
TWENTY-EIGHTH ANNUAL
WILLEM C. VIS INTERNATIONAL COMMERCIAL
ARBITRATION MOOT



**UNIVERSITY
OF TURKU**

MEMORANDUM FOR
CLAIMANT

on behalf of:
RespiVac plc
CLAIMANT

against:
CamVir Ltd
RESPONDENT NO. 1
and
VectorVir Ltd
RESPONDENT NO. 2

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¶	Paragraph
%	per cent
AAA/ICDR	American Arbitration Association: The International Centre For Dispute Resolution
AAA/ICDR Rules	ICDR International dispute resolution Rules and Procedures
A fortiori	from the stronger argument
ANA	Answer to the Notice of Arbitration of 14 August 2020
Appendix 1	Appendix of Procedural Order No 2 of 7 November 2020, para. 7
Art. / Arts.	article / articles
Base materials	HEK-294 cells and cell culture media
CIETAC	The China International Economic and Trade Arbitration Commission
CIETAC	Rules CIETAC Arbitration Rules (2015)
CISG	United Nations Convention on Contracts for the International Sale of Goods (1980)
Ed. / ed.	edition / editions
Exh. C	CLAIMANT's exhibit
Exh. R	RESPONDENTS' exhibit
et. Al	<i>et alii</i> , and others
EUR	Euro
CISG	The United Nations Convention on Contracts for the International Sale of Goods
CFO	Chief Financial Officer
COO	Chief Operating Officer
GorAdCam	GorAdCam viral vector
COVID-19	Coronavirus disease 2019
De facto	state of affairs that is true in fact
HKIAC	Hong Kong International Arbitration Centre
IBA	International Bar Association
ibid	in the same place
ICC	International Chamber of Commerce
ICC Rules	ICC Arbitration Rules (2017)

ICSID	International Centre for Settlement of Investment Disputes
i.e.	<i>id est</i> , that is
Infra	cited below
Inter alia	among other things
IPR	Intellectual Property Right
LCIA	The London Court of International Arbitration
LCIA Rules	LCIA Arbitration Rules (2020)
Model law	UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006
New York Convention	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958)
No.	Number
p. / pp.	page / pages
Parties	RespiVac plc, CamVir Ltd, and VectorVir Ltd
PCLA Parties	RespiVac plc and CamVir Ltd
PCLA	Purchase, Collaboration and Licensing Agreement between CLAIMANT and RESPONDENT NO. 1 dated 1 January 2019
PO1	Procedural Order No 1 of 9 October 2020
PO2	Procedural Order No 2 of 7 November 2020
Prima facie	on the first impression
NA	Notice of Arbitration of 15 July 2020
R&D	Research and development
Roctis	Roctis AG
Ross Agreement	Collaboration and Licensing Agreement between RESPONDENT NO. 2 and Ross Pharmaceuticals dated 15 June 2014
Supra	cited above
Swiss Rules	Swiss Rules of International Arbitration 1 June 2012
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law

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STATEMENT OF FACTS

- ❖ The Parties to this arbitration are RespiVac plc (“**CLAIMANT**”), CamVir Ltd (“**RESPONDENT NO. 1**”), and VectorVir Ltd (“**RESPONDENT NO. 2**”, or collectively “**Parties**”). Respondents are both subsidiaries of Roctis AG and collectively referred to as “**RESPONDENTS**”.
- ❖ CLAIMANT, established in Mediterraneo, is a biopharmaceutical company engaged in the development of vaccines for infectious respiratory diseases. Currently, CLAIMANT is developing a vaccine for COVID-19.
- ❖ RESPONDENT NO. 1 is the contract manufacturing organisation of the Roctis Group. RESPONDENT NO. 1 produces viral vectors, such as “**GorAdCam**”, in addition to HEK-294 cells and cell culture mediums (“**Base Materials**”). RESPONDENT NO. 2 owns the patent for GorAdCam and has licensed it to RESPONDENT NO. 1. RESPONDENTS are both established in Equatoriana.

15 June 2014 RESPONDENT NO. 2 published a press release in Nasdaq Equatoriana stating that it had concluded a Collaboration and Licensing Agreement with Ross Pharmaceuticals (“**the Ross Agreement**”), that granted Ross Pharmaceuticals an exclusive license to develop vaccines for malaria and related infectious diseases using GorAdCam.

10 September 2018 RESPONDENT NO. 2 granted RESPONDENT NO. 1 an exclusive license to GorAdCam for all applications relating to respiratory diseases. This happened shortly after Roctis AG acquired RESPONDENT NO. 2 and its patents.

1 December 2018 RESPONDENT NO. 1 officially started the production of GorAdCam, and shortly thereafter commenced contract negotiations with CLAIMANT.

6 December 2018 Mr. Doherty received an email concerning a licensing issue between Ross Pharmaceuticals and RESPONDENT No. 2. In the email, Ross Pharmaceuticals made it clear that it considers the exclusive license granted in the Ross Agreement to cover infectious respiratory diseases.

1 January 2019 RESPONDENT NO. 1 and CLAIMANT (collectively “**the PCLA Parties**”) concluded a Purchase, Collaboration and Licensing Agreement

(“**the PCLA**”), which granted CLAIMANT a non-exclusive license to develop vaccines for respiratory diseases using GorAdCam.

- 1 May 2020** CLAIMANT’s Chief Operating Officer, Mr. Paul Metschnikow received an article of an apparent dispute between RESPONDENT NO. 2 and Ross Pharmaceuticals, concerning the scope of the license granted in the Ross Agreement.
- 2 May 2020** Mr. Metschnikow contacted Ms. Alexandra Flemming, CEO of RESPONDENT NO. 1, to clarify the situation, as CLAIMANT was concerned of possibly conflicting rights.
- 4 May 2020** Ms. Flemming replied, downplaying CLAIMANT’s concerns, and stated that Ross Pharmaceuticals did not have an exclusive license to use GorAdCam in the field of respiratory diseases.
- 15 July 2020** CLAIMANT submitted the Notice of Arbitration (“**NA**”), in accordance with the arbitration agreement contained in the PCLA (“**the Arbitration Agreement**”), thus commencing the arbitral proceedings (“**the Proceedings**”) and requested the Tribunal to declare that RESPONDENT NO. 1 breached the PCLA by delivering GorAdCam not free from third party rights or claims.
- 14 August 2020** RESPONDENTS submitted the Answer to the Notice of Arbitration (“**ANA**”). RESPONDENTS requested the Tribunal to join Ross Pharmaceuticals to the Proceedings and argued that CLAIMANT’s claim for declaratory relief was baseless.
- 4 September 2020** The Tribunal informed the Parties that Ross Pharmaceuticals has objected to any joinder. The Tribunal also inquired the Parties of any objections to conduct the oral hearing remotely.
- 2 October 2020** RESPONDENTS stated that they strongly object to any hearings remotely, especially if they involve the taking of evidence.

SUMMARY OF ARGUMENTS

The dispute at hand is a straightforward case involving mainly legal questions. The Tribunal should find that RESPONDENT NO. 1 has delivered non-conforming goods, and thus breached the PCLA under the CISG. RESPONDENTS try to avoid the examination of this question by creating unnecessary hurdles. RESPONDENTS' request to join Ross Pharmaceuticals and their objection to remote hearings are thinly veiled attempts to avoid justice.

[ISSUE I] Ross Pharmaceuticals should not be joined to the Proceedings, as the Tribunal's jurisdiction does not cover them. The Tribunal needs to have jurisdiction to render a final, binding, and enforceable award. First, Ross Pharmaceuticals is not a party to the Arbitration Agreement and thus, the Tribunal does not have jurisdiction to join them. Second, even if the Tribunal finds that it has jurisdiction over Ross Pharmaceuticals, joining them would not be in the best interests of the Proceedings.

[ISSUE II] The Tribunal can conduct remote hearings, should it become necessary. First, conducting remote hearings is compliant with the Arbitration Agreement and the Swiss Rules. Second, conducting hearings remotely ensures the effective presenting of evidence in the current circumstances, without endangering the enforcement of the final award. In any case, the expert witnesses proposed by RESPONDENTS are not needed to resolve the dispute at hand.

