (eds.), International Arbitration and the COVID-19 Revolution, Alphen aan den Rijn, Kluwer Law International, 2020, pp. 65-103.	86, 141
<i>Schlechtriem/ Butler</i>	Schlechtriem, Peter/Butler, Petra UN Law on International Sales. The UN Convention on the International Sale of Goods Berlin/Heidelberg, Springer Verlag, 2009.	163
<i>Schlechtriem/ Schroeter</i>	Schlechtriem, Peter/Schroeter, Ulrich G. Internationales UN-Kaufrecht 5 th Edition, Tübingen, Mohr Siebeck, 2013.	167
<i>Schlechtriem/ Schwenzer</i>	Schlechtriem, Peter/Schwenzer, Ingeborg Commentary on the UN Convention on the International Sale of Goods (CISG) 4 th Edition, Oxford, Oxford University Press, 2016.	167, 178, 184, 204, 227, 264
<i>Schlechtriem/ Schwenzer/ Schroeter</i>	Schlechtriem, Peter/Schwenzer, Ingeborg/ Schroeter, Ulrich G. Kommentar zum UN-Kaufrecht (CISG) 7 th Edition, München/Basel, C.H. Beck/Helbing Lichtenhahn, 2019.	172
<i>Schmidt/Ebke</i>	Schmidt, Karsten/Ebke, Werner F. Münchener Kommentar zum Handelsgesetzbuch 4 th Edition, München, C.H. Beck, 2018.	163, 178, 264



- Schmitt* Schmitt, Hansjörg 178
Intangible Goods als Leistungsgegenstand
internationaler Online-Kaufverträge
Frankfurt am Main, Peter Lang Europäischer Verlag der
Wissenschaften, 2003.
- Schroeter* Schroeter, Ulrich G. 258
BGH, 11.1.2006 – VIII ZR 268/04: Rüge eines
Rechtsmangels im UN-Kaufrecht unter Angabe des
Rechte beanspruchenden Dritten und dessen rechtlicher
Schritte
In: (2006) Entscheidungen zum Wirtschaftsrecht
(EWiR), No. 14, pp. 427-428.
- Schütze* Schütze, Rolf A. 21, 22
Institutionelle Schiedsgerichtsbarkeit
3rd Edition, Köln, Kluwer Law International, 2018.
- Schwenzer/
Fountoulakis/
Dimsey* Schwenzer, Ingeborg/Fountoulakis, Christiana/
Dimsey, Mariel 237
International Sales Law. A Guide to the CISG
3rd Edition, Oxford, Hart Publishing, 2019.
- Schwenzer/Hachem* Schwenzer, Ingeborg/Hachem, Pascal 172
Anhang zu Art. 1: CISG und Datenhandel
In: Schlechtriem, Peter/Schwenzer, Ingeborg/Schroeter,
Ulrich G. (eds.), Kommentar zum UN-Kaufrecht
(CISG)
7th Edition, München/Basel, C.H. Beck/Helbing
Lichtenhahn, 2019, Annex to Article 1 CISG.
- Schwenzer/Mohs* Schwenzer, Ingeborg/Mohs, Florian 31
Arbitration Clauses in Chains of Contracts
In: (2009) ASA Bulletin, Vol. 27, Issue 2, pp. 213-235.



<i>Secretariat</i>	UNCITRAL Secretariat	237
<i>Commentary</i>	Commentary on the Draft Convention on Contracts for the International Sale of Goods prepared by the Secretariat UN DOC. A/CONF.97/5 New York, United Nations, 1979.	
<i>Singer</i>	Singer, David Arbitration Privacy and Confidentiality in the Age of (Coronavirus) Technology In: (2020) ADR Process Design, Vol. 38, No. 7, pp. 107-108.	151
<i>Smahi</i>	Smahi, Nadia Due Process Under the Swiss Rules of International Arbitration In: (2020) ASA Bulletin, Vol. 38, No. 4, pp. 930-952.	117
<i>Smith</i>	Smith, Gordon Comparative Analysis of Joinder and Consolidation Provisions Under Leading Arbitral Rules In: (2018) Journal of International Arbitration, Vol. 3, No. 2, pp. 173-202.	51
<i>Soergel</i>	Stein, Ursula Bürgerliches Gesetzbuch. Schuldrechtliche Nebengesetze 2. CISG 13 th Edition, Stuttgart, Verlag W. Kohlhammer, 2000.	184, 258
<i>Spohnheimer</i>	Spohnheimer, Frank Gestaltungsfreiheit bei antezipiertem Legalanerkennnis des Schiedsspruchs Tübingen, Mohr Siebeck, 2010.	105



<i>Stackpool-Moore</i>	Stackpool-Moore, Ruth Joinder and Consolidation: Examining Best Practice in the Swiss, HKIAC and ICC Rules In: Voser, Nathalie (ed.), 10 Years of Swiss rules of International Arbitration, New York, JurisNet, 2014, pp. 15-34.	70
<i>Staudinger</i>	Magnus, Ulrich J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetzen und Nebengesetzen: Wiener UN-Kaufrecht (CISG) Neubearbeitung 2018, Berlin, Otto Schmidt/De Gruyter Verlag OHG, 2018.	167, 184, 198, 204, 227, 237, 251, 258
<i>Steingruber</i>	Steingruber, Andrea Marco Notion, Nature and Extent of Consent in International Arbitration London, Queen Mary University of London Theses, 2009.	51
<i>Strong</i>	Strong, S. I. Intervention and Joinder as of Right in International Arbitration: An Infringement of Individual Contract Rights or a Proper Equitable Measure In: (1998) Vanderbilt Journal of Transnational Law, Vol. 31, No. 4, pp. 915-996.	70
<i>The New York Times, Dec. 14, 2020</i>	Sanger, David E./Perlroth, Nicole/Schmitt, Eric Scope of Russian Hacking Becomes Clear: Multiple U.S. Agencies Were Hit The New York Times, New York, December 14, 2021 Available at: https://www.nytimes.com/2020/12/14/us/politics/russia-hack-nsa-homeland-security-pentagon.html	151



<i>Tietje</i>	Tietje, Christian Internationales Wirtschaftsrecht 2 nd Edition, Berlin/Boston, Walter de Gruyter, 2015.	191
<i>Voser</i>	Voser, Nathalie Multi-party Disputes and Joinder of Third Parties In: Van den Berg, Albert Jan (ed.), 50 Years of the New York Convention: ICCA International Arbitration Conference, ICCA Congress Series/ICCA/Kluwer Law International, Vol. 14, 2009, pp. 343-410.	64, 70
<i>Voser/Meier</i>	Voser, Nathalie/Meier, Andrea Chapter II: The Arbitrator – Joinder of Parties or the Need to (Sometimes) be Inefficient In: (2008) Austrian Yearbook on International Arbitration, C.H. Beck/Stämpfli Verlag/Manz'sche Verlags- und Universitätsbuchhandlung, pp. 115-123.	64
<i>Voser/Raneda</i>	Voser, Nathalie/Raneda, Julie Recent Developments on the Doctrine of Res Judicata in International Arbitration from a Swiss Perspective: A Call for a Harmonized Solution In: (2015) ASA Bulletin, Vol. 33, No. 4, pp. 742-779.	76
<i>Vujinović</i>	Vujinović, Nataša The CISG's scope of application <i>ratione materiae</i> with regard to software transactions In: (2014) Zeitschrift für Europarechtliche Studien, Vol. 17, No. 4, pp. 529-545.	179



<i>Wahab/Katsh</i>	Wahab, Mohamed S. Abdel/Katsh, Ethan Revolutionizing Technologies and the Use of Technology in International Arbitration. Innovation, Legitimacy, Prospects and Challenges In: Piers, Maud/Aschauer, Christian (eds.), Arbitration in the Digital Age. The Brave New World of Arbitration, Cambridge, Cambridge University Press, 2018, pp. 27-55.	127
<i>Waincymer, Procedure</i>	Waincymer, Jeffrey Maurice Procedure and Evidence in International Arbitration Alphen aan den Rijn, Kluwer Law International, 2012.	70
<i>Waincymer, Online Arbitration</i>	Waincymer, Jeffrey Maurice Online Arbitration In: (2020) Indian Journal of Arbitration Law, Vol. 9, No. 1, pp. 1-23.	117, 128, 132
<i>Weigand</i>	Weigand, Frank-Bernd Practitioner's Handbook on International Commercial Arbitration 2 nd Edition, Oxford, Oxford University Press, 2009.	76
<i>WHO, Coronavirus</i>	World Health Organization Coronavirus January 17, 2019 Available at: https://www.who.int/health-topics/coronavirus#tab=tab_3	230



<i>WHO,</i> <i>Fact Sheet Cholera</i>	World Health Organization Fact Sheet Cholera January 17, 2019 Available at: https://www.who.int/news-room/fact-sheets/detail/cholera	230
<i>Wieczorek/Schütze</i>	Wieczorek, Bernhard/Schütze, Rolf ZPO. Band 11. Grosskommentare der Praxis 5 th Edition, Berlin/Boston, De Gruyter, 2019.	105
<i>Wilske</i>	Wilske, Stephan The Impact of COVID-19 on International Arbitration – Hiccup or Turning Point? In: (2020) Contemporary Asia Arbitration Journal, Vol. 13, No. 1, pp. 7-44.	128, 141, 151
<i>Witz/Salger/ Lorenz</i>	Witz, Wolfgang/Salger, Hanns-Christian/Lorenz, Manuel International Einheitliches Kaufrecht. Praktiker- Kommentar und Vertragsgestaltung zum CISG 2 nd Edition, Frankfurt am Main, dfw Mediengruppe, 2016.	237
<i>Wolff</i>	Wolff, Reinmar New York Convention. Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 Commentary 1 st Edition, München/Oxford/Baden-Baden, C.H. Beck/Hart Publishing/Nomos Verlagsgesellschaft, 2012.	127



<i>Wulf</i>	Wulf, Hans Markus UN-Kaufrecht und eCommerce. Problembereiche bei der Anwendung des Wiener Übereinkommens auf Internet-Verträge Frankfurt am Main, Peter Lang Europäischer Verlag der Wissenschaften, 2003.	179
<i>Zuberbühler/ Müller/ Habegger</i>	Zuberbühler, Tobias/Müller, Christoph/Habegger, Philipp Swiss Rules of International Arbitration 2 nd Edition, Geneva, Schulthess Juristische Medien AG, 2013.	21, 22, 27, 76, 127, 132, 141



INDEX OF CASES AND AWARDS

CITED AS	CASE OR AWARD	CITED IN PARA.
<i>Ameet Shah v. Rishabh Enterprises</i>	Ameet Lalchand Shah v. Rishabh Enterprises Supreme Court India Civil Appeal No. 4690 of 2018 3 May 2018 Available at: https://indiankanoon.org/doc/121891009/	31
<i>ASIC v. Wilson</i>	Australian Securities and Investments Commission v. Wilson Federal Court Australia Case No. WAD 259 of 2018 23 June 2020 Available at: https://jade.io/article/753595	114, 132
<i>Austrian Supreme Court, 18 Onc 3/20s</i>	Supreme Court Austria Case No. 18 Onc 3/20s 23 July 2020 Available at: https://tinyurl.com/y5djhfyZ	112, 113, 117



Bachmeer Capital v. Ong Chih Ching Bachmeer Capital Ltd v. Ong Chih Ching et al. 114, 128
Singapore International Commercial Court
Suit No. 2 of 2017
13 February 2018

Available at:

<https://www.sicc.gov.sg/docs/default-source/modules-document/judgments/bachmeer-capital-limited-v-ong-chih-ching-and-others.pdf>

BGE 142 III 360 X. et al. v. Z. GmbH 128
Federal Supreme Court
Switzerland
Case No. 4A_342/2015
26 April 2016

Available at:

http://relevancy.bger.ch/php/clir/http/index.php?highlight_docid=atf%3A%2F%2F142-III-360%3Ade&lang=de&type=show_document

BHPB Freight v. Cosco Oceania BHPB Freight v. Cosco Oceania Chartering 31
Federal Court
Australia
Case No. VID 903 of 2006
23 April 2008

Available at:

<https://jade.io/article/69537>



Campaign v. Forty Two International Campaign Master (UK) Ltd v. Forty Two International Pty Ltd; Bluefreeway Ltd. 114
Federal Court
Australia
Case No. NSD 651 of 2008
13 November 2009

Available at:

<https://jade.io/article/119929>

Car Trim GmbH v. KeySafety Systems Srl Car Trim GmbH v. KeySafety Systems Srl 191
v. KeySafety Systems Srl Court of Appeal Dresden
Germany
Case No. 3 U 336/07
CISG-Online No. 1720
11 June 2007

Available at:

https://www.cisg-online.org/files/cases/7639/fullTextFile/1720_58006135.pdf

CLOUT No. 1442 Supreme Court 105
Austria
Case No. 7 Ob 111/10i
CLOUT Case No. 1442
30 June 2010

Available at:

<https://tinyurl.com/yxa79npq>



- Corporate Web Solutions v. Vendorlink B.V.* 179, 212, 213
 Rechtsbank Midden-Nederland
 Netherlands
 Case No. HA ZA 14-217
 CISG-Online No. 2591
 25 March 2015
- Available at:
<http://www.cisg-online.ch/content/api/cisg/urteile/2591.pdf>
- Counterfeit Furniture Case* 251
 Fondation Le Corbusier et al. v. GrandOptical France et al.
 Tribunal de Grande Instance de Versailles
 France
 Case No. 01/08276
 CISG-Online No. 953
 23 November 2004
- Available at:
https://cisg-online.org/files/cases/6877/fullTextFile/953_99737199.pdf
- CRW Joint Operation v. PT Perusahaan Gas Negara (Persero) TBK* 128
 Court of Appeal
 Singapore
 Civil Appeal No. 59 of 2010
 13 July 2011
- Available at:
<https://www.supremecourt.gov.sg/docs/default-source/module-document/judgement/2011-sgca-33.pdf>



- EAS Tags Case* Federal Supreme Court 237
Switzerland
Case No. 4A_591/2011
CISG-Online No. 2346
17 April 2012
- Available at:
https://www.cisg-online.org/files/cases/8261/fullTextFile/2346_75767256.pdf
- Footware Case* Tachon diffusion S.A. v. Marshoes S.L. 251
Supreme Court
France
Case No. T 00-14.414
CISG-Online No. 662
19 March 2002
- Available at:
https://www.cisg-online.org/files/cases/6605/fullTextFile/662_58918669.pdf
- Golino v. City of New Haven* Anthony Golino v. City of New Haven et al. 38
Court of Appeals 2nd Circuit
USA
Case No. 91-7600
3 December 1991
- Available at:
https://scholar.google.com/scholar_case?case=3438606382544895712&q=Golino+v.+New+Haven&hl=en&as_sdt=2006



<i>Graphiplus Software Case</i>	District Court Munich I Germany Case No. 8 HKO 24667/93 CISG-Online No. 203 8 February 1995 Available at: https://www.cisg-online.org/files/cases/6177/fullTextFile/203_61437970.pdf	163, 172
<i>Grigson v. Creative Artists</i>	Charles O. Grigson; River City Films, Inc; Ultra Machos, Inc v. Creative Artists Agency, L.L.C.; Matthew David McConaughey. Court of Appeals 5 th Circuit USA Case No. 98-51016 24 April 2000 Available at: https://tinyurl.com/yxrn8elr	31
<i>Hydraulic Pressure Units Case</i>	Court of Appeal Vienna Austria Case No. 3 R 68/04y CISG-Online No. 954 1 June 2004 Available at: http://www.cisg-online.org/files/cases/6878/fullTextFile/954_95983710.pdf	198



- Incitec v. Alkimos Shipping* Incitec Ltd v. Alkimos Shipping Corporation et al. 76
Federal Court
Australia
Case No. 303 of 2003
3 June 2004

Available at:
<https://jade.io/article/108957>
- Jiangsu v. Owning* Jiangsu Shagang Group Co Ltd v. Loki Owning Company 114
Ltd
High Court
England and Wales
1 March 2018

Available at:
<https://www.casemine.com/judgement/uk/5b2897ab2c94e06b9e19832f>
- John Forster Emmott v. Michael Wilson & Partners* John Forster Emmott v. Michael Wilson & Partners Ltd 151
Emmott v. Michael Wilson & Partners Case No. 2007 Folio 1521
12 March 2008

Available at:
<https://tinyurl.com/y5bu9aym>



- Market Research Study Case* Court of Appeal Cologne 178
Germany
Case No. 19 U 282/93
CISG-Online No. 132
26 August 1994
- Available at:
https://www.cisg-online.org/files/cases/6110/translationFile/132_99259773.pdf
- New Zealand Mussels Case* Supreme Court 258
Germany
Case No. VIII ZR 159/94
CISG-Online No. 144
8 March 1995
- Available at:
https://cisg-online.org/files/cases/6122/translationFile/144_81006178.pdf
- Polish Equipment Case* International Arbitration Court of the Belarusian Chamber of Commerce and Industry 194
Case No. 1279/40-13
CISG-Online No. 3938
CLOUT Case No. 1711
4 March 2015
- Available at:
https://cisg-online.org/files/cases/9852/abstractsFile/3938_91425440.pdf



- PT First Media v. Astro* PT First Media TBK v. Astro Nusantara International B.V. 22, 51
Court of Appeal
Singapore
Civil Appeal Nos. 150 and 151 of 2012
31 October 2013

In: Yearbook Commercial Arbitration 2015, Vol. XL,
pp. 677-683
- Ross v. American Express* Robert Ross; Randal Wachsmuth v. American Express 38
Company; American Express Travel Related Services
Company; American Express Centurion Bank
Court of Appeals 2nd Circuit
USA
Case Nos. 06-4598-cv(L), 06-4759-cv(XAP)
21 October 2008

Available at:
<https://tinyurl.com/y23a9npg>
- Software Case III* Supreme Court 172, 179
Austria
Case No. 5 Ob 45/05m
CISG-Online No. 1047
21 June 2005

Available at:
https://www.cisg-online.org/files/cases/6971/translationFile/1047_56439963.pdf



- Soh Beng Tee v. Fairmount* Soh Beng Tee & Co v. Fairmount Development 127
Court of Appeal
Singapore
Case No. CA 100/2006
9 May 2007
- Available at:
<https://www.supremecourt.gov.sg/docs/default-source/module-document/judgement/2007-SGCA-28.pdf>
- Orintix Srl v. Fabelta Ninove NV* Orintix Srl v. Fabelta Ninove NV 191
Court of Appeal Ghent
Belgium
Case No. 1998/AR/2613
CISG-Online No. 966
24 November 2004
- Available at:
<https://cisgw3.law.pace.edu/cases/041124b1.html>
- Stolen Car Case* Federal Supreme Court 264
Germany
Case No. VIII ZR 268/04
CISG-Online No. 1200
11 January 2006
- Available at:
<http://www.cisg-online.ch/content/api/cisg/urteile/1200.pdf>



- Stuke v. ROST Capital Group* Alexander Stuke v. ROST Capital Group Pty Ltd; Crown 2 128
Pty Ltd; Grigory Rozentsvet; Serge Rozentsvet
Federal Court
Australia
Case No. NSD 332 of 2011
8 October 2012
- Available at:
<https://jade.io/article/284601>
- Sukanya v. Jayeshb* Sukanya Holdings Pvt. Ltd v. Jayesh H. Pandya et al. 30, 31
Supreme Court
India
Civil Appeal No. 1147 of 2002
14 April 2003
- Available at:
<https://indiankanoon.org/doc/1591400/>
- Sulamérica v. Enesa Engenharia* Sulamérica CIA Nacional de Seguros v. Enesa Engenharia 86
Court of Appeal
England and Wales
Case No. A3/2012/0249
16 May 2012
- Available at:
<https://www.bailii.org/ew/cases/EWCA/Civ/2012/638.html>



- Sunkist Soft Drinks v. Sunkist Growers* Sunkist Soft Drinks, Inc; Del Monte Corporation, Nabisco Brands, Inc v. Sunkist Growers, Inc Court of Appeals 11th Circuit USA Case No. 91-9153 30 December 1993 31
- Available at:
<https://tinyurl.com/y39cs4q6>
- Swint v. Chambers County* Swint et al. v. Chambers County Commission et al. Supreme Court USA Case No. 93-1636 1 March 1995 38
- Available at:
<https://tinyurl.com/yxayt88w>
- Thomson-CSF* Thomson-CSF, S.A. v. American Arbitration Association Court of Appeals 2nd Circuit USA Case No. 94-9118 24 August 1995 31
- Available at:
<https://casetext.com/case/thomson-csf-sa-v-american-arbitration-assn>



- Treibacher v. Allegheny* Treibacher Industrie AG v. Allegheny Technologies, Inc;
TDY Industries, Inc
Court of Appeals 11th Circuit
USA
Case No. 05-13995
CISG-Online No. 1278
12 September 2006

Available at:
https://www.cisg-online.org/files/cases/7201/fullTextFile/1278_43344263.pdf
- Tribunal Fédéral* Main contractor v. Subcontractor
Federal Supreme Court
Switzerland
14 November 1991

In: Yearbook Commercial Arbitration 1992, Vol. XVII,
pp. 279-286
- Yee Hong v. Andrew* Yee Hong Pte Ltd v. Tan Chye Hee Andrew (Ho Bee
Development Pte Ltd, Third Party)
High Court
Singapore
Case No. Suit 814/2003
31 August 2005

Available at:
<https://www.supremecourt.gov.sg/docs/default-source/module-document/judgement/2005-sghc-163.pdf>



STATEMENT OF FACTS

- 1 CamVir Ltd [*hereinafter* “RESPONDENT NO. 1”] produces HEK-294 cells and a growth medium [*hereinafter* “Base Materials”] as well as GorAdCam viral vectors [*hereinafter* “GorAdCam Vectors”]. It has the production facilities and the know-how to offer the production of vaccines to smaller companies. VectorVir Ltd [*hereinafter* “RESPONDENT NO. 2”] holds the patent for the GorAdCam Vectors. Both RESPONDENT NO. 1 and NO. 2 [*hereinafter* “RESPONDENTS”] are subsidiaries of Roctis AG and have their seat of business in Equatoriana.
- 2 RespiVac plc [*hereinafter* “CLAIMANT”] is a biopharmaceutical company currently developing a Covid-19 vaccine. It is owned by Khorana Lifescience and based in Mediterraneo.
- 3 Ross Pharmaceuticals [*hereinafter* “Ross Pharma”] is one of the market-leaders in the development of vaccines against malaria. It is seated in Danubia.
- 4 On **June 15, 2014**, Ross Pharma and RESPONDENT NO. 2 conclude the Collaboration and License Agreement [*hereinafter* “Ross Agreement”]. Under the Ross Agreement, Ross Pharma receives an exclusive license to research and develop vaccines against malaria and related infectious diseases using the GorAdCam Vectors.
- 5 Since the **summer of 2018**, Ross Pharma asserts that its license also covers infectious respiratory diseases.
- 6 On **September 10, 2018**, RESPONDENT NO. 2 grants RESPONDENT NO. 1 an exclusive license for the use of the GorAdCam Vectors in all fields except for malaria. It allows RESPONDENT NO. 1 to produce, sell and sublicense the GorAdCam Vectors.
- 7 On **January 1, 2019**, CLAIMANT and RESPONDENT NO. 1 [*hereinafter* “Parties”] conclude the Purchase, Collaboration and License Agreement [*hereinafter* “PCLA”]. It grants CLAIMANT a non-exclusive license to develop vaccines against respiratory diseases with the GorAdCam Vectors.
- 8 On **December 19, 2019**, the Biopharma Science journal reports that Ross Pharma holds the view that its exclusive license also covers infectious respiratory diseases.
- 9 On **April 20, 2020**, Khorana Lifescience, one of the leading life science companies in Danubia, acquires CLAIMANT. This enables CLAIMANT to produce vaccines in-house at lower cost.
- 10 On **July 15, 2020**, CLAIMANT initiates the proceedings. It requests the arbitral tribunal [*hereinafter* “Tribunal”] to find that Ross Pharma’s assertion renders the delivered GorAdCam Vectors non-conforming.
- 11 On **August 14, 2020**, RESPONDENTS request the joinder of Ross Pharma in order to determine the scope of Ross Pharma’s license and thereby conclusively settle the pending dispute.
- 12 On **October 2, 2020**, RESPONDENTS express concerns about holding a virtual hearing for the examination of witnesses and experts in the second hearing in May 2021.



INTRODUCTION

13 For some time, CLAIMANT and RESPONDENTS walked hand in hand down the fruitful path of vaccine production. Although RESPONDENTS are doing their very best to keep up the mutually beneficial business relationship, CLAIMANT seems adamant to continue down a different path. It initiated this arbitration on the basis of Ross Pharma's unjustified assertion. At the same time, CLAIMANT is going above and beyond to prevent everything that is conducive to an effective and final settlement of this dispute:

14 For such settlement, a joinder of Ross Pharma is indispensable. Considering that this dispute concerns the license of a third party, it is only reasonable to include this third party in the proceedings. Only by a joinder, the Tribunal will be able to assess the scope of Ross Pharma's license. CLAIMANT's strong objection to the joinder raises doubts as to whether it is seriously interested in the conclusive settlement of this dispute (**Issue 1**).

15 Notably, CLAIMANT is also reluctant to conduct any expert and witness hearings at all. Yet, the dispute at hand is highly complex and requires the assessment of various technical details in the field of biopharmaceuticals. What is more, the examination of witnesses that were involved in the drafting of the agreements is essential. Frankly, all of this is hardly possible seated in front of screens. Moreover, interruptions due to technical difficulties are inherent in videoconferences. In light of this, an effective expert and witness examination can only be conducted in person (**Issue 2**).

16 Regarding the merits of this case, CLAIMANT tries to squeeze the underlying collaboration and license agreement into a completely inappropriate set of rules: the CISG. This seems particularly questionable because the PCLA was drafted for vaccine research and production. It expressly sets forth in its scope that it governs the collaboration of the Parties and regulates the access to the necessary IP. However, CLAIMANT, for incomprehensible reasons, is trying to force this contract into a Convention designed to govern the sale of goods (**Issue 3**).

17 Not least, it is striking that shortly before CLAIMANT's request for arbitration, CLAIMANT was acquired by Khorana Lifescience. With Khorana Lifescience as mother company, CLAIMANT now has the relevant know-how, equipment and the financial means to produce the vaccine itself at lower costs than under the PCLA. It was only after the acquisition that CLAIMANT started to express concerns regarding the license of Ross Pharma. However, CLAIMANT is not affected in its vaccine research in any way. It even started Phase-III of the Clinical Trial recently. Against this background, it becomes evident that this arbitration is only a thinly disguised effort to prepare for the renegotiation of a contract no longer favorable for CLAIMANT (**Issue 4**).

**ISSUE 1: ROSS PHARMA SHOULD BE JOINED TO THE PROCEEDINGS**

18 RESPONDENTS respectfully request the Tribunal to allow the joinder of Ross Pharma.

19 Upon RESPONDENTS' request for joinder, the Tribunal consulted with all persons involved [*Answer*, p. 28 para. 23.a; *File*, pp. 46, 48]. To RESPONDENTS' regret, the consultation revealed that neither CLAIMANT nor Ross Pharma acknowledge the importance of this joinder [*File*, pp. 46, 48]. However, the joinder of Ross Pharma is essential to conclusively determine the scope of Ross Pharma's exclusive license and is thus the most effective way to settle the pending dispute.

20 In Section 14.1 of the PCLA [*hereinafter* "Arbitration Clause"] the Parties chose Vindobona, Danubia as the seat of arbitration [*PCLA*, p. 16 Sec. 14.1]. Thus, the *lex loci arbitri* is the Danubian Arbitration Law [*hereinafter* "DAL"]. It is an adoption of the UNCITRAL Model Law [*PO1*, p. 52 para. III.3]. In line with Art. 19(1) DAL, the Parties agreed on the Swiss Rules to govern their proceedings [*PCLA*, p. 16 Sec. 14.1].

21 Foremost, a joinder under the Swiss Rules requires compatible arbitration agreements [*Zuberbühler/Müller/Habegger*, Art. 4 para. 47; *Arroyo*, Art. 4 para. 43; *Schütze*, Art. 4 para. 5]. Arbitration agreements are compatible when they provide for the same institutional rules, the same number of arbitrators and the same seat of arbitration [*Zuberbühler/Müller/Habegger*, Art. 4 para. 47; *Born*, § 18.02 p. 2583]. In contrast to what CLAIMANT stated [*MfC*, p. 20 para. 18], the two arbitration agreements in the PCLA and the Ross Agreement are identical and thus compatible [*PCLA*, p. 16 Sec. 14.1; *Ross Agreement*, pp. 33-34 Sec. 14.1]. This renders Ross Pharma's joinder the most practical solution, preserving all persons' expectations with regard to the arbitral procedure.

22 The joinder provision in the Swiss Rules, Art. 4(2), is considered to be one of the most liberal approaches to joinder and grants tribunals wide discretion and flexibility [*PT First Media v. Astro*, para. 189; *Conejero Roos*, p. 424; *Schütze*, Art. 4 para. 2; *Castello/Digón*, p. 113; *Kleinschmidt*, p. 148; *Peter*, p. 60]. Under the Swiss Rules, tribunals can only order a joinder if they have jurisdiction over the third person and there is at least implicit consent to a joinder [*Zuberbühler/Müller/Habegger*, Art. 4 para. 50; *cf. Kleinschmidt*, p. 148]. Further, Art. 4(2) Swiss Rules stipulates that tribunals should consider all relevant circumstances of the case when deciding on a joinder.

23 Firstly, the Tribunal *can* order the joinder since both jurisdiction over Ross Pharma and implicit consent to a joinder are given (A). Secondly, the Tribunal *should* order the joinder of Ross Pharma as all relevant circumstances of this case speak in favor of such a joinder (B).

A. THE TRIBUNAL HAS THE POWER TO ORDER A JOINDER OF ROSS PHARMA

24 The Tribunal has the power to have Ross Pharma join the proceedings.

25 To begin with, the Tribunal has jurisdiction over Ross Pharma (I). Further, implicit consent to



a joinder is given as all persons involved chose the Swiss Rules in their arbitration agreements (II).

I. THE TRIBUNAL HAS JURISDICTION OVER ROSS PHARMA

26 The Tribunal should find that it possesses jurisdiction over Ross Pharma.

27 Following the principle of competence-competence embodied in Art. 21(1) Swiss Rules, tribunals have the authority to decide on their own jurisdiction. If a joinder is requested, tribunals must assess whether their jurisdiction extends to the third person to be joined [Zuberbühler/Müller/Habegger, Art. 4 para. 48; Gómez Carrión, p. 485; Dieners/Dietzel/Gasteyer, p. 451]. Tribunals have jurisdiction if the third person is bound by the arbitration agreement underlying the procedure either by signature or by means of extension [Zuberbühler/Müller/Habegger, Art. 4 para. 49; Loban, p. 1].