[ISSUE III] The CISG applies to the PCLA. First, CLAIMANT and RESPONDENT NO. 1 have concluded a contract of sales pursuant to Art. 1 CISG. Second, the sale of goods is the preponderant part of RESPONDENT NO. 1's obligations, and thus, the PCLA is cannot be excluded from the scope of the Convention. In any case, the CISG should apply at least to the sale of goods obligations, as the PCLA Parties intended to conclude a contract of sales.

[ISSUE IV] RESPONDENT NO. 1 breached the PCLA pursuant to Art. 42 CISG by delivering GorAdCam which were non-conforming as they were not free from third-party rights or claims based on intellectual property. As RESPONDENT NO. 1 knew or could not have been unaware of these rights or claims, it cannot exclude its liability.

It should be noted that CLAIMANT is in the process of creating a vaccine to combat the global pandemic caused by COVID-19. The vaccine could help to resolve the current economic and social crisis, and thus not only benefit CLAIMANT but also the public as a whole. A swift resolution to these proceedings is of utmost importance, as CLAIMANT cannot develop the vaccine with the threat of further litigation hanging over its head.

ARGUMENTS ON THE PROCEEDINGS

I. Ross Pharmaceuticals should not be joined to the Proceedings

1. The Tribunal does not have jurisdiction to resolve disputes including Ross Pharmaceuticals, since Ross Pharmaceuticals is not a party to the Arbitration Agreement. An arbitral tribunal needs to have jurisdiction to render a final, binding, and enforceable award [*van den Berg pp. 144–145; Hobér p. 126; Elektrim v Vivendi; ICC case 7929; Watkins-Johnson v Iran*]. In order to join Ross Pharmaceuticals, the Tribunal would have to establish proper jurisdiction to do so.
2. The Parties have agreed that the Proceedings shall be governed by the Swiss Rules of International Arbitration (“**the Swiss Rules**”) [*PCLA ¶ 14*]. Pursuant to Art. 33(1) of the Swiss Rules, “[t]he arbitral tribunal shall decide the case in accordance with the rules of law agreed upon by the parties or, in the absence of a choice of law, by applying the rules of law with which the dispute has the closest connection”. It has been generally viewed that the seat of the arbitration has the closest connection with the arbitration agreement [*Born 2014 p. 1614; Fouchard et al. p. 225; Kröll et al. p. 107; Sapphire case; Steel Corp. Of Philippines v Int. Steel; Sulamérica case; Enka v Chubb*]. The Parties have agreed that the seat of arbitration shall be Danubia [*PCLA ¶ 14*]. Therefore, the procedural matters, including the power of the Tribunal, are governed by the Danubian Arbitration Law, which is a verbatim adoption of the UNCITRAL Model Law on International Commercial Arbitration (“**the Model Law**”), and the Swiss Rules [*PO1 ¶ III.3*].
3. Furthermore, according to Art 21(1) of the Swiss Rules, “[t]he Arbitral tribunal shall have the power to rule on any objection to the existence or validity of the arbitration clause or the separate arbitration agreement”. This reflects the internationally recognised doctrine of Kompetenz-Kompetenz pursuant to which arbitrators may decide on their own jurisdiction, including the scope of the arbitration agreement [*Born 2014 pp. 1047–48; Fouchard et al p. 660; Jenny p. 647; ABS v Jules Verne; Continental Commercial Systems v Davies Telecheck International; Sharon Steel v Jewell Coal & Coke*]. Therefore, the Tribunal has the power to determine its jurisdiction.
4. CLAIMANT submits that, **(A.)** the Tribunal does not have jurisdiction to join Ross Pharmaceuticals, and even if it did, **(B.)** it is not in the legitimate interests of the Proceedings to join Ross Pharmaceuticals.

A. The Tribunal does not have jurisdiction to join Ross Pharmaceuticals

5. The jurisdiction of an arbitral tribunal is established in the parties’ agreement to arbitrate [*Chander v Chander; Skandia International Insurance Company*]. In arbitration, the agreement to arbitrate is the only source from which the arbitral tribunal may derive its jurisdiction [*Girsberger & Voser p. 64;*

Sornarajah p. 173; Andrés v Diez Carrillo]. Jurisdiction of the tribunal is fundamental, as awards rendered without proper jurisdiction have no legitimacy [*Gotanda p. 15; Kröll et al. p. 329*]. The arbitral tribunal's jurisdiction is limited to issues between the parties to an arbitration agreement [*Born 2014 p. 276; Choi p. 31; Dalimpex v Janicki*].

6. RESPONDENTS have alleged that Ross Pharmaceuticals can be joined to the Proceedings [ANA ¶ 22]. To join Ross Pharmaceuticals, the Tribunal would have to find that by merely selecting the Swiss Rules, the Parties have granted the Tribunal jurisdiction to join non-signatories to the Proceedings, or that Ross Pharmaceuticals falls within the scope of the Arbitration Agreement.
7. The Tribunal lacks jurisdiction to join Ross Pharmaceuticals to the Proceedings on two grounds. First, **(1.)** the Parties' subscription to the Swiss Rules does not, in itself, grant the Tribunal jurisdiction to join non-signatories to the Proceedings. Second, **(2.)** the Arbitration Agreement cannot be extended to cover Ross Pharmaceuticals. Additionally, **(3.)** forcing Ross Pharmaceuticals to join the Proceedings would endanger the enforcement of the award.

1. The Parties' subscription to the Swiss Rules does not grant the Tribunal jurisdiction to join non-signatories to the Proceedings

8. Contrary to RESPONDENT NO. 1's allegations, a subscription to the Swiss Rules is not an expression of consent to the joinder of non-signatory third persons [ANA ¶ 22]. The Parties have only agreed to resolve disputes related to the PCLA [PCLA ¶ 14.1].
9. According to Art. 4(2) of the Swiss Rules, "where a party to pending arbitral proceedings [...] requests that one or more third persons participate in the arbitration, the arbitral tribunal shall decide on such request, after consulting with all of the parties, including the person or persons to be joined, taking into account all relevant circumstances". This provision grants an arbitral tribunal power to join third parties but does not establish its jurisdiction to do so [*Zuberbuehler & Muller et al. p. 41*]. Jurisdiction of the arbitral tribunal stems only from the consent of the parties to submit their dispute to binding and final adjudication [*Choi p. 29; Waincymer p. 130; 4_A_150/2017; Volt v Leland*]. A subscription to institutional arbitration rules does not in itself constitute consent to joinder of third parties, and a departure from this principle would require express language from the provision under consideration [*Born 2014 p. 2600; Meier p. 705; Patocchi p. 30*].
10. This is in line with multiple scholarly opinions on the interpretation of Art. 4(2) of the Swiss Rules, stating that the provision is not a substitute for the actual consent of the parties or the third persons, and thus, a basis for the jurisdiction of an arbitral tribunal [*Bärtsch & Petti p. 64; Meier p. 2517; Voser p. 396*]. Rather, the provision only establishes the framework and procedural power to decide on a

joinder request when an arbitral tribunal's jurisdiction is already established [*Meier p. 2517; Voser pp. 396–400*]. Any other interpretation of Art. 4(2) is unsustainable [*Bärtsch & Petti p. 64*]. The parties cannot be viewed as having consented “to arbitrate generally or with the entire world” [*Born 2014 p. 1416*].

11. RESPONDENTS have alleged that by agreeing to arbitrate under the Swiss Rules, CLAIMANT has agreed to arbitrate with any non-signatories alleging conflicting rights [*ANA ¶ 22*]. RESPONDENTS have sublicensed GorAdCam to multiple parties [*ANA ¶¶ 9, 10, 14; PO2 ¶ 18*]. Therefore, such interpretation would be unsustainable, as it would result in CLAIMANT potentially having to arbitrate with any current or future licensees of RESPONDENT NO. 1.
12. Considering the above, the Tribunal should find that the Parties' subscription to the Swiss Rules does not grant it jurisdiction to join non-signatories to the Proceedings. Instead, the provision allocates an arbitral tribunal procedural power to join third parties to the proceedings where jurisdiction has already been established.