28 While Ross Pharma did not sign the Arbitration Clause, it can be extended to Ross Pharma (1). Moreover, the fact that CLAIMANT did not conclude a contract with Ross Pharma does not affect the Tribunal's jurisdiction (2).

1. ALTHOUGH ROSS PHARMA IS NOT A SIGNATORY TO THE ARBITRATION CLAUSE, IT IS BOUND BY MEANS OF EXTENSION

29 Ross Pharma can be bound by the Arbitration Clause by means of extension.

30 Referring to the decision in *Sukanya v. Jayesh* by the Indian Supreme Court, CLAIMANT argues that generally, tribunals only have jurisdiction over the signatories of an arbitration agreement [MfC, p. 18 para. 11]. Moreover, CLAIMANT denies the possibility of an extension of the Arbitration Clause to Ross Pharma in the present case [MfC, pp. 18-19 paras. 12-13].

31 However, the case *Sukanya v. Jayesh* was actually overruled by the very same court in its decision *Ameet Shah v. Rishabh Enterprises* in 2018 [*Ameet Shah v. Rishabh Enterprises*; Kulkarni, *Kluwer Arbitration Blog*, Aug. 9, 2018]. As a matter of fact, the Supreme Court held that jurisdiction can exist over non-signatories of an arbitration agreement [*ibid.*]. In line with this ruling, there are various scenarios in which both scholars and legal practice allow an extension of an arbitration agreement to non-signatories [*Thomson-CSF*, p. 776; *Girsberger/Voser*, p. 723 para. 301; *Bermann*, pp. 172-173 para. 192; *Hosking*, p. 482; *Schwenzer/Mohs*, p. 220]. Especially, under a dispute-based theory, an extension is allowed if the non-signatory shares a close relationship with one of the original parties [*BHPB Freight v. Cosco Oceania*, para. 15; *Brekoulakis, Third Party*, p. 136 para. 4.14]. Further, the pending dispute must be inextricably intertwined with a dispute involving the non-signatory [*Sunkist Soft Drinks v. Sunkist Growers*, p. 758; *Brekoulakis, Third Party*, p. 136 para. 4.14; cf. *Grigson v. Creative Artists*, pp. 530-531].

32 Firstly, RESPONDENTS share a close contractual relationship with Ross Pharma (a). Secondly,



the pending dispute is inextricably intertwined with the dispute between RESPONDENTS and Ross Pharma regarding the scope of the license granted under the Ross Agreement (b).

a) RESPONDENTS AND ROSS PHARMA HAVE A CLOSE CONTRACTUAL RELATIONSHIP

33 RESPONDENTS and Ross Pharma share a close contractual relationship.

34 A close relationship can be assumed if there is a contractual or corporate relationship between the non-signatory and one of the original parties [*Brekoulakis, Third Party, p. 136 para. 4.14*]. The closer the relationship, the more reasonable an extension [*Brekoulakis, Consent, p. 631*].

35 RESPONDENT NO. 2, one of the original parties, concluded a contract with Ross Pharma, the non-signatory [*Ross Agreement, pp. 32-34*]. Under the Ross Agreement, the parties collaborate to develop vaccines for malaria using the GorAdCam Vectors [*Ross Agreement, pp. 32-33 Sec. 2*]. Furthermore, the parties met on a weekly basis to exchange know-how and are jointly researching into vaccines [*PO2, p. 55 para. 21*].

36 Consequently, RESPONDENTS and Ross Pharma have a close contractual relationship.

b) THE PENDING DISPUTE IS INEXTRICABLY INTERTWINED WITH THE DISPUTE OF RESPONDENTS AND ROSS PHARMA

37 The dispute submitted to this arbitration is inextricably intertwined with the dispute between RESPONDENTS and Ross Pharma.

38 Two disputes are inextricably intertwined if the dispute involving the non-signatory can be considered crucial for the decision in the pending dispute [*Ross v. American Express, p. 142; Swint v. Chambers County, p. 51; Golino v. City of New Haven, p. 868*].

39 The subject-matter of the pending dispute is whether RESPONDENT NO. 1 breached its contractual obligations by delivering GorAdCam Vectors subject to a third-party IP-right [*PO1, p. 51 para. III.1.d*]. Ross Pharma asserts to have an IP-right for the use of GorAdCam Vectors in the field of infectious respiratory diseases [*Ex. R4, p. 35; Answer, p. 28 para. 23.b*]. In order for the Tribunal to solve the pending dispute between CLAIMANT and RESPONDENTS, it will, primarily, have to determine the actual scope of Ross Pharma's license. The scope of Ross Pharma's license is exactly the subject of the dispute between Ross Pharma and RESPONDENTS [*Ex. R4, p. 35; Ex. R5, p. 36; Ex. C4, p. 18*]. Hence, a decision in the dispute between RESPONDENTS and Ross Pharma is crucial for a ruling in the pending procedure.

40 The disputes are therefore inextricably intertwined.

41 Thus, the Tribunal should bind Ross Pharma to the Arbitration Clause by means of extension.



2. IT REMAINS WITHOUT CONSIDERATION THAT THE PCLA DOES NOT IMPOSE CONTRACTUAL OBLIGATIONS ON ROSS PHARMA

42 Contrary to CLAIMANT's view, the joinder would not extend obligations under the PCLA to Ross Pharma.

43 CLAIMANT argues that due to the principle *privity of contract* no contractual obligations within the PCLA can be imposed on Ross Pharma, as it is not a party to the agreement [*MfC*, pp. 16-18 paras. 5, 9]. CLAIMANT states that only parties to a contract can enforce obligations or sue on the basis of that contract [*MfC*, pp. 16-17 para. 5].

44 CLAIMANT requested the Tribunal to find that RESPONDENT NO. 1 breached the PCLA because Ross Pharma might have an exclusive license to the GorAdCam Vectors in the field of infectious respiratory diseases [*Notice*, p. 8 paras. 27, 30.1]. This necessarily led to the involvement of Ross Pharma in this arbitration. However, the purpose of the joinder was not to sue Ross Pharma on the basis of the PCLA. Rather, the purpose of the joinder is that Ross Pharma participates in the proceedings to facilitate the assessment of the scope of its license. This scope is only assessed on the basis of the Ross Agreement and not the PCLA. Hence, no obligations for Ross Pharma will be inferred from the PCLA.

45 Thus, the joinder would not impose obligations from the PCLA on Ross Pharma.

46 In light of all of the above, the Tribunal has jurisdiction over Ross Pharma.

II. ALL PERSONS CONSENTED TO ROSS PHARMA'S JOINDER BY THEIR CHOICE OF LAW

47 As all persons involved chose to arbitrate under the Swiss Rules, consent to a joinder is given.

48 By choosing the Swiss Rules, persons consent to a joinder implicitly (1). In this case, Ross Pharma and CLAIMANT consented to the joinder by choosing the Swiss Rules (2).

1. THE CHOICE OF THE SWISS RULES CONSTITUTES THE CONSENT TO A JOINDER

49 Already the choice of the Swiss Rules forms consent to a joinder under Art. 4(2) Swiss Rules.

50 Analyzing other institutional joinder provisions, CLAIMANT argues that under Art. 4(2) Swiss Rules, explicit consent is also required [*MfC*, pp. 19-22 paras. 16, 24-27].

51 However, these institutional rules prove that explicit consent is not a requirement under the Swiss Rules: When the Swiss Rules were amended in 2012, the other institutional rules CLAIMANT analyzes already existed. For instance, Art. 24(b) SIAC Rules 2010 requires "*the written consent of such third party*" while Art. 22(h) LCIA Rules 1998 determines that the "*third person [...] consented thereto in writing*". While CLAIMANT correctly recognizes that these rules require explicit consent [*MfC*, pp. 21-22 paras. 24-27], it draws the wrong conclusion with respect to the Swiss Rules. If the drafters of the Swiss Rules had intended to permit joinders only with explicit consent, Art. 4(2) Swiss Rules



would say so specifically [*Brekoulakis, Third Party*, p. 118 para. 3.96]. However, Art. 4(2) Swiss Rules does not mention consent at all. Hence, the Swiss Rules do not require explicit consent [*cf. Favre-Bulle*, p. 26]. By choosing the Swiss Rules in the arbitration agreement, the parties to such agreements thus implicitly consent to a joinder [*Castello/Digón*, p. 113; *Favre-Bulle*, p. 26; *Smith*, p. 176; *Gómez Carrión*, pp. 502-503; *Steingruber*, p. 173 para. 7.1.2.5.; *cf. PT First Media v. Astro*, para. 213]. A subsequent objection to a specific joinder, i.e. after the joinder request, remains out of consideration with regard to the question of consent [*PT First Media v. Astro*, para. 190; *Conejero Roos*, p. 424; *Steingruber*, p. 173 para. 7.1.2.5; *Favre-Bulle*, p. 26; *Pust*, p. 75 para. 59; *Smith*, p. 179].

52 To conclude, as evidenced by international comparison, consent to a joinder under the Swiss Rules is already given by choosing the Swiss Rules.

2. BY CHOOSING THE SWISS RULES, ROSS PHARMA AND CLAIMANT CONSENTED TO THE JOINDER OF ROSS PHARMA

53 Both Ross Pharma and CLAIMANT implicitly consented to the joinder.

54 Pursuant to CLAIMANT, a joinder is inadmissible since CLAIMANT and Ross Pharma did not agree to the joinder [*MfC*, p. 20 paras. 17-18]. Notably, CLAIMANT itself recognized that with the choice of the Swiss Rules the Parties agreed to all provisions therein [*MfC*, pp. 27-28 para. 38].

55 CLAIMANT concluded the Arbitration Clause with RESPONDENT NO. 1 in the PCLA choosing the “*Swiss Rules of International Arbitration*” [*PCLA*, p. 16 Sec. 14.1]. Ross Pharma likewise chose to arbitrate under the Swiss Rules in the arbitration agreement included in the Ross Agreement [*Ross Agreement*, pp. 33-34 Sec. 14.1]. Accordingly, both, CLAIMANT and Ross Pharma, also agreed to the joinder provision of the Swiss Rules, Art. 4(2). In this regard, the fact that neither CLAIMANT nor Ross Pharma agree to the specific joinder of Ross Pharma [*File*, pp. 46, 48] is irrelevant.

56 Therefore, by choosing the Swiss Rules in their respective arbitration agreements, both Ross Pharma and CLAIMANT implicitly consented to the joinder.

57 Hence, RESPONDENTS, the requesting party, as well as Ross Pharma and CLAIMANT consented.

58 In conclusion, the Tribunal has the power to order the joinder of Ross Pharma.

B. CONSIDERING ALL RELEVANT CIRCUMSTANCES, THE TRIBUNAL SHOULD EXERCISE ITS DISCRETION IN FAVOR OF ROSS PHARMA’S JOINDER

59 In light of the circumstances of this case, the Tribunal should order Ross Pharma’s joinder.

60 Pursuant to Art. 4(2) Swiss Rules, tribunals have to take into account all relevant circumstances when deciding upon a joinder request.

61 Regarding the circumstances of this case, CLAIMANT focuses its argument on the alleged lack of a close link between Ross Pharma and the proceeding [*MfC*, pp. 20-21 paras. 19, 21-22]. However,



the fact that the disputes are inextricably intertwined shows that a close link exists [*supra paras. 37-40*].

62 What is even more important is that the joinder of Ross Pharma is necessary for the efficient resolution of the pending dispute (I). Further, the joinder does not contravene the confidentiality of the proceedings (II). Lastly, in case Ross Pharma is not joined to this arbitration, separate arbitration proceedings could lead to conflicting results (III).

I. THE JOINDER SIGNIFICANTLY ENHANCES THE OVERALL EFFICIENCY OF THE PROCEEDINGS

63 The joinder of Ross Pharma promotes the efficient conduct of the proceedings.

64 Art. 15(7) Swiss Rules stipulates the duty of the parties to contribute to the efficient conduct of the proceedings. A joinder improves the efficiency of the procedure if common issues of fact or law exist [*Platte, p. 78; Leboulanger, p. 62; Voser, p. 350*]. Considering that arbitration and especially expert witnesses involve high costs [*Redfern/Hunter, p. 36 para. 1.124*], a joinder reduces the overall costs by avoiding the dispenses of separate proceedings, including the costs of expert witnesses [*Leboulanger, p. 63; Platte, p. 78; Voser/Meier, p. 116*].

65 The decision of the dispute between RESPONDENTS and Ross Pharma is crucial for the settlement of the pending dispute [*supra para. 39*]. Therefore, the joinder would not introduce new issues of fact or law. Rather, the scope of Ross Pharma's license is decisive for both disputes. Moreover, if Ross Pharma is joined to the proceedings, the scope of its license can be assessed more effectively. This is because both parties to the Ross Agreement could then contribute to the proceedings. In particular, the witnesses of Ross Pharma would enable the Tribunal to obtain the information necessary to interpret the Ross Agreement comprehensively.

66 The joinder would also avoid unnecessary costs of additional proceedings. If the two disputes are settled conclusively by means of the joinder, such costs can be prevented. Especially, it will allow for a singular examination of witnesses and expert witnesses [*cf. File, p. 49*].

67 Thus, Ross Pharma's joinder can guarantee an efficient resolution of the pending proceedings.

II. CONFIDENTIALITY IS MAINTAINED IN CASE OF THE JOINDER

68 If Ross Pharma is joined to the proceedings, confidentiality is safeguarded.

69 CLAIMANT could have argued that the joinder impairs the confidentiality of the proceedings.

70 However, if the third person to be joined already possesses knowledge of the content of the pending proceeding, a joinder does not impair confidentiality [*Strong, pp. 933-934; Waincymer, Procedure, p. 540; cf. Voser, p. 352*]. Furthermore, confidentiality agreements with the third person, or similar legal instruments, may be adopted to avoid the disclosure of confidential information



[*Stackpool-Moore*, p. 19; *Strong*, p. 934; *Waincymer, Procedure*, p. 540].

71 In a proceeding joined by Ross Pharma, the Tribunal will primarily assess the scope of Ross Pharma's license. For this purpose, it will interpret the term "*malaria and related infectious diseases*" included in the Ross Agreement [*Ross Agreement*, p. 33 Sec. 5.2]. In particular, it will determine whether respiratory diseases cover such related infectious diseases. Most likely, experts will explain the scientific differences between malaria and infectious respiratory diseases. Further, the Tribunal will consider the Ross Agreement's negotiation history, contents of which Ross Pharma already has knowledge of. What does not need to be scrutinized by the Tribunal, however, is information or know-how regarding the development and research of vaccines. In any case, the confidentiality clauses in both contracts would bar the parties from disclosing any confidential information "*in relation to the Compound or the Licensed Technology*" [PO2, pp. 56-57 paras. 25, 30; PCLA, p. 15 Sec. 10].

72 In case of the joinder, Ross Pharma would potentially receive copies of the procedural documents between CLAIMANT and RESPONDENTS. Ross Pharma can already access most of these documents, such as its own email correspondence or publicly available newspaper articles [*Ex. C4*, p. 18; *Ex. R4*, p. 35; *Ex. R5*, p. 36]. The only procedural document that might seem sensitive for CLAIMANT at first sight is its internal calculation regarding the production option in the PCLA [*Appendix I*, p. 59; PCLA, p. 17 Sec. 16.2]. These internal calculations, however, only concern the question whether an in-house production or a production by RESPONDENT NO. 1 is economically more viable for CLAIMANT [*cf. Appendix I*, p. 59]. Yet, the Ross Agreement does not contain this production option. Hence, the decision whether to produce the vaccine in-house or externally does not arise for Ross Pharma. When these internal calculations were made, CLAIMANT – at that time a start-up [*Notice*, p. 4 para. 1] – operated at a completely different economic scale than Ross Pharma operates now. Being one of the market leaders for malaria vaccines [*Ex. C1*, p. 9], Ross Pharma cannot make any use of these calculations.