2. The Arbitration Agreement cannot be extended to cover Ross Pharmaceuticals

13. Determining whether a non-signatory can be joined to arbitration proceedings is not a question of extending an arbitration agreement to third parties. Instead, it is determined whether the non-signatory falls within the scope of the arbitration agreement and thus, can be said to be included in the agreement [*Born 2009 p. 1139; Hanotiau pp. 341, 343; Waincymer p. 514*]. Whether a non-signatory falls within the scope of an arbitration agreement is determined in accordance with the applicable law [*Bärtsch & Petti p. 65; Kaistinen p. 115; Kröll et al p. 141*]. As shown above, the law applicable to interpreting the scope of the Arbitration Agreement is the Danubian Arbitration Law [*supra ¶ 2*].
14. Pursuant to Art. 7(1) Danubian Arbitration Law, an arbitration agreement is formed between parties concerning certain disputes between them in respect of a defined legal relationship. Furthermore, according to Art. 7(3) of the Danubian Arbitration Law, an arbitration agreement may be concluded orally, by conduct, or by other means. The wording “conduct or other means” to form an arbitration agreement refers to, for instance, interrelated contractual obligations and relations [*Born 2014 pp. 2582–2583; Kahn pp. 15–17; Leboulanger p. 47; Gay Constructions v Caledonian Techmore; Nanisivik Mines v Canarctic Shipping; SCC case 2018/084*]. Where the signatory parties to an arbitration agreement and a party are not involved in the same commercial transaction with interrelated obligations or performance, even an identical dispute resolution clause does not extend the scope of the arbitration agreement [*Born 2014 p. 2584; Patel v Kanbay International; XX Y.B. Comm. Arb. 745*].

15. It is undisputed that there is no prior agreement constituting an arbitration agreement between CLAIMANT and Ross Pharmaceuticals [PO2 ¶ 13]. Furthermore, Ross Pharmaceuticals cannot be interpreted to be a party to the Arbitration Agreement, as (i.) the PCLA and the Ross Agreement are not interrelated. In addition, (ii.) the arbitration agreements in the PCLA and the Ross Agreement are not identical.
- i. The PCLA and the Ross Agreement are not interrelated**
16. The PCLA and the Ross Agreement are not interrelated. An arbitration agreement cannot be extended to third parties when there are no interrelated contractual obligations between the signatory parties and the third parties [*Born 2014 p. 2584; Leboulanger p. 74*].
17. The UK Supreme Court held in *Dallah* that “the effects of [an] arbitration clause may extend to parties that did not actually sign the main contract but that were directly involved in the negotiation and performance of such contract” [*Dallah case*]. This means that application of an arbitration clause can only be extended to parties directly involved in the conclusion of a contract who, at the time of contracting, knew the existence and scope of the agreement [*Dundas p. 140; Malek & Harris p. 54; Khanna p. 133; Dalico case; 4P_115/2003*]. This test has been recognised and developed in case law to also include considerations, such as the common intention of the parties and their established commercial relationship [*Dow Chemical case; Orri v Société des Lubrifiants Elf Aquitaine; Sponsor AB v Lestrade*].
18. In this case, the only parties involved in the conclusion and performance of the PCLA were, and still are, CLAIMANT and RESPONDENT NO. 1, whereas the Ross Agreement was concluded between RESPONDENT NO. 2 and Ross Pharmaceuticals [*PCLA; Ross Agreement*]. Subsequently, the only parties whose intent was to resolve disputes arising from the PCLA, were CLAIMANT and RESPONDENT NO. 1 [*PCLA ¶ 14.1*]. Furthermore, RESPONDENT NO. 1 was not involved in the conclusion of the Ross Agreement, nor positively knew of its scope and the discussions leading up to it [PO2 ¶ 1]. Similarly, CLAIMANT was not involved in the conclusion or performance of the Ross Agreement, as it had no commercial relationship with Ross Pharmaceuticals, or RESPONDENT NO. 2 for that matter [PO2 ¶ 13]. It should also be noted that Ross Pharmaceuticals only became aware of the PCLA and the dispute at hand, at the earliest, in April 2020, whereas the PCLA came into force in January 2019 [*Exb. R1; PCLA*]. Therefore, Ross Pharmaceuticals was not in any way involved in the conclusion or performance of the PCLA.
19. As shown above, the PCLA Parties and the parties to the Ross Agreement were not aware of, or involved in, each other’s business relations or actions relating thereto. Considering the above, the Tribunal should find that the PCLA and the Ross Agreement are not interrelated.

ii. The arbitration agreements included in the PCLA and the Ross Agreement are not essentially identical

20. Contrary to RESPONDENTS' allegations, the arbitration clause agreed between CLAIMANT and RESPONDENT NO. 1 and the arbitration clause agreed between RESPONDENT NO. 2 and Ross Pharmaceuticals are not identical or essentially identical [ANA ¶ 22].
21. Academic opinion maintains that a third party objecting to a joinder request may only be joined if that third party is a signatory of an essentially identical arbitration agreement, with at least the party requesting the joinder [*Born 2014 p. 2584; Grierson & Van Hoof* pp. 124–125; *Meier p. 2508; Schramm p. 497*]. Two arbitration agreements are not essentially identical when they do not provide for, at least, the same place of arbitration [*Grierson & Van Hoof p. 125*].
22. In this case, both arbitration agreements state that hearings shall be held “either in Vindobona or in the city where the Respondent has its place of business” [PCLA ¶ 14.3; *Ross Agreement* ¶ 14.3]. The two arbitration agreements seem identical *prima facie*, however, they provide for different places of hearings, as potential “respondents” vary between the two agreements. The Arbitration Agreement in the PCLA provides for hearings either in Danubia, Equatoriana, or Mediterraneo, whereas the arbitration agreement included in the Ross Agreement provides for hearings in Danubia or Equatoriana [PCLA ¶ 14.3; *Ross Agreement* ¶ 14.3]. This is because RESPONDENT NO. 2 and Ross Pharmaceuticals, the parties to the Ross Agreement, are situated in Equatoriana and Danubia, respectively [*Ross Agreement's preamble*].
23. Furthermore, the alleged similarity of the arbitration agreements results from the use of the Swiss Chambers' Arbitration Institution's (“SCAI”) model arbitration clause [NA ¶ 23]. Extending the Arbitration Agreement to cover Ross Pharmaceuticals due to the similarity of the two clauses would be unsustainable, as effectively similar arbitration clauses can be found in any arbitration agreement following the SCAI model clause or Mr. Doherty's contract template [*Exh. R2; NA ¶¶ 12, 24*].
24. Considering the above, the Tribunal should find that as the two arbitration agreements are not identical as they provide for different places of hearings, and the alleged similarities result only from the use of the SCAI model arbitration clause.
25. In conclusion, Ross Pharmaceuticals cannot be joined to the Proceedings, as it are not a party to the Arbitration Agreement. Contrary to RESPONDENTS' allegations, the contracts are neither interrelated nor identical in a way that would constitute a tripartite contractual relationship, extending the Arbitration Agreement to Ross Pharmaceuticals.

3. Forcing Ross Pharmaceuticals to join the Proceedings would endanger the recognition and enforcement of the award

26. An arbitral tribunal has a duty to render an enforceable award [*Alessi* p. 760; *Waincymer* p. 97; *Youssef* p. 72; *BGH Judgement of 3 July 1975*; *KKO 2005:14*; *SCC case 2017/134*]. This means that the tribunal should not do anything of procedural nature that could leave the award vulnerable to a legitimate challenge [*Waincymer* pp. 99–100]. Therefore, in the case at hand, the Tribunal must render an enforceable award.
27. Forcing Ross Pharmaceuticals to join the Proceedings would potentially render the award unenforceable. Pursuant to Art. V(1)(d) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“**the New York Convention**”), “[r]ecognition and enforcement of the award may be refused [...] if [...] [t]he arbitral procedure was not in accordance with the agreement of the parties”. Should a tribunal wrongly join a third party, over which it holds no jurisdiction, to the arbitral proceedings, the final award may be refused recognition under Art. V(1)(d) of the New York Convention [*Born 2014* p. 3569; *Platte* pp. 484–485; *Ten Cate* pp. 133, 146; *Eddie Javor v Fusion-Crete*; *OLAETI & Sofidif v Cogema Polimaster v Rae*].
28. As CLAIMANT has shown above, the Tribunal does not have jurisdiction over Ross Pharmaceuticals, and thus, cannot join it to the Proceedings [*supra* ¶¶ 8–19]. Therefore, should Ross Pharmaceuticals be joined, the Tribunal could not render an enforceable award.
29. Concluding **(I.A)** the Tribunal does not have the jurisdiction to join Ross Pharmaceuticals to the Proceedings for two reasons. First, CLAIMANT has not agreed to the joinder of Ross Pharmaceuticals by agreeing to the Swiss Rules. Second, Ross Pharmaceuticals is not a party to the Arbitration Agreement and cannot be interpreted to be one. Furthermore, the joinder of Ross Pharmaceuticals would seriously threaten the recognition and enforcement of the final award.