73 Moreover, in case of the joinder, the Tribunal could, as a precaution, oblige Ross Pharma to maintain the confidentiality of the proceedings as well.

74 Therefore, CLAIMANT does not have to be concerned about confidentiality issues if Ross Pharma is joined to the proceedings.

III. A DISMISSAL OF THE JOINDER REQUEST ENTAILS THE SEVERE RISK OF CONFLICTING DECISIONS

75 Dismissing the joinder will create the risk of conflicting decisions.

76 Another circumstance for tribunals to consider is the risk of conflicting decisions if closely linked disputes are not arbitrated in a single proceeding [*Yee Hong v. Andrew*, para. 20; *Arroyo*, Art. 4 para. 64; *Zuberbühler/Müller/Habegger*, Art. 4 para. 18; *Weigand*, p. 102 para. 1258]. Conflicting



decisions can arise because an award only binds the parties to the arbitration but not third persons [Pust, p. 61 para. 15; cf. Voser/Raneda, pp. 748-749]. This should be avoided as conflicting decisions cause great legal uncertainty and impede procedural economy [Incitec v. Alkimos Shipping, para. 62].

77 In the present arbitration, the Tribunal could find that Ross Pharma's license does not cover the field of infectious respiratory diseases. If the joinder is dismissed, Ross Pharma would not be bound by any such award rendered in the present arbitration. Consequently, the dispute between RESPONDENTS and Ross Pharma concerning the scope of the license could be addressed in separate proceedings [cf. Ex. R5, p. 36]. Thus, there is a credible risk that, in these separate proceedings, an opposite ruling regarding Ross Pharma's license could be made. This risk denies the parties legal certainty.

78 Hence, if the Tribunal decides against the joinder, there is a severe risk of conflicting results.

79 Conclusively, considering all relevant circumstances, the Tribunal should order the joinder.

CONCLUSION TO ISSUE 1

80 There are always two sides to the coin: if one is willing to sue, one must also be willing to settle the dispute once and for all. CLAIMANT only looks at one side of the coin, hastily trying to pick up a favorable award. It fails to see, however, the other side of the coin, namely that initiating multi-party disputes necessarily leads to the involvement of multiple parties. The only instrument for effectively solving such disputes is the joinder. This is why RESPONDENTS invited CLAIMANT to embrace the flip side of its own claim and settle this dispute altogether, once and for all. Unfortunately, with its strong objection to the joinder, CLAIMANT refuses to see both sides of the arbitral process. Therefore, RESPONDENTS respectfully request the Tribunal to order the joinder of Ross Pharma to the arbitral proceedings.

ISSUE 2: THE SECOND HEARING SHOULD BE CONDUCTED IN PERSON

81 RESPONDENTS respectfully request the Tribunal to order an in-person hearing for the examination of witnesses and experts from May 3 to May 7, 2021.

82 The Tribunal asked the parties if the hearing should be conducted remotely in case the circumstances of the pandemic render a hearing in person inappropriate or impossible [File, pp. 46-47]. Contrary to CLAIMANT [MfC, pp. 27-28 paras. 37-40], RESPONDENTS are convinced that waiting until an in-person hearing is admissible again is a necessary delay given the severe risks a remote hearing would entail [cf. PO2, pp. 57-58 paras. 35, 38]. In particular, holding a virtual hearing will open the door for third-party intrusions and the leak of confidential data [PO2, p. 57 para. 35]. Hence, RESPONDENTS ask to conduct an in-person hearing [File, p. 49].



83 In fact, the Parties agreed on an in-person hearing in their Arbitration Clause (A). In any case, considering all legal and factual arguments, the Tribunal should order an in-person hearing (B).

A. THE ARBITRATION CLAUSE PRESCRIBES IN-PERSON HEARINGS

84 The Arbitration Clause sets out that hearings have to be conducted in person.

85 CLAIMANT argues that the Arbitration Clause does not stipulate that hearings must be conducted in person [MfC, p. 23 para. 25, pp. 25-26 paras. 30-32]. Moreover, it states that based on the circumstances of the current pandemic, a reasonable person would understand the Arbitration Clause to also allow for remote hearings [MfC, pp. 26-27 para. 34].

86 When parties determine the conduct of the proceedings in their arbitration agreement, this overrides the tribunal's discretion [Scherer, *Revolution*, p. 77; Hill, p. 203; cf. *Gielen/Wabnschaffe*, p. 260]. Based on the fact that parties incorporated an arbitration agreement in their contract, it is generally assumed that they intended the arbitration agreement to be governed by the same law as the entire contract [*Sulamérica v. Enesa Engenbaria*, para. 11]. Thus, when interpreting the arbitration agreement, tribunals may apply the substantive law governing the contract [*Redfern/Hunter*, p. 160 para. 3.19].

87 As the PCLA is not a sales contract [*infra paras. 160, 188, 218*], the substantive law governing the PCLA is the Danubian Contract Law, a verbatim adoption of the PICC [*hereinafter* "DCL"; PCLA, p. 16 Sec. 15.2; PO1, p. 52 para. III.3]. Hence, the Arbitration Clause should be interpreted in accordance with the DCL, as CLAIMANT has also recognized [MfC, pp. 26-27 paras. 33-34]. In line with Artt. 4.1(2), 4.3 DCL, the interpretation should be based on how a reasonable person would understand the contract when considering all circumstances such as negotiations.

88 In the PCLA, the Parties adopted the Model Clause of the SCAI and added that "*Hearings shall be held, at the Arbitral Tribunal's discretion, either in Vindobona or in the city where the Respondent has its place of business.*" [PCLA, p. 16 Sec. 14.1; File, p. 49]. Considering this clear wording, the Parties evidently limited the places of a hearing to one of these two locations. Yet, the purpose of a virtual hearing is that all participants attend the hearing, gathering from different geographical places. Thus, if the Parties had intended to conduct the hearing virtually, they would not have specified the locations so precisely. Moreover, they would have named a virtual platform via which the hearing should be conducted, rather than naming a city. From this wording, a reasonable person would conclude that the Parties intended to only conduct in-person hearings.

89 The Parties' intention to conduct hearings in person is further evidenced by the circumstances of the case. The Parties never discussed the possibility of remote hearings [PO2, p. 57 para. 32]. As a matter of fact, at the time of the conclusion of the Arbitration Clause, the Parties neither knew of nor could have foreseen the pandemic. CLAIMANT, however, attempts to construe the possibility of a remote hearing into the PCLA by referring to the circumstances of the pandemic. This



modifies the agreement to hold hearings in person as written in the contract. Yet, the entire agreement clause in the PCLA only allows for modifications of the wording “*by a written instrument duly executed by authorized representatives of both Parties*” [PCLA, p. 16 Sec. 15.3]. Since the Parties have not done so, CLAIMANT’s interpretation violates this clause.

90 Thus, the agreement in the Arbitration Clause remains standing and prescribes for hearings to be held in person.

B. IN ANY CASE, CONSIDERING ALL LEGAL AND FACTUAL ARGUMENTS, AN IN-PERSON HEARING IS INDISPENSABLE

91 In light of all legal and factual arguments, the Tribunal should favor an in-person hearing.

92 Firstly, the procedural law requires the implementation of an in-person hearing (I). Secondly, jurisprudence and national law favor in-person hearings (II). Thirdly, the circumstances of this case demand for the hearing to be conducted in person (III).

I. THE PROCEDURAL LAW REQUIRES THE CONDUCT OF AN IN-PERSON HEARING

93 The procedural law provides for hearings to take place in person.

94 To start with, Art. 25(4) Swiss Rules provides in-person hearings as the general rule (1). Moreover, Art. 16(2) Swiss Rules does not apply to the pending arbitration (2). Lastly, Art. 24(1) DAL demands for in-person hearings (3).

1. ART. 25(4) SWISS RULES STIPULATES THE GENERAL RULE OF IN-PERSON HEARINGS

95 As evidenced by Art. 25(4), the Swiss Rules assume a hearing to be conducted in person.

96 CLAIMANT argues that Art. 25(4) Swiss Rules explicitly allows for a virtual conduct of the entire hearing as an alternative to in-person hearings [MfC, p. 24 para. 31].

97 However, the wording of the provision stipulates that only the physical presence of witnesses “*at the hearing*” is not required. If all participants of the hearing were allowed to take part virtually, it would be unnecessary to include an exceptional provision for witnesses.

98 This exception proves that Art. 25(4) Swiss Rules is based on the premise that the hearing has to be conducted in person.

2. ART. 16(2) SWISS RULES DOES NOT APPLY IN THE PRESENT CASE

99 In this arbitration, Art. 16(2) Swiss Rules is not applicable.

100 CLAIMANT argues that Art. 16(2) Swiss Rules gives tribunals discretion over the place of hearings if parties do not agree on a specific place themselves [MfC, pp. 24-25 para. 32]. CLAIMANT understands this provision to grant tribunals the discretion to order remote hearings [*ibid.*].

101 It is true that Art. 16(2) Swiss Rules stipulates that tribunals can decide on any convenient place



to hold hearings if the parties did not provide specific places to arbitrate [*Arroyo, Art. 16 paras. 16-17*]. In any event, the tribunal's discretion to "conduct the arbitration in such a manner as it considers appropriate" is explicitly set forth in Art. 15(1) and not in Art. 16(2) Swiss Rules.

102 In the Arbitration Clause, the Parties agreed on holding the hearing "either in Vindobona or in the city where the Respondent has its place of business" [*PCLA, p. 16 Sec. 14.1*]. Thereby, they limited the Tribunal's discretion to decide on this procedural issue as per Art. 16(2) Swiss Rules.

103 Consequently, Art. 16(2) Swiss Rules is not applicable to this case.

3. ART. 24(1) DAL PROVIDES FOR IN-PERSON HEARINGS

104 Art. 24(1) DAL shows that the *lex loci arbitri* assumes hearings to be in-person hearings.

105 Under Art. 24(1) DAL, in absence of an agreement of the parties to hold a documents-only proceeding, tribunals have to implement an oral hearing if one party requests such a hearing [*CLOUT No. 1442, p. 9; Bantekas et al., Art. 24 p. 660; Holtzmann/Neubaus, Art. 24 p. 670*]. Thus, Art. 24(1) DAL favors oral hearings over documents-only proceedings. An "oral hearing" within the meaning of Art. 24(1) DAL is only an in-person hearing [*Krüger/Rauscher, § 1047 para. 9; Wiczorek/Schütze, § 1047 para. 8; Spohnheimer, p. 309*].

106 Art. 24(1) DAL thus evidences that the *lex loci arbitri* is based on the assumption of in-person hearings.

107 Hence, the fact that both the Swiss Rules and the *lex loci arbitri* assume that hearings are in-person hearings as a general rule argues for an in-person hearing.

II. NATIONAL JURISPRUDENCE AND LAW SUPPORT THE IN-PERSON HEARING

108 Following the example of national jurisprudence and legislation, the Tribunal should order an in-person hearing.

109 The ruling of the Austrian Supreme Court cited by CLAIMANT should not be considered (1). Moreover, the Danubian procedural law clearly favors holding an in-person hearing (2).

1. THE RULING OF THE AUSTRIAN SUPREME COURT CANNOT SERVE AS GUIDANCE FOR THE TRIBUNAL

110 The Tribunal should not follow the ruling of the Austrian Supreme Court cited by CLAIMANT.

111 CLAIMANT argues that even when one of the parties opposes a remote hearing, the tribunal can nonetheless order it [*MfC, p. 25 para. 34*]. Moreover, it states that the use of videoconferencing technology in judicial proceedings is widespread and that this practice must radiate into arbitration proceedings [*ibid.*]. It bases its argument on a recent decision by the Austrian Supreme Court [*ibid.*].

112 The case concerned an arbitrator challenge in a VIAC arbitration due to the tribunal's decision to order a virtual hearing for the examination of witnesses [*Austrian Supreme Court, 18 Onc 3/20s*,



p. 13 para. 11.1.2]. The VIAC arbitration, however, is not comparable to the case at hand:

113 The parties in that case did not agree on in-person hearings in their arbitration agreement [*Austrian Supreme Court, 18 Onc 3/20s, p. 13 para. 11.1.1*]. In contrast, the parties of the underlying proceeding agreed on in-person hearings in their Arbitration Clause [*supra paras. 84-90*].

114 Moreover, no technical difficulties occurred during the VIAC arbitration. However, this is not the rule. For example, the England and Wales High Court set aside an award as testimony via video technology was considered “unreliable” [*Jiangsu v. Owing, paras. 15, 18.iii., 91-92; Saunders, p. 106*]. The High Court found that in fact, an in-person testimony would have led to a different finding [*Jiangsu v. Owing, para. 92*]. What is more, various courts have recognized that remote witness examinations are ineffective [*Campaign v. Forty Two International, para. 78; Bachmeer Capital v. Ong Chih Ching, para. 18; ASIC v. Wilson, para. 37*]. These examples should also radiate into arbitration.

115 Consequently, the ruling of the Austrian Supreme Court should not guide the Tribunal when deciding on the conduct of the examination of witnesses and experts in the second hearing.

2. FOLLOWING DANUBIAN LAW THE HEARING HAS TO BE HELD IN PERSON

116 The Tribunal should take into account that under the Danubian Code of Procedure, a virtual hearing would not be permissible.

117 National laws concerning state court proceedings are not binding for tribunals but can serve as guidance in arbitration [*Austrian Supreme Court, 18 Onc 3/20s, p. 15 para. 11.2.2; Scherer, Remote Hearings, p. 422; Waincymer, Online Arbitration, p. 9; Smabi, pp. 934-935*].

118 Danubia is the seat of arbitration [*PCLA, p. 16 Sec. 14.1*]. Thus, its procedural law should serve as guidance for the Tribunal. The Danubian procedural code provides that court hearings shall generally be conducted in person [*PO2, pp. 57-58 para. 37*]. The Danubian legislator intentionally refused to allow hearings via videoconference when it amended the code in 2010 [*ibid.*]. Only when reacting to the pandemic, the legislator allowed hearings to exceptionally be conducted via videoconference, “if required by public interest” or when all parties agree to it [*ibid.*].

119 The requirement of public interest traditionally applies to a category of subject-matters that are reserved for state court proceedings [*Drličková, pp. 59-60; cf. Park, p. 630*]. Therefore, this requirement cannot serve as guidance for arbitral proceedings. Even if the Tribunal wanted to use it as guidance, the resolution of the subject-matter in the case at hand would not be required by public interest. Public interest generally describes those interests that serve a large group of individuals beyond the parties [*Drličková, p. 58*].

120 The case at hand only deals with an alleged breach of contract by RESPONDENT NO. 1 [*PO1, p. 51 para. III.1.d.*]. It merely concerns an IP-dispute between the Parties to the PCLA and Ross Pharma. Thus, the award does not impact and therefore does not serve a large group of individuals



beyond the parties to the arbitration.

121 The other exception under the Danubian Code of Procedure, namely that both parties agree to a remote hearing, is also not fulfilled in this case: Neither have the Parties agreed to a remote hearing in their Arbitration Clause [*supra paras. 84-90*]. Nor do the parties currently agree on this issue as RESPONDENTS strongly object [*File, p. 49*].