B. In any case, it is not in the legitimate interests of the Proceedings to join Ross Pharmaceuticals

30. If the Tribunal does not agree with CLAIMANT on **(I.A)**, and holds that it has jurisdiction to join Ross Pharmaceuticals, CLAIMANT submits that, in any case, the joinder of Ross Pharmaceuticals is not in the legitimate interests of the Proceedings.
31. According to Art. 4(2) of the Swiss Rules, “where a party to pending arbitral proceedings [...] requests that one or more third persons participate in the arbitration, the arbitral tribunal shall decide on such request [...] taking into account all relevant circumstances”. These relevant

circumstances include, *inter alia*, unnecessary costs and delays, issues of confidentiality, and enforceability of the award [*Bärtsch & Petti p. 65; Schramm p. 500*].

32. The joinder of Ross Pharmaceuticals is not in the legitimate interest of the Tribunal, as the joinder would **(1.)** inevitably incur unnecessary additional costs and delays, and **(2.)** the subsequent extension of legal issues would infringe the confidentiality interests of CLAIMANT and Ross Pharmaceuticals. In any case, **(3.)** Ross Pharmaceuticals is objecting to any joinder.

1. The joinder of Ross Pharmaceutical would incur unnecessary costs and delays

33. Pursuant to Art. 15(7) of the Swiss Rules, “[a]ll participants in the arbitral proceedings shall [...] contribute to the efficient conduct of the proceedings and to avoid unnecessary costs and delays”.
34. This requirement to contribute to the efficient conduct of the proceedings extends beyond the parties in the proceedings and binds arbitral tribunals [*Fiebinger & Hauser p. 180; Jermini & Gamba pp. 193–195*]. International arbitration is generally perceived as speedy and efficient [*Born 2014 p. 73; Waincymer p. 21; Fairchild v Richmond; Forsythe v Gibbs*]. Furthermore, pursuant to the official Swiss Chambers’ Arbitration Institution Guidelines for Arbitrators, “the tribunal shall make every effort to contribute to the efficient conduct of the proceedings and avoid unnecessary costs and delays” [*SCAI Guidelines for Arbitrators p. 2*]. Naturally, whenever the duration of proceedings is prolonged and further complexified, their costs rise also [*Born 2014 p. 2569; Brunner p. 451; Wahab p. 481*].
35. The joinder of Ross Pharmaceuticals would extend the scope of the Proceedings to new complex issues regarding virology, requiring expert testimonies irrelevant to the current Proceedings [*Letter by Fasttrack p. 49; Letter by Langweiler p. 48*]. Furthermore, costs and delays resulting from the potential joinder of Ross Pharmaceuticals would be completely unnecessary to resolve the issues at hand, as CLAIMANT will show, the mere threat of a claim is sufficient to constitute a breach of the PCLA [*infra ¶¶ 137–140*]. This extension of issues and advanced testimonies would require more time and resources. Subsequently, the award sought by CLAIMANT would be delayed. Additionally, as these costs and delays would result from solving issues not concerning CLAIMANT, these costs and delays are completely unnecessary for the Proceedings.
36. Furthermore, the Parties have intended to resolve their issues swiftly, as evidenced by their omission of the possibility of mediation from the SCAI model clause, according to which, “the parties may agree at any time to submit the dispute to mediation in accordance with the Swiss Rules of Commercial Mediation of the Swiss Chambers’ Arbitration Institution” [*PCLA ¶ 14.1*]. This emphasises the Parties’ intention to avoid unnecessary additional costs and delays.

37. Therefore, the Tribunal should find that joinder of Ross Pharmaceuticals would incur unnecessary costs and delays to the Proceedings.

2. The requested joinder would infringe the confidentiality interests of CLAIMANT and Ross Pharmaceuticals

38. The joinder of Ross Pharmaceuticals and the subsequent extension of legal issues would infringe the confidentiality interests of CLAIMANT and Ross Pharmaceuticals, as they are direct competitors. Art. 44(1) of the Swiss Rules requires that “the parties undertake to keep confidential [...] all materials submitted by another party in the framework of the arbitral proceedings”.

39. This duty to confidentiality prohibits parties from disclosing or using commercially beneficial information, such as intellectual property knowledge, which is submitted during the proceedings [*Born 2014 p. 2779; Cook & Garcia pp. 230, 247; Smeureanu pp. 27–31*]. Information concerning intellectual property is especially problematic in situations where the other party has an interest towards that information, which it then cannot use [*Cook & Garcia p. 259; Rosenthal 2018 p. 949; Waincymer p. 540; Dolling-Baker v Merrett*].

40. Parties to the PCLA, as well as to the Ross Agreement, have expressly recognised confidentiality interests, agreeing that “each party acknowledges that confidentiality and know-how protection is of paramount importance for the other Party” [*PCLA ¶ 10.1; PO2 ¶ 25*]. This confidential information encompasses “all information, data or know-how, whether technical or non-technical” [*PO2 ¶¶ 25, 30*]. Therefore, the Parties have intended to have an extensive scope to the protection of confidential information.

41. In addition, Ross Pharmaceuticals and CLAIMANT are direct competitors, since Ross Pharmaceuticals has begun developing a vaccine for COVID-19 [*Exh. R4; NA 18; PO2 ¶ 16*]. The joinder would extend the issues in the Proceedings to concern vaccine development [*Letter by Fasttrack p. 49*]. This is problematic for two reasons. First, joining Ross Pharmaceuticals to the Proceedings could require CLAIMANT to disclose crucial information to its direct competitor. Second, Ross Pharmaceuticals could similarly be required to disclose information relating to their shared field of business, which CLAIMANT has not yet discovered. This in turn could limit CLAIMANT’s prospects in the field of vaccine development.

42. Considering the above, the Tribunal should find that the requested joinder would infringe on the confidentiality interests of CLAIMANT and Ross Pharmaceuticals.

3. Ross Pharmaceuticals is objecting to any joinder

43. Pursuant to Art. 4(2) of the Swiss Rules, before deciding whether a third person is joined, an arbitral tribunal must consult “with all of the parties, including the person or persons to be joined”. The arbitral tribunal must consider whether the third person is willing to join the proceedings [*Schramm pp. 499–500*]. If the third party is unwilling to join, it should be considered if ordering them to do so is feasible at all [*Habegger p. 280; Voser p. 349*].
44. Ross Pharmaceuticals has communicated to the Tribunal that it is objecting to any joinder, and does not see any basis for it [*Letter by Sinoussi p. 46*]. Furthermore, there is no contractual, or any other, relationship between CLAIMANT and Ross Pharmaceuticals [*Letter by Langweiler p. 48; Letter by Sinoussi p. 46; PO2 ¶ 13*].
45. In contrast, RESPONDENT NO. 2’s participation in the Proceedings is not at all problematic, as it did not object to the Tribunal’s jurisdiction and was willing to participate [*PO2 ¶ 33*]. Furthermore, all parties concerned wished to include RESPONDENT NO. 2 in the Proceedings [*NA; PO2 ¶ 33*]. Therefore, RESPONDENT NO. 2 effectively became a party to the Arbitration Agreement and thus, the Tribunal’s jurisdiction over them was established. In addition, the participation of RESPONDENT NO. 2 does not affect the scope of the legal questions at hand, which is the exact opposite of what the joinder of Ross Pharmaceuticals would result in, as shown above [*supra ¶ 35*].
46. In light of the above, the Tribunal should not force Ross Pharmaceuticals to join to the Proceedings against its will.