122 Hence, taking the Danubian law into account, the in-person hearing should be conducted.

123 To conclude, national jurisprudence and legislation support an in-person hearing.

III. ALL CIRCUMSTANCES OF THIS CASE DEMAND A HEARING IN PERSON

124 In light of the specific circumstances of this case, an in-person hearing is necessary.

125 To start with, a virtual hearing threatens RESPONDENTS' right to be heard (1). Additionally, a virtual hearing endangers the equal treatment of the parties (2). Also, in an in-person hearing, the Tribunal would comply with its duty to avoid unnecessary costs and delays (3). Lastly, only an in-person hearing can ensure confidentiality (4).

1. A VIRTUAL HEARING ENDANGERS RESPONDENTS' RIGHT TO BE HEARD

126 A remote hearing will threaten RESPONDENTS' right to be heard.

127 Art. 15(1) Swiss Rules establishes the parties' right to be heard as a barrier to the tribunal's discretion when deciding on the conduct of the proceedings [*Zuberbühler/Müller/Habegger, Art. 15 para. 4; Arroyo, Art. 15 para. 15*]. The right to be heard guarantees each party the opportunity to properly present its case [*Soh Beng Tee v. Fairmount, para. 42; Wahab/Katsb, p. 44; Hörnle, p. 131*]. It additionally comprises a party's right to reply to the arguments and evidence submitted by the other party [*Tribunal Fédéral, p. 282; Girsberger/Schramm, p. 617*]. If one party loses its internet connection in a virtual hearing, it is deprived of its opportunity to reply to the arguments of the other party [*Gielen/Wahnschaffe, p. 259; Kaufmann-Kobler/Schultz, p. 85 para. 354*]. Thus, in case the tribunal does not interrupt the hearing in spite of such incident, the party's right to be heard is violated [*Kaufmann-Kobler/Schultz, p. 85 para. 354*]. In this case, the award can be rendered unenforceable on the grounds of Art. V(1)(b) NYC [*Ferrari et al., Due Process, § 1.02 p. 3; Wolff, Art. V para. 539*].

128 In addition, witness and expert examinations can form part of the presentation of one's case [*CRW Joint Operation v. PT, para. 94; BGE 142 III 360, para. 4.1.1; Ferrari et al., Due Process, § 1.03 pp. 19-20*]. Conducting the witness examination virtually, however, will impede its effectiveness [*Bachmeer Capital v. Ong Chih Ching, para. 18; Wilske, p. 14; Waincymer, Online Arbitration, p. 20; Fan, Kluwer Arbitration Blog, July 10, 2020*]. For example, it is difficult to determine whether the delay in the response of the witness is due to the uncertainty of the witness or the result of an unstable connection [*Stuke v. ROST Capital Group, para. 30; Lo, p. 90*].



129 CLAIMANT filed for arbitration asserting that RESPONDENT NO. 1 breached its contractual obligations existing under Art. 42 CISG [*Notice*, p. 8 para. 30.1]. In order to refute this assertion, RESPONDENTS need to present witnesses and expert witnesses [*File*, p. 49]. In particular, the expert witnesses will examine whether the field of the Ross Agreement “*malaria and related infectious diseases*” also extends to Covid-19 [*Ross Agreement*, pp. 32-33 Sec. 2]. Thus, the experts’ complex scientific explanations are crucial for the presentation of RESPONDENTS’ case [*cf. File*, p. 49]. Any risks that impede the effectiveness of the witness examination should be avoided.

130 Consequently, a virtual hearing will put RESPONDENTS’ right to be heard at unnecessary risk.

2. THE RIGHT TO EQUAL TREATMENT IS THREATENED BY A VIRTUAL HEARING

131 A virtual hearing significantly endangers the right to equal treatment.

132 According to Art. 15(1) Swiss Rules, the tribunals’ discretion is also limited by the duty to treat the parties equally [*Arroyo*, Art. 15 para. 15; *Zuberbühler/Müller/Habegger*, Art. 15 para. 4]. In remote hearings, various reasons can cause a case of unequal treatment: Firstly, the risk that one of the parties secretly coaches its witness without this being noticed is severe [*Scherer*, *Remote Hearings*, p. 444; *Bateson*, p. 167; *Brown/McNeill/Sharpe*, p. 4]. Secondly, one of the parties may have better technical equipment than the other [*Cachard*, p. 36; *Kaufmann/Kobler-Schultz*, p. 85 para. 354; *Backsmann/Fröhlingsdorf*, p. 425]. Thirdly, different time zones can disadvantage one of the parties if it has to participate in the hearing outside appropriate working hours [*ASIC v. Wilson*, para. 31; *Waincymer*, *Online Arbitration*, p. 17; *Bateson*, pp. 166-167].

133 CLAIMANT has better technical equipment than RESPONDENTS [*PO2*, p. 58 para. 38]. This does not only result in superior participation of CLAIMANT’s counsels. It also enables the Tribunal to observe potential witnesses presented by CLAIMANT in a better light. Due to the importance of witness and expert examination in this case [*supra* para. 129], even the smallest advantage while presenting the respective case could lead to a different outcome.

134 Further, all parties will participate from different time zones [*File*, p. 47]. The time difference amounts to eleven hours [*cf. PO2*, p. 57 para. 36]. This inevitably forces one party to participate during inappropriate working hours. When participants attend the hearing at night, their capability to concentrate will decrease significantly. Hence, one party will be substantially disadvantaged.

135 Thus, the remote conduct of the hearing could impede the equal treatment of the parties.

3. HOLDING THE HEARING IN PERSON WILL NOT VIOLATE THE TRIBUNAL’S DUTY TO AVOID UNNECESSARY COSTS AND DELAYS

136 Holding the hearing in person is time and cost-efficient as required by Art. 15(7) Swiss Rules.

137 Art. 15(7) Swiss Rules stipulates that all participants have the duty to contribute to the efficient



conduct of the proceedings and to avoid unnecessary delays and costs.

138 An in-person hearing would neither cause unnecessary delays (a) nor unnecessary costs (b).

a) HOLDING THE HEARING IN PERSON AVOIDS UNNECESSARY DELAYS

139 The conduct of the hearing in person can prevent unnecessary delays.

140 CLAIMANT alleges that RESPONDENTS' request for the hearing in person is a violation of its duty to act in good faith since an in-person hearing will create unnecessary delays [*MfC*, pp. 27-28 paras. 37-39]. Also, CLAIMANT worries that waiting until an in-person hearing is possible again will delay the production of its vaccine [*MfC*, p. 28 para. 40].

141 This assessment is built on a false premise. The duty to act in good faith following Art. 15(7) Swiss Rules is directed only against *unnecessary* delays [*Zuberbühler/Habegger/Müller*, Art. 15 para. 30]. Whether the delay is necessary must be assessed considering the circumstances of the case including the potential alternatives [*cf. Scherer, Revolution*, para. 8]. In fact, remote hearings can cause unnecessary delays. A tribunal is held to check regularly for technical issues and in case a technical problem is detected, it must interrupt the hearing completely to avoid infringing the parties' right to be heard [*Lo*, p. 93; *Wilske*, p. 15]. Even if a tribunal interrupts the hearing, a party could still potentially challenge the award on such basis [*Lo*, p. 93]. This can lead to the postponement of the final award and ultimately result in the epiphany of a delay – annulment.

142 As a matter of fact, CLAIMANT still conducts its research on a vaccine and is unhindered in carrying out the clinical trials [*PO2*, p. 55 para. 16]. Thus, waiting until an in-person hearing is admissible will not affect CLAIMANT at all. If an in-person hearing in May 2021 should not be possible, the hearing may be postponed for four months [*PO2*, p. 58 para. 42.a]. However, in light of all the risks associated with remote hearings, such postponement would be necessary.

143 Therefore, an in-person hearing will avoid unnecessary delays.

b) TO HOLD THE HEARING IN PERSON DOES NOT LEAD TO UNNECESSARY COSTS

144 The in-person hearing does not increase the costs of the proceedings.

145 CLAIMANT is certain that holding in-person hearings is more expensive [*MfC*, p. 27 para. 37].

146 In fact, to conduct virtual hearings, tribunals have to make considerable expenses to facilitate the operation of the hearing. This, for example, requires investments into expensive technical equipment [*Lo*, p. 89; *Backsmann/Fröhlingsdorf*, p. 425].

147 An in-person hearing does not lead to higher costs than a remote hearing [*PO2*, p. 57 para. 35]. Quite to the contrary, the costs of a remote hearing could turn out even higher due to the necessity of hiring an outside provider and precautionary safety measures [*ibid.*].

148 Hence, the in-person hearing does not lead to unnecessary costs.



149 The Tribunal will therefore safeguard the principle of efficiency set forth in Art. 15(7) Swiss Rules by conducting the hearing in person.

4. ONLY THE IN-PERSON HEARING CAN SAFEGUARD CONFIDENTIALITY

150 To hold the hearing virtually significantly impedes the confidentiality of the proceedings.

151 Confidentiality is one of the main reasons why parties entrust their disputes to arbitration [*John Forster Emmott v. Michael Wilson & Partners*, para. 105; *Lew/Mistelis/Kröll*, p. 660; *Noussia*, p. 1; *Bagner*, p. 243]. Tribunals must consider this principle if it is stipulated in the chosen procedural rules or if the parties agreed on a confidentiality obligation [*Singer*, p. 107; *Risse/Oehm*, p. 416]. In a remote hearing, unauthorized persons can potentially interfere and access confidential data [*Backsmann/Fröhlingsdorf*, p. 422; *Wilske*, p. 15; *Lasprogata*, p. 118; *Bateson*, p. 167]. This is not a fringe issue, preventable by basic security measures. The IT security measures of companies and government organizations are attacked and overcome every day [*The New York Times*, Dec. 14, 2020]. An example concerning arbitration in particular can be found in the hack of the Permanent Court of Arbitration. During the course of an arbitration between China and the Philippines, the Philippines' Department of Justice and the law firm representing the Philippines were hacked [*Saunders*, p. 110; *de Westgaver*, *Kluwer Arbitration Blog*, Oct. 6, 2017].

152 For one, the protection of confidential information is set out in Art. 44 Swiss Rules. Further, in Section 10.1 PCLA, the Parties even agreed that confidentiality is of “*paramount importance*” [*PCLA*, p. 15 Sec. 10.1]. Yet, CLAIMANT does not act accordingly and insists on a remote hearing. In this arbitration, regardless of any safety precautions, it cannot be ruled out that unauthorized persons interfere and obtain access to the hearing [*PO2*, p. 57 para. 35]. Thus, it is also in the best interest of CLAIMANT to avoid this risk by conducting the hearing in person.

153 Moreover, in case of any data leak, the alleged breach of contract could become public and impair RESPONDENTS' reputation as trustworthy pharmaceutical companies.

154 Therefore, only the in-person hearing can maintain confidentiality.

155 In sum, the specific circumstances of the case speak in favor of the in-person hearing.

156 Considering all legal and factual arguments of this case, the Tribunal should order the examination of experts and witnesses at the second hearing to be conducted in person.

CONCLUSION TO ISSUE 2

157 To hold a virtual hearing will open Pandora's box. Not only is the hearing at risk of intruders hacking the proceedings and obtaining confidential data. There are also countless technical difficulties that could lead to a collapse of the hearing at any time. Due to this unpredictability, handing over the success of this arbitration to vulnerable technology is unacceptable. To make



matters worse, the imponderables of a virtual hearing entail the constant threat of an unenforceable award. Considering that CLAIMANT is not even hindered in developing its vaccine, it seems bearable for it to exercise patience in order to allow for the most reliable way of conducting this arbitration: an in-person hearing. Thus, in light of the myriad risks, Pandora's box shall remain closed. Therefore, RESPONDENTS respectfully ask the Tribunal to order an in-person hearing.

ISSUE 3: THE CISG DOES NOT APPLY TO THE PCLA

158 RESPONDENTS respectfully request the Tribunal to declare the CISG inapplicable to the PCLA.

159 CLAIMANT argues that the CISG is applicable to the PCLA [*MfC*, p. 26 para. 33]. It bases its argument on two main factors: First, it refers to the CISG's scope of application and, second, it addresses the Parties' intent in light of previous negotiations [*MfC*, p. 30 para. 46].

160 However, contrary to CLAIMANT's submission, the PCLA does not fall within the substantive scope of the CISG. This is because it is not a contract of sale of goods as per Art. 1(1) CISG (A). Also, the extension of the CISG's substantive scope as per Art. 3(2) CISG does not allow for the Convention's applicability (B).

A. THE PCLA DOES NOT MEET THE CONDITIONS SET OUT BY ART. 1(1) CISG AS IT IS NOT A CONTRACT OF SALE OF GOODS

161 The PCLA is not a contract of sale of goods in the sense of Art. 1(1) CISG.

162 CLAIMANT correctly argues that the CISG applies to the PCLA territorially and temporally in accordance with Artt. 1(1)(a), 100(1) CISG [*MfC*, pp. 33-35 paras. 65-71].

163 However, the CISG is only applicable if a contract falls into the temporal, territorial and substantive scope of the CISG [*Hau/Poseck*, Art. 1 para. 2; cf. *Lookofsky*, p. 11 para. 2.1]. According to Art. 1(1) CISG, the substantive scope of the CISG only covers contracts of sale of goods. The requirements can be deduced from Artt. 30, 53 CISG [*Grieser*, p. 35; *Piltz Handbook*, p. 507 para. 22]. Pursuant to Art. 30 CISG, the seller is obliged to deliver goods and to transfer the property in the goods. Goods under the CISG are defined as tangible and moveable objects [*Reithmann/Martiny*, para. 6.7; *Schmidt/Ebke*, Art. 1 para. 24; *Czerwenka*, p. 147]. In exchange for the goods, the buyer is required to pay the purchase price in accordance with Art. 53 CISG. In short, a sales contract in terms of the CISG is the exchange of goods and the ownership thereof in return for a onetime payment [*Karollus*, p. 20; *Schlechtriem/Butler*, p. 22 para. 24; cf. *Graphiplus Software Case*, p. 2].

164 The obligation to purchase the Base Materials from RESPONDENT NO. 1 [*hereinafter* "Purchase Obligation"; *PCLA*, p. 17 Sec. 16.1] constitutes a sale of goods. In this respect, CLAIMANT's submission proves correct [*MfC*, p. 31 paras. 51, 54-55]. However, all other transactions under the



PCLA do not qualify as sales of goods: Neither the grant of the license (I) nor the delivery of the GorAdCam Vectors (II) nor the transfer of know-how (III) nor the production of the vaccine (IV) constitute a sale of goods in the sense of the CISG.

I. THE GRANT OF THE LICENSE IS NOT A SALE OF GOODS

165 The grant of the license does not constitute a sale of goods in the sense of Art. 1(1) CISG.

166 CLAIMANT recognizes that the payment stipulated in Section 9.2 PCLA is made in exchange for the license to use the GorAdCam Vectors [*MfC*, p. 33 para. 61]. It, however, does not address whether the grant of the license as such can constitute a sale of goods.

167 Rights such as licenses cannot be considered goods under the CISG [*Schlechtriem/Schwenzer, Art. 1 para. 22; Staudinger, Art. 1 para. 56; Schlechtriem/Schroeter, para. 79; cf. Karollus, p. 21*]. This follows from their lack of tangibility [*Staudinger, Art. 1 para. 56; cf. Reinhart, Art. 1 para. 3*].

168 Under the PCLA, RESPONDENT NO. 1 grants CLAIMANT a non-exclusive license giving CLAIMANT access to IP regarding the GorAdCam Vectors [*hereinafter “License”; PCLA, pp. 12-13 Sec. 1.6, 5.2*]. The License allows CLAIMANT to research, develop, manufacture and sell products using the GorAdCam Vectors [*PCLA, p. 13 Sec. 5.2*]. CLAIMANT receives this right in exchange for varying license payments [*Notice, pp. 6-7 para. 16; PCLA, pp. 13-14, 17 Sec. 9.2-9.5, 16.3*].

169 This transaction is thus the sale of rights, which is not a sale of goods in terms of the CISG.

II. THE DELIVERY OF THE GORADCAM VECTORS IS NOT A SALE OF GOODS

170 The delivery of the GorAdCam Vectors under the License does not constitute a sale of goods.

171 CLAIMANT states that it “*acquired*” the GorAdCam Vectors [*MfC*, p. 35 para. 74].

172 To constitute a sales contract under the CISG, a contract must entail the obligation of the seller to transfer the property in the delivered goods [*Kröll et al., Art. 30 para. 13*]. The transfer of property requires the perpetual transfer of the specific goods to the buyer [*Säcker et al., Art. 1 para. 21; Magnus, ZEuP 2017, p. 148; cf. Software Case III, p. 3*]. Such perpetual transfer does not exist if the other party is merely granted rights of use with regard to such goods [*Kröll et al., Art. 30 para. 13; Ensthaler, Art. 1 para. 4*]. Particularly, recurring or continuous payment obligations indicate that no perpetual transfer is intended [*Schlechtriem/Schwenzer/Schroeter, Annex Art. 1 para. 7; cf. Graphipus Software Case, p. 2 para. 1; cf. Endler/Daub, p. 603*]. Consequently, the grant of licenses as only temporary rights of use in return for the payment of recurring royalties does not constitute a sale of goods [*Schwenzer/Hachem, para. 7.30; cf. Eiselen, Ch. 5 para. 27; cf. Green/Saidov, pp. 175-176*].

173 Under the PCLA, RESPONDENT NO. 1 is obliged to deliver the GorAdCam Vectors to CLAIMANT [*PCLA, p. 13 Sec. 9.2*]. However, these GorAdCam Vectors are subject to the License and therefore inseparably connected to it [*PCLA, p. 13 Sec. 5.2, 9.2*]. This License only grants



CLAIMANT a right of use to the GorAdCam Vectors and does not stipulate a transfer of property. Without the License, CLAIMANT could not use the delivered GorAdCam Vectors as intended [PCLA, p. 13 Sec. 5.2]. In case the PCLA is terminated, CLAIMANT will thus not be able to work with the GorAdCam Vectors any longer [PCLA, pp. 13, 16 Sec. 5.2, 13]. Consequently, CLAIMANT's right of use to the GorAdCam Vectors is only temporary.

174 In return for this right, CLAIMANT not only has to make a payment of EUR 2.5 million upfront [*hereinafter* "Upfront Payment"; PCLA, p. 13 Sec. 9.2]. It is also obliged to make payments upon reaching certain milestones [PCLA, p. 14 Sec. 9.3-9.4]. Additionally, it has to pay royalties on its annual net sales in case of commercialization [PCLA, pp. 14-15, 17 paras. 9.5, 16.3]. Thus, CLAIMANT has several payment obligations, which are recurring over a significant period of time.

175 To conclude, the delivery of the GorAdCam Vectors subject to the License does not entail a transfer of property and can thus not be considered a sale of goods.

III. THE TRANSFER OF THE KNOW-HOW IS NOT A SALE OF GOODS

176 As the know-how transferred by RESPONDENT NO. 1 to CLAIMANT is not a good in the sense of the CISG, its transfer cannot constitute a sale of goods.

177 CLAIMANT acknowledges that the PCLA involves the transfer of know-how [MfC, p. 37 para. 80], but does not discuss whether the transfer of know-how is a sale of goods.

178 As know-how is intangible, it cannot be a good in the sense of the CISG [Honnold, Art. 2 para. 56; Schlechtriem/Schwenzer, Art. 1 para. 19; Magnus, ZEuP 1995, p. 206; cf. Schmitt, p. 47; cf. Maley, pp. 83-84; cf. Saenger et al., § 3 para. 35]. This remains unaffected even if know-how is embodied on a physical medium [Schlechtriem/Schwenzer, Art. 1 para. 19; cf. Market Research Study Case], because the knowledge transfer remains the foreground of the transaction [Schmidt/Ebke et al., Art. 1 para. 26].

179 There is only one common exception: Software qualifies as a good under the CISG despite generally being intangible [Software Case III, pp. 2-3; Corporate Web Solutions v. Vendorlink B.V., para. 4.12; Ostendorf/Kluth, p. 587 para. 7; Eggen, p. 231; Vujinović, p. 535]. However, this cannot be applied to know-how as it is not comparable to software. Software is a computer program which can perform specific tasks [Black's Law Dictionary, p. 1606; IEEE Glossary Software, p. 66; Wulf, p. 51 para. 2.2.2.1]. As soon as the program is written, it is ready to be sold and used. In contrast, know-how consists of practical knowledge, information, and skill to achieve a practical end [Black's Law Dictionary, p. 1003; Gabler, Know-How]. Foremost, unlike software, it is not a clearly definable product in terms of quality and quantity. In particular, it is hardly possible to determine when know-how is non-conforming. Therefore, due to its characteristics, know-how is not compatible with the typical instruments of a sales law, such as warranty rights or remedies. Rather, the transfer of know-how is comparable to a service. Consequently, know-how as opposed to software should



not exceptionally be considered a good in the sense of the CISG.

180 In case a vaccine is produced, RESPONDENT NO. 1 will transfer know-how to CLAIMANT [PO2, p. 55 para. 17]. Because CLAIMANT itself lacks the necessary knowledge to amplify the GorAdCam Vectors [cf. Ex. C2, p. 10; cf. Answer, p. 25 para. 2], the transfer of this know-how is fundamental for CLAIMANT to produce its vaccine [cf. PO2, p. 55 para. 17].

181 Hence, the transfer of the know-how is not a sale of goods as per Art. 1(1) CISG.

IV. THE PRODUCTION OPTION IS NOT A SALE OF GOODS

182 The production option in Section 16.2 PCLA does not constitute a sale of goods.

183 CLAIMANT argues that the production option in Section 16.2 PCLA is considered a sale as per Art. 3(1) CISG [MfC, p. 36 para. 75].

184 It is true that the Convention generally applies to contracts for goods to be manufactured according to Art. 3(1) CISG. Such contracts are then considered sales of goods in the sense of Art. 1(1) CISG. However, if the party ordering the goods supplies a substantial part of the necessary materials itself, such contracts are excluded from the CISG [Reithmann/Martiny, para. 6.28; Soergel, Art. 3 para. 3]. To assess whether a part is substantial, the economic value of the materials must be considered [Säcker et al., Art. 3 para. 7; Staudinger, Art. 3 para. 14]. If a part of the materials accounts for more than 50 % of the economic value of all materials necessary, it is certainly substantial [Kröll et al., Art. 3 para. 9; Brunner/Gottlieb, Art. 3 para. 3; CISG AC No. 4, para. 2.8; Magnus, Problem, p. 1777]. Additionally, qualitative elements, such as the importance of the materials for the production, must be taken into account [Säcker et al., Art. 3 para. 7; Schlechtriem/Schwenzer, Art. 3 para. 6]. Materials previously bought by the ordering party from the producing party are considered to be supplied by the ordering party [cf. Piltz, International, p. 33 para. 2.33; cf. Achilles, Art. 3 para. 3].

185 Under Section 16.2 PCLA, CLAIMANT can have its vaccine produced entirely by RESPONDENT NO. 1 [hereinafter “Production Option”; PCLA, p. 17 Sec. 16.2]. The materials necessary to produce the vaccine are the charged GorAdCam Vectors and the Base Materials [Notice, pp. 4-5, 7 paras. 3, 17]. Prior to the production, CLAIMANT will have purchased the Base Materials under the Purchase Obligation [PCLA, p. 17 Sec. 16.1]. CLAIMANT – the ordering party – will then supply RESPONDENT NO. 1 with the Base Materials for the production [PCLA, p. 17 Sec. 16.2].

186 For one, the Base Materials are essential for the vaccine production. Without them, it is highly inefficient to amplify the GorAdCam Vectors in sufficient quantities [PO2, p. 55 para. 19; Notice, p. 7 para. 17]. What is more, the economic value of the Base Materials by far exceeds the economic value of the charged GorAdCam Vectors: The economic value of the GorAdCam Vectors per batch is **EUR 2.5 million**, which is sufficient to produce all doses of the vaccine [Appendix I, p. 59; PO2, p. 53 para. 4]. The economic value of the Base Materials is EUR 2 million per batch [PCLA,



p. 17 Sec. 16.1]. To produce a vaccine, however, the parties calculated with a demand of 20 batches [Appendix I, p. 59]. Accordingly, their economic value amounts to **EUR 40 million**. The total economic value of the materials necessary for the production thus amounts to **EUR 42.5 million**. Therefore, the Base Materials account for 95 % of the economic value of all materials necessary. Thus, the substantial part of these materials for the production will be supplied by CLAIMANT.

187 Hence, the Production Option is not a sale governed by the CISG as per Artt. 1(1), 3(1) CISG.

188 Conclusively, the PCLA as a whole is not a contract of sale of goods in the sense of the CISG. Due to its varying elements, it is rather a mixed contract.

B. THE CISG DOES NOT APPLY TO THE PCLA PURSUANT TO ART. 3(2) CISG

189 Moreover, as a mixed contract, the PCLA does not fall within the Convention's substantive scope as per Art. 3(2) CISG.

190 In its analysis of the PCLA, CLAIMANT itself found that the PCLA contains different contractual elements [MfC, pp. 30-31, 33, 37 paras. 49, 54, 61, 80]. CLAIMANT could thus have argued that the CISG is applicable to the PCLA pursuant to Art. 3(2) CISG.

191 According to Art. 3(2) CISG, mixed contracts with labor or service elements fall within the scope of the Convention when the sales part preponderates [Ensthaler, Art. 3 para. 1; Kronke/Melis/Kuhn, p. 61 para. 173]. Only by way of analogy, the CISG may also govern mixed contracts with other elements [Karner/Karziol, p. 17; Herber/Czerwenka, Art. 3 para. 6; cf. Tietje, p. 743 para. 30]. In order to identify the preponderant part of a mixed contract, the weight the parties attached to the different contractual obligations is determinative [Car Trim GmbH v. KeySafety Systems Srl, p. 8 para. 47; Orintix Srl v. Fabelta Ninove NV, para. II.3; CISG AC No. 4, para. 3.4]. Determining this weight requires examining the economic value of the contract and the parties' intent [Gsell et al., Art. 3 para. 9; Herber/Czerwenka, Art. 3 para. 3; Bridge, para. 2.16; Huber/Mullis, p. 47].

192 When determining the preponderant part of the PCLA, the Production Option must be taken into account (I). Considering all contractual elements, the economic value of the PCLA (II) and the Parties' intent (III) show that the Parties attached the most weight to the non-sales part.

I. THE PRODUCTION OPTION MUST BE CONSIDERED IN THE COMPREHENSIVE INTERPRETATION OF THE PCLA

193 Assessing the PCLA's preponderant part, the Production Option must be taken into account.

194 According to Art. 3(2) CISG, all obligations of the seller have to be taken into account when determining the preponderant part of a contract. This requirement aims at ensuring a comprehensive interpretation of the contract when determining the contractual nature [cf. CISG AC No. 4, para. 1.2; cf. Säcker et al., Art. 3 para. 3]. Against this background, the determination of



the preponderant part must not be limited to obligations in a narrow sense. Rather, the contractual interpretation must include all contractual provisions which, due to their overall importance, cannot reasonably be disregarded [*cf. Polish Equipment Case*, p. 2].

195 The Production Option is a proposal by RESPONDENT NO. 1 addressed to CLAIMANT [*PCLA*, p. 17 Sec. 16.2]. This option, while not an obligation in the narrow sense, is an important contractual provision. This becomes evident as CLAIMANT itself uses the Production Option to determine the nature of the PCLA [*MfC*, pp. 31-32 paras. 52, 55-56]. Additionally, the foremost purpose of the PCLA is the future production of a vaccine [*PCLA*, pp. 12-13 Sec. 2; *Notice*, p. 6 para. 11]. Especially for CLAIMANT, a company primarily focused on the development of vaccines, this was the main reason to enter into the PCLA [*cf. Notice*, p. 4 para. 1]. The economically most viable solution for both Parties to reach their common goal of producing a vaccine is the Production Option [*cf. Appendix I*, p. 59]. What is more, the option is expressly included in the PCLA signed by both Parties [*PCLA*, p. 17 Sec. 16.2]. It is thus an irrevocable offer in the sense of Art. 16(2)(a) CISG, binding RESPONDENT NO. 1 particularly to the fixed price terms therein [*cf. PCLA*, p. 17 Sec. 16.2].

196 Hence, the Production Option must reasonably be included in the comprehensive interpretation of the PCLA and thus must also be included when assessing the preponderant part.

II. THE ECONOMIC VALUE OF THE NON-SALES ELEMENTS PREVAILS

197 From an economic point of view, the non-sales part of the PCLA preponderates.

198 For assessing the economic value ratio, the value the parties attached to the respective elements at the time of the conclusion of the contract is decisive [*Honsell*, Art. 3 para. 6; *Díez-Picazo*, p. 69; *Staudinger*, Art. 3 para. 18]. The non-sales part preponderates if its value exceeds 50 % of the total economic value [*Hydraulic Pressure Units Case*, p. 3; *Kröll et al.*, Art. 3 para. 18; *Ferrari*, *Law and Commerce*, pp. 61-62].

199 The following table shows the economic value which is attached to the different elements of the PCLA – classified by their sales or non-sales nature:

PCLA (pp. 11-17)	Non-Sales Elements (in EUR)	Sales Elements (in EUR)
Upfront Payment (Sec. 9.2)	2,500,000	
Milestone Payments (Sec. 9.4)	3,000,000	
Purchase Obligation (Sec. 16.1)		400,000,000
Production Costs (Sec. 16.2)	400,000,000	
Royalties (Sec. 16.3)	125,000,000	
Sum	530,500,000	400,000,000

Table 1: Economic value ratio of the PCLA



200 For one, the Upfront Payment of **EUR 2.5 million** must be considered [*PCLA*, p. 13 Sec. 9.2]. On top, milestone payments of a total of **EUR 3 million** are due [*PCLA*, p. 14 Sec. 9.3-9.4]. Additionally, the economic value of the Purchase Obligation must be added. Annually, CLAIMANT will purchase 20 batches of Base Materials for EUR 2 million per batch [*PCLA*, p. 17 Sec. 16.1; cf. *Appendix I*, p. 59]. Extrapolated over the ten years of the royalty term [*PO2*, pp. 53-54, 56 paras. 6, 29], the economic value of the Purchase Obligation thus amounts to **EUR 400 million**. Further, the production costs under the Production Option will amount to EUR 2 million per vaccine batch [*cf. PCLA*, p. 17 Sec. 16.2; cf. *Appendix I*, p. 59]. In their internal calculations both Parties anticipated an annual production of 20 batches of vaccine [*Appendix I*, p. 59]. Thus, the production costs amount to **EUR 400 million** over the ten-year royalty term. Lastly, CLAIMANT also has to pay the royalties in exchange for being allowed to sell products containing the GorAdCam Vectors. These will amount to **EUR 125 million** under the reduced royalty rate under the Production Option [*cf. PCLA*, p. 17 Sec. 16.3; cf. *Appendix I*, p. 59].