47. Concluding, **(I.)** Ross Pharmaceuticals cannot be joined to the Proceedings. The Tribunal does not have jurisdiction to extend the Arbitration Agreement to cover Ross Pharmaceuticals. Such jurisdiction cannot be established by solely relying on the Parties’ subscription to the Swiss Rules and Ross Pharmaceuticals cannot be interpreted to be a party to the Arbitration Agreement. In any case, Ross Pharmaceuticals should not be joined as it would result in unnecessary costs, delays, and endangerment of the confidentiality interests, all of which the Tribunal has a duty to avoid.

II. The hearing of witnesses and experts should be conducted remotely, if it is not possible or appropriate to conduct the hearings in-person

48. The Tribunal can conduct remote hearings, should it become necessary. The Tribunal has recognised the possibility of conducting the hearing of witnesses and experts on hearing of 3 to 7 May 2021 (“**the Hearing**”) remotely via electronic means [*PO1 ¶ II*]. This is resulting from the

current global pandemic caused by COVID-19, which has led to global travel restrictions and health concerns [*Letter by Sinoussi p. 46; PO2 ¶ 34*]. RESPONDENTS have requested the Hearing to be conducted in-person, alleging that the Arbitration Agreement and the Parties' subscription to the Swiss Rules prohibit remote hearings [*Letter by Fasttrack p. 49*]. Furthermore, they wish to hear expert witnesses concerning Ross Pharmaceuticals' allegations supposing that the joinder of Ross Pharmaceuticals would be granted [*ibid*]. The question then becomes whether the Tribunal can conduct hearings remotely, and on what grounds.

49. CLAIMANT submits that the Hearing can be held remotely, should the Tribunal deem it necessary, as **(A.)** conducting the Hearing remotely is compliant with the Arbitration Agreement and the Swiss Rules. Besides, due to the current circumstances, **(B.)** conducting the Hearing remotely is the most appropriate form of presenting evidence. In any case, **(C.)** the Tribunal should consider not hearing the expert witnesses proposed by RESPONDENTS, as they are not necessary to the Proceedings.

A. Conducting the Hearing remotely is compliant with the Arbitration Agreement and the Swiss Rules

50. Contrary to RESPONDENTS' allegations, **(1.)** the Arbitration Agreement does not exclude the possibility of conducting the Hearing remotely, and **(2.)** the Swiss Rules do not operate on the assumption of in-person hearings. Furthermore, **(3.)** in best arbitral practice, oral hearings are considered to include both in-person and remote hearings.

1. The Arbitration Agreement does not exclude conducting the Hearing remotely

51. Pursuant to Art. 19 of the Danubian Arbitration Law, “[t]he parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings [...] [and] [...] [f]ailing such agreement, the arbitral tribunal may [...] conduct the arbitration in such manner as it considers appropriate”. An agreement on a hearing place does not preclude a tribunal's discretion to decide on conducting hearings remotely [*Nater-Bass & Pfisterer p. 676; Scherer 2020A p. 82; BGE 117 II 346; BGE 119 II 386*]. Any agreement to the contrary must be detailed and stringent for it to be effective [*MAL Digest p. 101; Herrmann p. 43; Holtzmann & Neuhaus p. 584; Jardine Lloyd Thompson v SJO Catlin*]. In summary, the threshold to preclude an arbitral tribunal's discretionary power to decide on the conduct of hearings is high.
52. The Arbitration Agreement provides that “[h]earings 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 ¶ 14.3*]. This means that the Parties have agreed on a potential hearing place, and not

specifically on the conduct or details of the hearings. Furthermore, the Arbitration Agreement does not contain any clause pertaining to oral hearings, remote hearings, or any other part of the conduct of the hearings.

53. Therefore, the Arbitration Agreement cannot be interpreted as excluding a possibility to conduct the Hearing remotely, as there are no detailed and stringent clauses restricting the Tribunal's discretion.

2. The Swiss Rules do not operate on the assumption of in-person hearings

54. Contrary to RESPONDENTS' allegations, the Swiss Rules are not based on the assumption that hearings will be held in-person [*Letter by Fasttrack p. 49*].
55. According to Art. 25(4) of the Swiss Rules, "witnesses and expert witnesses may be heard and examined in the manner set by the arbitral tribunal. The arbitral tribunal may direct that witnesses or expert witnesses be examined through means that do not require their physical presence at the hearing (including by videoconference)". The Swiss Rules make no preference between an in-person or a remote testimony, and the manner in which the witnesses are heard belongs to the discretion of the arbitral tribunal [*Caron & Caplan p. 571; Oetiker p. 270; Poudret & Besson p. 656*].
56. The Tribunal's discretion to determine the conduct of hearings, including remote hearings, has been recognised in most institutional arbitration rules [*AAA/ICDR Art. 20; ICC Arts. 22, 24; LCIA Art. 14.3*]. Furthermore, arbitral institutions have issued guidance notes explicitly recognising the overall compliance and usefulness of remote hearings [*AAA/ICDR Model Order; HKIAC Guidelines for Virtual Hearings; ICC Commission Report; ICSID guidelines; Seoul Protocol*].
57. This discretionary power of an arbitral tribunal must be contrasted with institutional rules which have not allowed remote hearings, such as CIETAC Rules, which have only recognised international remote hearings with special guidelines, which are in force only for the duration of the current pandemic [*CIETAC Art. 35; CIETAC Guidelines*].
58. The Tribunal should find that the Swiss Rules, as most institutional arbitration rules, contain no prohibition concerning the conducting of remote hearings, but rather expressly provide for the option to conduct hearings remotely. Therefore, the Swiss Rules do not operate on the assumption of in-person hearings.

3. In best arbitral practices, oral hearings are considered to include both in-person and remote hearings

59. Contrary to RESPONDENTS' allegations, the term "oral hearing" includes both in-person and remote hearings [*Letter by Fasttrack p.49*]. The concept of an oral hearing has multiple meanings throughout different institutional rules, and it is often left without specific definition [*Scherer 2020.A p. 71; Stein p. 167*].
60. To clarify the lack of express rules on remote hearings, CLAIMANT submits that the Tribunal adopts the IBA Rules on the Taking of Evidence ("IBA Rules") as it represents the best arbitral practices [*Emanuele et al. p. 64; Kantor p. 329; Müller p. 85*]. The IBA Rules consider oral hearings to include both in-person and remote hearings, provided that an arbitral tribunal allows the use of remote hearings [*Commentary on IBA Rules p. 17; IBA Rules pp. 4, 17*]. As stated above, under the Swiss Rules, the tribunal has broad powers to decide on procedural matters, including how the hearings should be conducted [*supra* ¶ 55]. As oral hearings are considered to include both in-person and remote hearings, the Tribunal should interpret "hearings" as including both in-person and remote hearings [*PCLA* ¶ 14.3].
61. Concluding **(II.A)**, the Tribunal can conduct the Hearing remotely, should it become necessary, as the Parties have not excluded the possibility of holding hearings remotely, and the Swiss Rules do not operate on the assumption of in-person hearings. Furthermore, conducting the hearing remotely is compliant with the best arbitral practices.

B. Due to the current circumstances, conducting the Hearing remotely is the most appropriate form of presenting evidence

62. The Tribunal should conduct the Hearing remotely as it ensures the presenting of evidence in an appropriate manner, despite the current circumstances. Additionally, not conducting the Hearing remotely would effectively lead to a postponement to the Proceedings of at least four months, which would be unsustainable [*PO2* ¶ 42a]. Therefore, RESPONDENTS' objection to remote hearings would mean a postponement to the Proceedings.
63. The Tribunal should find that **(1.)** the current situation is an insufficient reason for postponing the Hearing, and **(2.)** remote hearings provide for effective presenting of evidence, **(3.)** without threatening the recognition and enforcement of the final award.