201 In sum, the *PCLA*'s overall economic value amounts to **EUR 930.5 million**. As the Purchase Obligation is the only sales element [*supra para. 164*], the economic value of the *PCLA*'s non-sales part adds up to **EUR 530.5 million**. This makes up **57 %** of the overall economic value.

202 Therefore, economically speaking, the non-sales part of the *PCLA* preponderates.

III. THE PARTIES HAD NO INTENT TO CONCLUDE A SALES CONTRACT

203 The Parties' intent demonstrates that the non-sales part of the *PCLA* preponderates.

204 The CISG determines its own sphere of applicability to a contract autonomously [*Staudinger, Art. 6 para. 11; Schlechtriem/Schwenzer, Art. 6 para. 4*]. Thus, Art. 8 CISG applies to interpret the parties' intent regarding whether the CISG shall govern their contract [*Schlechtriem/Schwenzer, Art. 6 para. 4; cf. Treibacher v. Allegheny, pp. 5-8 para. II.A; cf. Mankowski, Art. 8 para. 1*]. Pursuant to Art. 8(2) CISG, if the actual intent is not clear, the interpretation should be based on the understanding a reasonable person in the same circumstances would have had. As expressly set forth in Art. 8(3) CISG, all relevant circumstances including the negotiations shall be considered.

205 The contractual elements of the *PCLA* (1) as well as its drafting history (2) prove that the Parties did not intend to conclude a sales contract.

1. THE CONTRACTUAL ELEMENTS OF THE *PCLA* ARE INCONSISTENT WITH THE CHARACTER OF A SALES CONTRACT

206 The contractual elements included in the *PCLA* show that the Parties did not intend to conclude a sales contract.

207 CLAIMANT is of the opinion that Section 16 *PCLA* containing the Purchase Obligation and the



Production Option as well as Section 9 PCLA setting forth the payment terms are characteristic features of a sales contract [*MfC*, p. 31 paras. 53-54].

208 Foremost, in its scope in Section 2 PCLA, the contract defines itself as a collaboration and license agreement [*PCLA*, pp. 12-13 Sec. 2]. According to this clause, the PCLA governs the collaboration under the research plan, the access and scope of rights granted including the License, the ownership of IP, license payments and potential purchases [*ibid.*]. Of all these elements mentioned, only the last one is sales related. All other elements relate to the collaboration of the Parties aimed at the development of a vaccine using the GorAdCam Vectors. In this regard, regulating the terms and conditions of access to the necessary IP, i.e. the License, is of central importance [*cf. Ex. R2*, p. 30 para. 7].

209 Furthermore, as CLAIMANT itself acknowledged, the research plan in Section 3 PCLA is of central importance [*MfC*, p. 33 para. 61; *cf. PCLA*, p. 13 Sec. 3]. This plan regulates the exact nature of the Parties' collaboration in order to achieve the PCLA's main objective of developing a vaccine [*PCLA*, pp. 12-13 Secs. 1.10, 3.1]. In contrast, the only sales element in the PCLA – the Purchase Obligation – was primarily added to induce CLAIMANT to opt for the Production Option [*Ex. R2*, p. 31 para. 11] – a service element [*supra* paras. 182-187; *MfC*, pp. 31-32, 36 paras. 52, 56, 78]. Since CLAIMANT did not have any production facilities at that time, it did not object to the additional Section 16 [*cf. PO2*, p. 53 para. 3]. Against this background, it becomes evident that the Parties did not attach the most weight to the Purchase Obligation – the only sales element.

210 In sum, contractual elements of the PCLA prove the Parties' intent to conclude a collaboration and license agreement, not a sales contract.

2. THE DRAFTING HISTORY OF THE PCLA ALSO REFLECTS THE PARTIES' INTENT TO CONCLUDE A MIXED LICENSE AGREEMENT

211 The drafting history of the PCLA further shows the lack of intent to conclude a sales contract.

212 According to CLAIMANT, the fact that the Parties added Section 16 to the template used for the PCLA evidences their intent to conclude a sales contract [*MfC*, pp. 30-31 para. 50]. Moreover, it argues that the contract's designation underlines the Parties' intent to conclude a sales contract, referring to *Corporate Web Solutions v. Vendorlink B.V.* [*MfC*, pp. 30, 37 paras. 45, 80].

213 However, according to this exact decision, the designation of a contract is not decisive in determining the contract's nature [*Corporate Web Solutions v. Vendorlink B.V.*, para. 4.9]. Instead, the intentions of the parties or the meaning that a reasonable person would have attached to the contract are decisive [*ibid.*].

214 The PCLA is based on RESPONDENT NO. 2's template for its collaboration and license agreements [*Ex. R2*, p. 31 para. 8]. This is because CLAIMANT rejected the first draft on the grounds



that it did not sufficiently take into account the IP-element involved [Ex. R2, p. 30 para. 7]. A reasonable person in the same circumstances would thus conclude that the IP-element in the PCLA was of fundamental importance for CLAIMANT. Apparently, both Parties shared the view that RESPONDENT NO. 2's license and collaboration agreement-template was more suitable to govern a "research and development transaction" like the PCLA [Notice, p. 6 para. 12; Answer, pp. 26-27 para. 10]. RESPONDENT NO. 2's template was consequently adopted almost identically [PO2, p. 56 para. 25].

215 The only exception was the addition of Section 16 [PO2, pp. 55-56 paras. 24-25]. However, the Purchase Obligation in Section 16.1 is the *only* sale element in the PCLA [*supra* para. 164] and does not economically dominate the contract [*supra* paras. 200-201]. Besides, Section 16.2 PCLA stipulates the Production Option portraying the Parties' overall objective to produce a vaccine [*supra* para. 195]. A reasonable person in the same circumstances as the Parties would therefore not understand this addition to reflect the Parties' intent to enter into a sales contract.

216 Therefore, the PCLA's drafting history proves that the Parties intended to conclude a mixed license agreement and not a sales contract.

217 Consequently, the Parties' intent indicates the preponderance of the PCLA's non-sales part.

218 To conclude, the Parties attached the most weight to the PCLA's non-sales part, leaving it outside of the Convention's substantive scope as per Art. 3(2) CISG.

CONCLUSION TO ISSUE 3

219 On closer examination, all issues presented by CLAIMANT in favor of the applicability of the CISG in fact argue against it. Concluding the PCLA, CLAIMANT and RESPONDENTS set themselves a common goal: to develop innovative vaccines. To reach groundbreaking achievements in the treatment of respiratory diseases, the Parties agreed to jointly research, unify their expertise and pool their resources. RESPONDENTS, as part of one of the biggest pharmaceutical companies in the world, are not merely concerned with selling products. Rather, they aim at driving innovation in biopharmaceutics and foster the rapid cure of life-threatening diseases. The PCLA serves to achieve this very goal. Hence, it can in no way be described a sales contract. RESPONDENTS therefore respectfully request the Tribunal to declare the CISG inapplicable.

ISSUE 4: RESPONDENT NO. 1 DID NOT BREACH THE PCLA

220 RESPONDENTS respectfully request the Tribunal to find that – assuming the applicability of the CISG – RESPONDENT NO. 1 did not breach its obligations existing under Art. 42 CISG.

221 RESPONDENT NO. 1 delivered the GorAdCam Vectors to CLAIMANT under the non-exclusive License for the field of infectious and non-infectious respiratory diseases [PCLA, pp. 11, 13



Secc. 1.3, 5.2, 9.2]. Ross Pharma has an exclusive license to the GorAdCam Vectors for “*malaria and related infectious diseases*” but asserts that this license extends to infectious respiratory diseases [*Ross Agreement, p. 33 Sec. 5.2; Ex. C4, p. 18*].

222 CLAIMANT initiated this arbitration arguing that RESPONDENT NO. 1 breached the PCLA by delivering non-conforming GorAdCam Vectors [*Notice, p. 8 para. 30.1*].

223 If the CISG was applicable, a breach under Art. 42(1) CISG would exist in case the seller delivered goods subject to a third-party IP-right or claim. At any rate, the seller’s liability would be excluded as per Art. 42(2)(a) CISG if the buyer knew or could not have been unaware of the right or claim at the time of the contract’s conclusion. Art. 43(1) CISG would further exclude the seller’s liability if the buyer failed to fulfill its obligation to give notice of the right or claim.

224 Contrary to CLAIMANT’s submission [*MfC, pp. 42-43 paras. 102, 105*], Ross Pharma has neither a right (A) nor a claim (B) to the GorAdCam Vectors in the field of infectious respiratory diseases. Even if Ross Pharma’s assertion fulfilled the requirements of Art. 42(1) CISG, RESPONDENT NO. 1’s liability would nonetheless be excluded pursuant to Artt. 42(2)(a) and 43(1) CISG (C).

A. ROSS PHARMA DOES NOT HAVE A RIGHT TO THE GORADCAM VECTORS FOR INFECTIOUS RESPIRATORY DISEASES IN THE SENSE OF ART. 42(1) CISG

225 The GorAdCam Vectors delivered to CLAIMANT are not subject to a right of Ross Pharma.

226 CLAIMANT argues that Ross Pharma’s license extends to infectious respiratory diseases and that therefore Ross Pharma has a conflicting right to the GorAdCam Vectors [*MfC, p. 43 para. 105*].

227 IP-rights within the meaning of Art. 42(1) CISG encompass all rights which can affect the distribution or use of the purchased good [*Piltz, International, p. 286 para. 5-125; Staudinger, Art. 42 para. 9; Schlechtriem/Schwenzer, Art. 42 para. 4*]. In particular exclusive licenses give the licensee a right to prohibit and exclude third parties from the use of the patented goods [*Engels/Ilzhöfer, p. 531 para. 1517; cf. Langenecker, p. 87*]. Rights in the sense of Art. 42(1) CISG need not be raised against the buyer [*Randa/Etier, paras. 43-45; Janal, p. 207; Staudinger, Art. 42 para. 9*].

228 As the Ross Agreement is a collaboration and license agreement its interpretation is governed by Art. 4 DCL.

229 To begin with, the wording of the Ross Agreement “*malaria and related infectious diseases*” [*Ross Agreement, p. 33 Sec. 5.2; emph. add.*] limits Ross Pharma’s license to specific infectious diseases. This is further demonstrated by the fact that Ross Pharma paid EUR 600,000 in return for the extension of the scope [*PO2, p. 55 para. 20*]. Considering the economic value of license agreements in the same field, as for example the PCLA without Section 16, this is a rather small amount [*supra para. 201*]. A reasonable person in the position of the parties would thus understand this payment as a further indication that the extension is limited to a narrow field of specific infectious diseases.



230 Moreover, the main field of use for the GorAdCam Vectors was at first projected to vaccines against malaria in developing countries [Ex. C2, p. 10; Ex. C7, p. 21 para. 4]. Ross Pharma wanted to use the addition “*and related infectious disease.*” to ensure that it could also research into infectious diseases in developing countries which are related to malaria [PO2, p. 55 para. 20]. This is also highlighted by the research plan in the Ross Agreement which, in addition to malaria, expressly refers to “*cholera*” [PO2, p. 55 para. 21]. Cholera is a gastrointestinal infectious disease also primarily occurring in developing countries [WHO, *Fact Sheet Cholera*]. Respiratory diseases were never mentioned in any way [PO2, p. 55 para. 21; *Ross Agreement*, pp. 32-34]. Consequently, a reasonable person in the parties’ position would conclude that the wording covers infectious diseases which predominantly affect the gastrointestinal tract and typically occur in developing countries. This includes cholera and malaria, but not infectious respiratory diseases like Covid-19 that affect the respiratory tract and frequently occur on a worldwide scale [WHO, *Coronavirus*; PO2, p. 55 para. 23].

231 Accordingly, Ross Pharma’s license does not include a right to the GorAdCam Vectors in CLAIMANT’s field of infectious respiratory diseases. The delivered GorAdCam Vectors are thus not subject to a third-party right pursuant to Art. 42(1) CISG.

B. ROSS PHARMA’S ASSERTION DOES NOT QUALIFY AS A CLAIM IN THE SENSE OF ART. 42(1) CISG

232 Ross Pharma’s assertion is not an IP-claim in the sense of Art. 42(1) CISG to the GorAdCam Vectors delivered to CLAIMANT.

233 CLAIMANT argues that Ross Pharma’s assertion at least qualifies as a claim and that therefore RESPONDENT NO. 1 should be held liable under Art. 42(1) CISG [MfC, pp. 42-43 paras. 102, 105].

234 Yet, this assertion does not meet the requirements for a claim as per Art. 42(1) CISG since Ross Pharma has never raised any such issue towards CLAIMANT (I). Even assuming that a mere imminent threat of legal action by Ross Pharma were already sufficient, such imminent threat does not exist (II).

I. ROSS PHARMA DID NOT RAISE ANY ASSERTION AGAINST CLAIMANT

235 Ross Pharma never approached CLAIMANT with any assertion.

236 CLAIMANT argues that a claim in the sense of Art. 42(1) CISG does not have to be raised against the buyer [MfC, p. 42 para. 102].

237 Generally, not only existing but also merely asserted IP-rights are sufficient to render goods non-conforming as per Art. 42(1) CISG [Staudinger, *Art. 42 para. 12*; *Secretariat Commentary, Art. 39 para. 3*; *Schwenzer/Fountoulakis/Dimsey, p. 383*]. However, contrary to rights, a claim in terms of that provision only exists if the third party raises its assertion against the buyer in some form [EAS Tags



Case, para. 13; Gsell et al., Art. 42 para. 12; Achilles, FS Schwenzler, pp. 5-6; Witz/Salger/Lorenz, Art. 42 para. 5; cf. Hau/Poseck, Art. 42 para. 6]. This is because Art. 42(1) CISG aims at protecting the buyer from restrictions of use resulting from third-party IP-claims [cf. Kröll et al., Art. 42 para. 1; cf. Honnold, Art. 42 para. 270]. Such restriction does not exist if the assertion is not raised against the buyer. Accordingly, in regard to the assertion, it does not suffice if the third party merely contacts the seller [Brunner/Gottlieb, Art. 42 para. 4; Achilles, FS Schwenzler, p. 5].

238 Ross Pharma asserts to possess an IP-right in relation to the GorAdCam Vectors [Ex. C4, p. 18; Ex. R4, p. 35]. Yet, it has never expressed such assertion towards CLAIMANT [Answer, p. 28 paras. 20-21; cf. Ex. C5, p. 19]. It solely raised this assertion towards its own contractual partner, RESPONDENT NO. 2, and in recent against Roctis AG [Ex. C4, p. 18; Ex. R4, p. 35; Answer, p. 27 para. 12]. Thus, CLAIMANT is not restricted in its use of the GorAdCam Vectors in any way. This is well evidenced by the fact that CLAIMANT is continuing its research with the GorAdCam Vectors without let or hindrance, notwithstanding Ross Pharma's assertion [PO2, p. 55 para. 16].

239 Conclusively, Ross Pharma has never raised any assertion against CLAIMANT and, consequently, no IP-claim within the meaning of Art. 42(1) CISG exists.

II. EVEN IF RAISING THE ASSERTION AGAINST CLAIMANT WAS NOT REQUIRED, STILL NO IP-CLAIM IN THE SENSE OF ART. 42(1) CISG WOULD EXIST

240 Even if it was not necessary for the assertion to have been raised, the present circumstances would still not qualify as an IP-claim within the meaning of Art. 42(1) CISG.