1. The current situation is an insufficient reason for postponing the Hearing

64. The current situation is an insufficient reason for postponing the Hearing, as the current pandemic is not an unforeseeable obstacle.
65. Postponements to arbitral proceedings should be granted reluctantly, and only when there are unforeseeable obstacles which effectively make conducting hearings impossible [*Lazopoulos p. 609; 4P_208/2004; Capic v Ford; Versace v Montè*]. Furthermore, arbitral proceedings should not be substantially delayed if there are alternative measures for the parties to conduct the proceedings without postponement [*Liberty Securities v Fetcho; Sungard Energy v Gas Transmission; Tetra Pak Marketing v Musashi*].
66. In a recent ruling, the Supreme Court of Austria held that COVID-19 pandemic, or travel restrictions resulting from it, are not a valid reason to postpone proceedings, where conducting remote hearings would have been appropriate [*OGH 18 ONc 3/20s*]. This ruling is significant, as Austria, similarly to Danubia, has adopted the Model Law [*Liebscher p. 523; PO1 ¶ III.3*]. Furthermore, at the time of submission, this case is the only decision by a national supreme court specifically addressing remote hearings in international arbitration [*Scherer 2020B ¶ 1*].
67. In the current case, the reason for the effective postponement of the Proceedings is implied to be the COVID-19 pandemic [*PO2 ¶ 34*]. As shown above, the current pandemic is not recognised as an unforeseeable obstacle or a valid reason for postponing proceedings, especially in cases where there is a possibility for a remote hearing [*supra ¶¶ 65–66*]. Additionally, such a postponement should not be allowed, as it would constitute a significant delay to the Proceedings of at least four months, which would be against the intention of the parties to conduct the Proceedings swiftly [*supra ¶ 36*]. Furthermore, possible future travel restrictions could further delay the Proceedings, if the Hearing is not conducted remotely [*PO2 ¶ 42a*].
68. As stated above, the COVID-19 pandemic is not an unforeseeable obstacle, rather a new normal, where it is still possible to hold planned hearings remotely [*PO2 ¶ 34*]. Therefore, the current situation is an insufficient reason for postponing the Hearing.

2. Remote hearings provide for effective presenting of evidence

69. RESPONDENTS are objecting to remote hearings on the grounds that it would make the presentation of evidence less effective [*Letter by Fasttrack p. 49; PO2 ¶ 38*]. This allegation is baseless as conducting the Hearing remotely provides for effective presenting of evidence, without endangering the Parties' right to be heard.

70. Art. 15(1) of the Swiss Rules provides that “the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that it ensures [...] the parties [...] right to be heard.” This duty extends to an arbitral tribunal, which must take necessary measures to fulfil that duty [*SCAI Guidelines for Arbitrators p. 2*].
71. Remote hearings have been recognised as an effective tool of an arbitral tribunal in conducting witness hearings [*Scherer 2020A p. 65; Myers v Canada; Frankfurt Airport Services v Philippines*]. When parties in the proceedings have sufficient technological means, conducting hearings remotely does not endanger the effective presentation and examination of evidence, or protection of data related thereto [*Aghababayan et al.; Bajpai et al.; Rosenthal 2019 p. 827; Pack All Manufacturing v Triad Plastics; Polanski v Condé Nast Publications; Wright v Wasilewski*]. Similarly, in situations where remote hearings have not been possible, proceedings have had to be adjourned, effectively resulting in justice being delayed to a degree where justice is denied [*Fan ¶ 3; Motorola Solutions v Hytera Communications*].
72. In the current case, the Parties have sufficient technological means to conduct the Hearing remotely [PO2 ¶¶ 35, 38]. Furthermore, RESPONDENTS have not raised any significant issues which would endanger the effective presenting of evidence. Therefore, conducting the Hearing remotely provides for effective presentation and examination of evidence, without endangering the Parties’ right to be heard.

3. Conducting the Hearing remotely would not threaten the recognition and enforceability of the final award

73. Remote hearings would not threaten the recognition and enforceability of the final award, as conducting hearings remotely does not breach the Parties’ due process rights. Pursuant to Art. V(1)(b) of the New York Convention, “[r]ecognition and enforcement of the award may be refused [...] only if [...] [a] party [...] was otherwise unable to present his case”. This provision applies only in situations where there has been a severe violation of procedural due process [*van den Berg p. 297; China Machine v Jaguar Energy; Reynolds v Lomas; X K.K. v American International Underwriters*].
74. The Austrian Supreme Court has ruled that remote hearings themselves do not breach the parties’ due process rights [OGH 18 ONc 3/20s]. The court held that an arbitral tribunal must ensure that the parties are fairly heard, notwithstanding the form of the hearing [*ibid*]. Furthermore, in other Model Law jurisdictions, courts have found that remote hearings themselves do not breach the parties’ due process rights [AUS: *Haiye case*; HK: *Re Chow Kam Fai*; SG: *Sandz Solutions v SWA*; *Siraj v Ting*]. Awards have been enforceable even when hearing of witnesses has been restricted [4A_335/2012; *Alma Services v Bouygues Bâtiment*; *FC A v Trabzonspor Kulubu Derneği*; *Mahajan v HCL Technologies*].

75. As stated above, contrary to RESPONDENTS' allegation, conducting the Hearing remotely does not in itself risk the infringement of due process rights [PO2 ¶ 38]. Therefore, conducting the Hearing remotely does not threaten the enforceability of the final award under Art. V(1)(b) of the New York Convention.
76. In addition, conducting the Hearing remotely does not risk the recognition and enforcement of the award, as the procedure is in accordance with the Parties' Arbitration Agreement. Pursuant to Art. V(1)(d) of the New York Convention, "[r]ecognition and enforcement of the award may be refused [...] only if [...] the arbitral procedure was not in accordance with the agreement of the parties". As CLAIMANT has shown, conducting the Hearing remotely is in line with the Arbitration Agreement [*supra* ¶¶ 50–62]. Therefore, the award cannot be annulled on the grounds of Art. V(1)(d) of the New York Convention.
77. Therefore, conducting the Hearing remotely would not threaten the recognition and enforceability of the award, should the Tribunal deem it necessary to hold the Hearing remotely.
78. Concluding **(II.B)**, if the Tribunal considers holding in-person hearings inappropriate in the current situation, conducting the Hearing remotely is the most appropriate form of presenting evidence. Furthermore, as the current pandemic is an insufficient reason to postpone the Hearing, remote hearings provide for effective presenting of evidence, without threatening the recognition and enforceability of the final award.

C. In any case, the Tribunal should consider not hearing the expert witnesses proposed by RESPONDENTS as they are not necessary to the Proceedings

79. Pursuant to Art. 24(2) of the Swiss Rules, "[t]he arbitral tribunal shall determine the admissibility, relevance, materiality, and weight of the evidence". This allows an arbitral tribunal to dismiss irrelevant or unnecessary evidence [*Kröll et al. p. 562; Flughafen Zürich case; OAO Northern Shipping v Remolcadores de marin; OLG 10 Sch 8/01*]. As a default position, the arbitral tribunal can refuse to hear witnesses which it deems not relevant for the issues [*A_335/2012; A_486/2014; 4A_497/2015*]. The tribunal's refusal to a request of a hearing does not constitute a violation to the right to be heard in cases where the tribunal does not consider the proposed witnesses to be material [*Pfisterer p. 687; A's Co v Dagger; OLG 10 Sch 8/01; Soh Beng Tee v Fairmount*].
80. In the case at hand, RESPONDENTS request an in-person hearing of expert witnesses "to prove that the exclusive license to Ross Pharmaceuticals does not extend to the use of GorAdCam viral vector for respiratory diseases" [*Letter by Fasttrack p. 49*]. The hearing of expert witnesses is unnecessary, as the expert witnesses concern issues between RESPONDENT NO. 2 and Ross

Pharmaceuticals [*ibid*]. As CLAIMANT has shown, Ross Pharmaceuticals cannot be joined to the Proceedings [*supra* ¶¶ 5–29].

81. Therefore, the Tribunal should find that hearing the expert witnesses proposed by RESPONDENTS is unnecessary, as the expert witnesses do not concern the legal issues between the Parties to these Proceedings.

82. Concluding **(II.)**, the Hearing should be conducted remotely, if it is not possible or appropriate to hold it in-person. Not only is conducting the Hearing remotely compliant with the Arbitration Agreement and the Swiss Rules, but it is also the most appropriate form of presenting evidence. In any case, the Tribunal should consider not hearing the expert witnesses proposed by RESPONDENTS, as they are not necessary to the Proceedings.

ARGUMENTS ON THE SUBSTANCE

III. The CISG applies to the Purchase, Collaboration and License Agreement

83. The United Nations Convention on Contracts for the International Sale of Goods (“**CISG**” or “**Convention**”) applies to the PCLA.
84. CLAIMANT and RESPONDENT NO. 1 concluded the PCLA on 1 January 2019 [*PCLA preamble*]. In the PCLA, RESPONDENT NO. 1 agreed to sell GorAdCam to CLAIMANT for the development of vaccines against respiratory infectious diseases, such as COVID-19 [*PCLA* ¶¶ 2, 9.2; *PO2* ¶ 23]. For this purpose, CLAIMANT received a non-exclusive license to use GorAdCam [*PCLA* ¶ 5.2]. RESPONDENTS have alleged that the PCLA is merely “a license agreement as the transfer of know-how is by far the most important obligation” of RESPONDENT NO. 1 [*ANA* ¶ 19]. This interpretation of the PCLA would exclude it from the Convention’s sphere of application pursuant to Art. 3(2) CISG.
85. These allegations made by RESPONDENTS are baseless, as CLAIMANT will show, that the CISG applies to the PCLA, as **(A.)** it is an international contract of sales pursuant to Art. 1(1)(a) CISG, and instead of the transfer of know-how, **(B.)** the sale of goods is the preponderant part of RESPONDENT NO. 1’s obligations. **(C.)** Alternatively, the Convention should apply only to the sale of goods obligations in the PCLA.

A. The PCLA is an international contract of sale of goods pursuant to Art. 1(1)(a) CISG

86. CLAIMANT and RESPONDENT NO. 1 have entered a sale of goods contract in accordance with the Convention. Pursuant to Art. 1(1)(a) CISG, “[t]he Convention applies to contracts of sale of goods between parties whose places of business are in different States when the States are Contracting States”. In this case, CLAIMANT is based in Mediterraneo and RESPONDENT NO. 1 is based in Equatoriana, both of which are contracting states to the Convention [PO1 ¶ III.3].
87. The PCLA is a contract of sales, as **(1.)** it consists of sale of goods obligations, and **(2.)** the PCLA Parties have not excluded the Convention pursuant to Art. 6 CISG.

1. The PCLA consists of sale of goods obligations

88. The PCLA consists of sale of goods obligations, as agreed by the PCLA Parties [PCLA ¶¶ 9.2, 16.1].
89. The definition of “sale of goods” is derived from Arts. 30 and 53 CISG, which define both the seller’s and the buyer’s obligations in a contract of sale of goods [Mistelis p. 28; Schlechtriem 2005 p. 26; Winship p. 21; Al Palazozo v Bernardaud di Limoges; Aluminum granules case; Cisterns and accessories case]. In addition, contracts of sale of goods, which also include other obligations, are by no means uncommon in terms of the CISG [Eiselen p. 105; Mistelis & Raymond p. 54; Schlechtriem 2005 p. 58; Blood infusion devices case; Floating center case; Movable room units case].
90. The PCLA consists of sale of goods obligations, as **(i.)** GorAdCam and Base Materials are goods, and **(ii.)** RESPONDENT NO. 1 delivers these goods to CLAIMANT, as agreed in the PCLA.

i. GorAdCam viral vectors, HEK-294 cells and cell culture medium are goods

91. GorAdCam and Base Materials are goods in terms of Art. 1(1) CISG.
92. The CISG does not contain an express definition of the term “goods” [Secretariat Digest of CISG 2012 pp. 6–7; Honnold p. 56]. CISG scholars consider goods to be tangible and deliverable objects, which can form the subject matter of commercial sales contracts [Lookofsky 2000 p. 36, Mistelis p. 31; Vujinović p. 532]. Furthermore, this view has also been confirmed in case law [Cisterns and accessories case; Genpharm v Pliva-Lachema; Market study case].
93. GorAdCam and Base Materials are tangible objects, which can be traded [PCLA ¶ 16.1; Exh. C6, R1]. Therefore, they fall within the definition of goods in accordance with Art. 1(1) CISG.

ii. RESPONDENT NO. 1 delivers these goods to CLAIMANT as agreed in the PCLA

94. RESPONDENT NO. 1 delivers GorAdCam and Base Materials to CLAIMANT as agreed in the PCLA [PCLA ¶¶ 9.2, 16.1].
95. Pursuant to Art. 30 CISG, “[t]he seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention”, and according to Art. 53 CISG, “[t]he buyer must pay the price for the goods and take delivery of them as required by the contract and this Convention”. Additionally, for a contract to be considered a sale of goods contract under Art. 1(1) CISG, there needs to be a delivery of goods [Möls p. 821; Piltz p. 396; Widmer Lüchinger p. 515].
96. In this case, RESPONDENT NO. 1 delivers CLAIMANT GorAdCam and Base Materials for a price agreed in the PCLA [PCLA ¶¶ 9.2, 16.1]. RESPONDENT NO. 1 has already delivered GorAdCam, and it is obliged to deliver Base Materials to CLAIMANT, should the vaccine be commercialised [Exh. R1; PCLA ¶¶ 3.1, 9.2, 16.1].

2. CLAIMANT and RESPONDENT NO. 1 have not excluded the application of the CISG

97. The PCLA Parties have not excluded the application of the CISG, and therefore, the PCLA falls within the scope of application of the Convention.
98. Pursuant to Art. 6 CISG, “[t]he parties may exclude the application of this Convention”. In order to exclude the application of the Convention, the parties must mutually agree to the exclusion, and this exclusion should be expressly stated in the contract [AC Opinion no. 16 ¶ 3; Mistelis p. 106; Schwenger & Hachem pp. 105–106; Ceramique Culinaire v Musgrave; Corn case; Olivaylle v Flottweg].
99. The PCLA does not contain any clause expressly excluding the CISG [PCLA]. Therefore, the Parties have not excluded the application of the Convention.
100. Concluding **(III.A)**, the PCLA is a contract of sales between two parties situated in different contracting states. The PCLA governs the sale of GorAdCam and Base Materials, which fall within the definition of “goods”. Furthermore, the PCLA Parties have not excluded the Convention pursuant to Art. 6 CISG. Therefore, the PCLA is in the scope of the Convention.

B. The sale of goods is the preponderant part of RESPONDENT NO. 1's obligations in the PCLA

101. Contrary to RESPONDENTS' allegations, the preponderant part of the PCLA is the sale of goods, instead of the transfer of know-how [*ANA* ¶ 19]. Therefore, the PCLA is not excluded from the scope of application of the Convention pursuant to Art. 3(2) CISG.
102. According to Art. 3(2) CISG, the "Convention does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services". When there is a single contract between the parties, the preponderant part of the seller's obligations is defined primarily using the economic value criterion, or should that fail, using the essential criterion [*AC Opinion no. 4* ¶ 9; *Mistelis & Raymond p. 58*; *Schlechtriem 2005 pp. 58–59*].
103. The PCLA Parties have concluded a single contract, which governs all obligations related thereto [*PCLA* ¶ 15.3]. In this case, the furnisher of the goods is RESPONDENT NO. 1, as it delivers GorAdCam and Base Materials to CLAIMANT [*supra* ¶¶ 94–96].
104. The sale of goods is the preponderant part of RESPONDENT NO. 1's obligations in the PCLA. In this case, **(1.)** it is impossible to determine the preponderant part of the seller's obligations using speculative economic values, however, as CLAIMANT will show, **(2.)** the sale of goods is the most essential part of RESPONDENT NO. 1's obligations in the PCLA. In any case, **(3.)** should the Production Option be included in the evaluation of the PCLA, the PCLA would still be a contract of sales pursuant to Art. 3(1) CISG.

1. It is impossible to determine the preponderant part of the seller's obligations using speculative economic values

105. In this case, it is impossible to use the economic value criterion, because the pricing structure of the PCLA is dynamic and heavily reliant on uncertain future events [*PCLA* ¶¶ 9, 16].
106. According to CISG Advisory Council, the economic value criterion should not be used when it is impossible or inappropriate to determine the economic values of obligations at the time of contracting [*AC Opinion no. 4* ¶¶ 3.3, 9]. According to the economic value criterion, the preponderant part of the seller's obligations is the obligation which exceeds significantly over 50 % of the entire contract's value [*AC Opinion no. 4* ¶ 3.4; *Hascher pp. 222–223*; *Mistelis & Raymond p. 59*; *Schwenzer & Hachem pp. 69–71*; *Hotel materials case*; *Saltwater isolation tank case*; *Warehouse case*].
107. The only economic value of the PCLA that was defined at time of contracting, is the upfront payment [*PCLA* ¶ 9.2]. As all the other payments rely on the success of vaccine development, and

subsequent commercialisation of a developed vaccine, it is impossible to accurately and objectively estimate the economic values of all these obligations at the time of contracting [PCLA ¶¶ 9, 16].