241 CLAIMANT argues that there is a high risk of Ross Pharma taking legal action against it which, in turn, is supposed to support a claim as per Art. 42(1) CISG [MfC, p. 43 paras. 103, 105].

242 According to a view in scholarly literature, the imminent threat of legal action itself can already prevent the buyer from freely using the goods [Kröll et al., Art. 42 para. 10]. It is therefore argued that an IP-claim within the meaning of Art. 42(1) CISG does not necessarily require the third party to approach the buyer with its assertion [*ibid.*]. Rather, it is considered sufficient if legal action by the third party against the buyer is fairly likely [*ibid.*].

243 As correctly stated by CLAIMANT, Ross Pharma has a reputation for enforcing its IP-rights strictly [Ex. C5, p. 19; Ex. C7, p. 21 para. 7; PO2, p. 54 para. 15]. If Ross Pharma was actually convinced of possessing an IP-right, it would have already sued CLAIMANT by now. However, in view of the misconceptions about its license, Ross Pharma proposed to rely on mediation and strives for a compromise [Ex. R4, p. 35]. It is actively seeking to clarify the “*divergence in interpretation*” outside of court [*ibid.*] and even objects to be joined to this arbitration [File, p. 46].

244 What is more, Ross Pharma had originally tried to acquire RESPONDENT NO. 2 for its patents, including the patent for the GorAdCam Vectors [Ex. R2, p. 30 para. 2; Answer, p. 26 paras. 5-7]. But:



Whoever already possesses an exclusive right, would not try to acquire one. Notably, only shortly after the second attempt in summer 2018 failed, Ross Pharma started to raise its assertion towards RESPONDENTS [*cf. Answer, p. 26 paras. 5-7; cf. Ex. C4, p. 18; cf. Ex. R4, p. 35*]. This behavior also strongly indicates that Ross Pharma is not convinced about its ownership of an IP-right extending to infectious respiratory diseases. Instead, Ross Pharma likely made these assertions to improve its negotiating position in relation to RESPONDENTS [*cf. Ex. R4, p. 35*].

245 In light of this, Ross Pharma taking legal action against CLAIMANT is not fairly likely.

246 Conclusively, irrespective of the approach taken under Art. 42(1) CISG, Ross Pharma's assertion does not qualify as an IP-claim to the GorAdCam Vectors delivered to CLAIMANT.

C. EVEN IF THE TRIBUNAL FOUND THAT ROSS PHARMA'S ASSERTION FULFILLS THE REQUIREMENTS OF ART. 42(1) CISG, RESPONDENT NO. 1 WOULD NOT BE LIABLE

247 Even if the Tribunal found that Ross Pharma's assertion falls within the meaning of Art. 42(1) CISG, RESPONDENT NO. 1 nevertheless would not be liable.

248 RESPONDENT NO. 1's liability is excluded pursuant to Art. 42(2)(a) CISG since CLAIMANT could not have been unaware of Ross Pharma's assertion (I). In any case, according to Art. 43(1) CISG, CLAIMANT could also not rely on RESPONDENT NO. 1's supposed breach as it did not fulfill its obligation to give notice (II).

I. RESPONDENT NO. 1'S LIABILITY IS EXCLUDED AS PER ART. 42(2)(A) CISG AS CLAIMANT HAD TO KNOW OF ROSS PHARMA'S ASSERTION

249 As CLAIMANT could not have been unaware of Ross Pharma's assertion, RESPONDENT NO. 1's liability is anyhow excluded.

250 CLAIMANT argues that it was not aware of Ross Pharma's assertion because it was only a small start-up [*MfC, p. 42 para. 101*].

251 According to Art. 42(2)(a) CISG, the seller's liability is excluded if the buyer knew or could not have been unaware of the claim or right at the time of the conclusion of the contract. It is sufficient if the buyer is aware of the facts leading to the third parties' right or claim [*Janal, p. 219; cf. Staudinger, Art. 42 paras. 26, 22; cf. Kröll et al., Art. 42 para. 27*]. In that regard, it is decisive what a reasonable businessperson in the same position as the buyer can be expected to have known [*Fogt, p. 98*]. A minimum of due diligence can particularly be expected from professional buyers who are familiar with the specific subject area [*Footware Case; Counterfeit Furniture Case, pp. 3, 5 paras. 14, 28; Achilles, Art. 42 para. 11; Bacher, FS Schwenzger, pp. 125-126*]. According to Art. 8 CISG, the interpretation of statements made by one party is based on the understanding of the recipient [*Achilles, Art. 8 para. 2; Staudinger, Art. 8 para. 12*]. Thus, even if statements are factually incorrect, they must be interpreted



in the manner in which the recipient would have reasonably understood them [*Achilles, Art. 8 para. 2*]. By analogy, this also applies to the interpretation of third-party statements.

252 CLAIMANT is a biopharmaceutical start-up which develops vaccines against respiratory diseases [*Notice, p. 4 para. 1*]. At the time of the conclusion of the PCLA, it planned to focus its entire work on a single product – a vaccine based on the GorAdCam Vectors [*cf. Notice, p. 8 para. 28*]. In this case, a reasonable businessperson in CLAIMANT's position would have obtained a general overview of the market for GorAdCam Vectors prior to the conclusion of a long-term contract. This could, for example, have already been achieved by means of a simple internet research.

253 Had CLAIMANT done so, it would have come across the press release published by RESPONDENT NO. 2 on June 15, 2014 [*Ex. C1, p. 9*]. This release falsely states that Ross Pharma received an exclusive right to the GorAdCam Vectors in the field of “*malaria and infectious diseases*” under the Ross Agreement [*ibid.*]. This quote should have caught CLAIMANT's attention right away: Firstly, it concerns the GorAdCam Vectors which CLAIMANT planned to use under the PCLA. Secondly, if Ross Pharma's license covered all infectious diseases, as the press release mistakenly stated, the license would also cover infectious respiratory diseases [*cf. PO2, p. 55 para. 23*]. Consequently, any license given to CLAIMANT in the field of infectious respiratory diseases would appear to collide with an exclusive license in the same field. Hence, from this misquote, CLAIMANT must have concluded that a supposed third-party IP-right to the GorAdCam Vectors existed.

254 Therefore, RESPONDENT NO. 1 is not liable as CLAIMANT must have known of Ross Pharma's assertion in relation to the GorAdCam Vectors.

II. IN ANY EVENT, CLAIMANT CANNOT RELY ON A SUPPOSED BREACH OF RESPONDENT NO. 1 AS IT DID NOT FULFILL ITS DUTY TO GIVE NOTICE AS PER ART. 43(1) CISG

255 Even if the Tribunal recognized that RESPONDENT NO. 1 is liable under Art. 42(1) CISG and that this liability is not excluded as per Art. 42(2)(a) CISG, CLAIMANT in any case did not fulfill its obligation to give notice pursuant to Art. 43(1) CISG.

256 CLAIMANT did not notify RESPONDENT NO. 1 within a reasonable time (1). Also, CLAIMANT was not relieved from its obligation to give notice (2).

1. CLAIMANT DID NOT NOTIFY RESPONDENT NO. 1 WITHIN A REASONABLE TIME

257 CLAIMANT did not give timely notice as required under Art. 43(1) CISG.

258 Pursuant to Art. 43(1) CISG, the buyer cannot hold the seller liable for a breach under Art. 42(1) CISG if it does not notify the seller about the right or claim. It must do so within a reasonable time after it ought to have become aware of the right or claim. This standard of simple negligence places a duty to investigate on the buyer [*Beline, p. 20; Fogt, p. 52; Honnold, Artt. 42, 35*].



paras. 270.1, 229; cf. Soergel, Art. 43 para. 3]. The buyer is culpably unaware if disputes have been publicly reported in the media in a way the buyer can be expected to recognize [*Gsell et al., Art. 43 para. 8*]. This particularly applies to publications in the buyer's own industry [*ibid.*]. The time period assumed to be reasonable is one month [*Staudinger, Art. 43 para. 20; Brunner/Gottlieb, Art. 43 para. 11; Schroeter, p. 428 para. 3; cf. New Zealand Mussels Case, p. 7 para. 30*].

259 The Biopharma Science journal published an article on December 19, 2019 [*Ex. C4, p. 18*]. This article provides detailed information about the dispute between RESPONDENT NO. 2 and Ross Pharma concerning the “*exclusive license*” of Ross Pharma [*ibid.*]. It explains that Ross Pharma interprets its exclusive license to cover its most recent research into vaccines against several infectious respiratory diseases using the GorAdCam Vectors [*ibid.*]. Reading this, CLAIMANT must have recognized that Ross Pharma asserts to have the right to use the GorAdCam Vectors in CLAIMANT's field.

260 CLAIMANT did not read this article until May 1, 2020, four months after its publication [*Ex. C5, p. 19*]. However, CLAIMANT can be reasonably expected to have read this article earlier: Biopharma Science is a very popular magazine in the bioscience start-up scene in Mediterraneo, CLAIMANT's place of business [*PO2, p. 54 para. 8; PCLA, p. 11*]. Particularly, as a company working in this field, CLAIMANT could reasonably be expected to follow publications within its own industry. It is therefore reasonable to assume that after the publication on December 19, 2019, a reasonable person in CLAIMANT's field would have read the article at the latest after an appropriate period of seven business days. The notice period thus started on January 2, 2020. Accordingly, CLAIMANT would have had to give notice to RESPONDENT NO. 1 before February 3, 2020 at the latest. CLAIMANT did, however, not approach RESPONDENT NO. 1 until May 2, 2020 [*Ex. C5, p. 19*].

261 Consequently, CLAIMANT did not give timely notice.

2. RESPONDENT NO. 1 CAN RELY ON CLAIMANT'S FAILURE TO GIVE TIMELY NOTICE

262 For the sake of completeness, it should be finally noted that a notice was not dispensable under Art. 43(2) CISG.

263 Even though CLAIMANT refrains from referring to Art. 43(2) CISG, it has repeatedly argued that RESPONDENT NO. 1 had actual knowledge of Ross Pharma's claim [*MfC, pp. 39, 41-42 paras. 88, 96, 100, 101*]. It should, therefore, be made clear that RESPONDENT NO. 1 did not have actual knowledge in the sense of Art. 43(2) CISG.

264 Pursuant to Art. 43(2) CISG, the seller cannot rely on the buyer's obligation to give notice if it had actual knowledge of the right or claim. Such exception can only apply if the seller had actual knowledge at the time at which it would have received the notice [*Stolen Car Case, p. 5 para. 7; Schlechtriem/Schwenzer, Art. 43 para. 11*]. The rationale behind the buyer's duty to inform about



existing defects is to allow the seller to take appropriate action [*Stolen Car Case*, p. 7 para. 13; *Herberger et al.*, Art. 43 para. 3; *Brunner/Gottlieb*, Art. 43 para. 1]. Accordingly, a notice is not required if it is practically obsolete [*Brunner/Gottlieb*, Art. 43 para. 17; *Schmidt/Ebke*, Art. 43 para. 9; *Hau/Poseck*, Art. 43 para. 8]. This applies to cases in which the seller is already aware of the facts to be included in a hypothetical notice [*ibid.*]. Thus, only if the seller is aware that a third-party right or claim impairs the buyer in its use of the good at the time of the expected notice, a notice is in fact dispensable.

265 RESPONDENT NO. 1 did not know that CLAIMANT understood its rights to be impaired by Ross Pharma's assertions: Firstly, RESPONDENT NO. 1's current Head of Contract, Mr. Doherty, confirmed internally that Ross Pharma's assertions are baseless [*Ex. R2*, p. 30 paras. 1, 5; *Answer*, p. 27 para. 11]. He was in the best position to make this legal assessment as he is a lawyer and drafted both the Ross Agreement and the PCLA [*Ex. R2*, pp. 30-31 paras. 1, 4-5, 7-8]. This legal evaluation was also verified by the IP-lawyers of Roctis AG [*Ex. R5*, p. 36]. Secondly, due to the correspondence between the Roctis Group and Ross Pharma [*Ex. R4*, p. 35; *Ex. R5*, p. 36], RESPONDENT NO. 1 assumed that the problem existed only between these parties. And, considering that Ross Pharma was even reluctant to initiate legal proceedings against its own business partner, the Roctis Group [*Ex. R4*, p. 35], RESPONDENT NO. 1 was convinced that Ross Pharma would even less take legal action against CLAIMANT. Rather, RESPONDENT NO. 1 assumed that such dispute would be resolved bilaterally – without any involvement of CLAIMANT. Thirdly, none of the other companies that have been granted similar licenses as CLAIMANT have so far approached RESPONDENT NO. 1 in this matter [*PO2*, p. 55 para. 18]. Therefore, RESPONDENT NO. 1 was justifiably assured in its overall assessment that none of its clients would be impaired in their use of the GorAdCam Vectors.

266 In light of this, RESPONDENT NO. 1 was convinced that Ross Pharma's unsubstantiated assertions could not impair CLAIMANT's contractual rights in any way. Only with CLAIMANT's email in May 2020 [*Ex. C5*, p. 19], RESPONDENT NO. 1 became aware that CLAIMANT understood the mere assertions to constitute a breach of contract. Hence, RESPONDENT NO. 1 was not positively aware of a supposed defect in the sense of Art. 42(1) CISG at the time it would have received a timely notice. Thus, a notice was not obsolete.

267 Therefore, and only as a matter of precaution, it should be recognized that RESPONDENT NO. 1 can rely on CLAIMANT's obligation to give notice.

268 To conclude, RESPONDENT NO. 1 cannot be held liable for a breach of contract under Art. 42(1) CISG in any case.



CONCLUSION TO ISSUE 4


269 Although the Parties have made steady progress on their common path to jointly developing innovative vaccines so far, CLAIMANT suddenly seems to have lost interest in taking this path together. Interestingly, this loss of interest coincides with its acquisition by Khorana Lifescience. Shortly after, CLAIMANT filed a request for arbitration. Quite conveniently for CLAIMANT, Khorana Lifescience can supply it with the Base Materials at half price. Further, it can even provide CLAIMANT with the necessary financing to build its own production facilities for a Covid-19 vaccine. In short: the PCLA is no longer favorable for CLAIMANT. Desperately searching for forks in the road to stray from the Parties' common path, CLAIMANT is clinging to Ross Pharma's unsubstantiated assertion to leave the PCLA behind. These efforts bear no merit. RESPONDENTS respectfully request the Tribunal to find that RESPONDENT NO. 1 did not breach the PCLA.

STATEMENT OF RELIEF SOUGHT

On the grounds of the argument set out in this memorandum, RESPONDENTS respectfully request the Arbitral Tribunal to find that:

- Ross Pharmaceuticals should be joined to the Arbitration Proceedings,
- the examination of witnesses and experts in the 2nd Hearing of May 3 to 7, 2021 should not be conducted remotely if a hearing in person is not possible or considered by the Arbitral Tribunal to be inappropriate,
- the CISG is not applicable to the "Purchase, Collaboration and License Agreement" concluded between CLAIMANT and RESPONDENT NO. 1 and
- RESPONDENT NO. 1 has not breached its contractual obligations to deliver conforming goods existing pursuant to Art. 42 CISG by providing CLAIMANT with the GorAdCam Vectors.

Respectfully submitted on behalf of RESPONDENTS, *CamVir Ltd* and *VectorVir Ltd*,
January 28, 2021

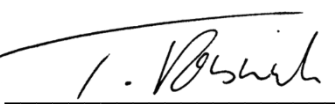

YASMIN DRILL


CHRISTOPHER KUNZMANN


CHARLENE OLSCHOWKA


LUKAS SCHWITALLA


SOPHIA SHANG


TESSA VOSWINKEL