108. Therefore, in this case, it is impossible to determine the preponderant part of the obligations using the economic value criterion, and thus, the essential criterion should be used.

2. The sale of goods is the most essential part of RESPONDENT NO. 1's obligations

109. As CLAIMANT will show, the preponderant part of RESPONDENT NO. 1's obligations is the sale of goods, as it is the most essential obligation of the seller in the PCLA.

110. According to the CISG Advisory Council, the essential criterion defines the preponderant part of obligations by an overall assessment based on several factors: the intent of the parties; the denomination and entire content of the contract; the structure of the price; and the weight given by the parties to the different obligations under the contract [AC *Opinion no. 4* ¶¶ 3.4, 8]. Furthermore, when determining the most essential obligation, a tribunal should give the most weight to the intent of the parties [Brunner & Feit ¶ 8; Mistelis & Raymond p. 59; Schlechtriem 2005 pp. 60–61; *Cylinder case*; *Machines case*].

111. The sale of goods is the most essential part of RESPONDENT NO. 1's obligations, as **(i.)** the PCLA parties intended to conclude a contract of sales, and **(ii.)** the PCLA's pricing structure indicates the preponderance of the sale of goods.

i. CLAIMANT and RESPONDENT NO. 1 intended to conclude a contract of sales

112. The PCLA Parties intended to conclude a contract of sales, as illustrated by the contents of the PCLA. According to Art. 8(1) CISG, “[s]tatements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was”. The extent to which the parties have intended to be bound, should be determined by examining the contract's wording [AC *Opinion no. 4* ¶¶ 3.4, 8; *Schmidt-Kessel* pp. 150–151; *Zuppi* p. 151; *Cowbides case*; *Yarn case*].

113. In the PCLA, RESPONDENT NO. 1 is defined as the seller of Base Materials [PCLA's *recitals*]. It was RESPONDENT NO. 1 who insisted on the addition of the purchase obligation to the PCLA [Exh. R2]. RESPONDENT NO. 1's intention behind the addition of the purchase obligation was to induce CLAIMANT to request RESPONDENT NO. 1 to produce the vaccine “instead of merely buying the base materials and then producing the vaccine themselves” [Exh. R2 ¶ 11; PO2]. In contrast, CLAIMANT's intent was primarily to acquire GorAdCam, and secondarily, to

purchase the Base Materials, which both are necessary for vaccine development [*Exh. R2* ¶ 13; *NA* ¶ 15].

114. The extent to which the PCLA Parties have intended to become legally bound, is limited to the purchase obligation. Therefore, the PCLA Parties' common intent was to conclude a contract of sales.

ii. The PCLA's pricing structure indicates the essentiality of the sale of goods

115. The PCLA's pricing structure indicates the preponderance of the sale of goods, since the sale of goods would accumulate the most sales revenue to RESPONDENT NO. 1. The pricing structure is a relevant factor in determining which of the seller's obligations is the most essential [*AC Opinion no. 4* ¶ 3.4].

116. The only guaranteed payment was the upfront payment, as CLAIMANT could not begin its development work without obtaining the first batch of GorAdCam [*PCLA* ¶ 9.2]. The milestone payments are conditional, as they will be due only if predetermined development milestones, set in the PCLA, are reached [*PCLA* ¶ 9.4]. Should the development work fail, the conditional purchase obligation and royalty scheme would have no value for RESPONDENT NO. 1. Therefore, the only guaranteed payment during the development phase is related to the sale of goods.

117. Even in the case of successful vaccine development, the sale of goods is still the preponderant part of RESPONDENT NO 1's obligations, regardless the amount of Base Materials CLAIMANT would purchase. Base Materials have a fixed price of EUR 2,000,000 for a batch [*PCLA* ¶ 16.1]. The royalty payments from the net sales of vaccines produced from one batch of Base Materials would amount to anything between EUR 630,000 to EUR 1,500,000 [*Appendix 1; PCLA* ¶¶ 9.5, 16.3]. In any case, due to the pricing structure, the sale of Base Materials is more valuable to RESPONDENT NO. 1 than the royalty scheme [*Appendix 1*].

118. As shown above, the sale of goods would accumulate the most sales to RESPONDENT NO. 1. Therefore, the PCLA's pricing structure indicates the essentiality of the sale of goods.

3. Even if the Production Option is evaluated, the PCLA would be a contract of sales pursuant to Art. 3(1) CISG

119. Should the Tribunal hold that the entire content of the PCLA, including the Production Option, must be evaluated, the PCLA would still fall into the Convention's scope of application, as CLAIMANT would not supply a substantial part of the materials necessary for vaccine production. When a contract governs a complex transaction, obligations to manufacture or produce are examined under Art. 3(1) CISG, and all other obligations are examined under Art. 3(2) CISG [*AC*

Opinion no. 4 ¶¶ 1.2, 4; Brushes and brooms case; Sliding doors case; Waste recycling plant case; Window production plant case].

120. Pursuant to Art. 3(1) CISG, “[c]ontracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production”. Contracts including manufacturing or production services are contracts of sales, if the party ordering the production does not provide a substantial part of the materials necessary for the production [*AC Opinion no. 4 ¶¶ 1.1, 2; Mistelis & Raymond p. 55; Schwenzler & Hachem p. 61*]. The substantial part of materials necessary for production is determined by the economic value criterion using the buyer's purchase price of the materials at time of the contract's conclusion [*AC Opinion no. 4 ¶ 2.6; Brunner & Feit ¶ 3; Schroeter p. 75; Windmill drives case*].
121. The materials necessary for the vaccine production are Base Materials and GorAdCam [*PO 2 ¶ 4*]. As shown above, RESPONDENT NO. 1 will supply the Base Materials for a fixed price [*supra ¶ 117*]. The purchased GorAdCam will be used in the vaccine production [*PCLA ¶ 16.1*]. The amount of GorAdCam already delivered is enough to produce vaccines for a period of ten years [*PO 2 ¶ 4*]. This is based on RESPONDENT NO. 1's maximum annual production capacity [*ibid*]. Therefore, the value of GorAdCam, that CLAIMANT is required to provide for the vaccine production, is EUR 12,500 per each batch of Base Materials supplied by RESPONDENT NO. 1. The total value of materials necessary for the production of one batch of vaccines amounts to EUR 2,012,500 at the time of contract's conclusion.
122. The value of CLAIMANT's contribution would be approximately 0.6 % of the total economic value of all the materials necessary for vaccine production. Therefore, even if the Production Option is evaluated, the PCLA would be a contract of sales pursuant to Art. 3(1) CISG, as CLAIMANT would not supply the substantial part of the materials necessary for the vaccine production.
123. Therefore, should the production option be evaluated, the PCLA would still be a contract of sale of goods.
124. Concluding **(III.B)**, contrary to RESPONDENTS' allegations, the sale of goods is the preponderant part of RESPONDENT NO. 1's obligations. Therefore, the applicability of the Convention is not excluded by Art. 3(2) CISG. This is further emphasised if the Production Option is also evaluated, as in that case, the PCLA would still be a contract of sales pursuant to Art. 3(1) CISG.

C. Alternatively, the CISG should apply at least to the PCLA’s sale of goods obligations as the PCLA Parties intended to conclude a contract of sale of goods

125. If the Tribunal disagrees on **(III.B)**, CLAIMANT submits that the CISG should apply at least to the sale of goods obligations in the PCLA, as it was the intent of the PCLA Parties to conclude a contract of sales [*supra* ¶¶ 112–114].
126. The CISG does not prevent an arbitral tribunal from examining sale of goods obligations separate from other obligations, as this would promote international trade in accordance with the Convention’s general principles, *inter alia*, respecting and upholding party intent [*Ferrari pp. 62–63; Honnold p. 61; Mistelis & Raymond p. 60; Schlechtriem 2005 p. 140; Schwenger pp. 9–12*]. Furthermore, it has been held in case law that in situations where different contractual obligations could have formed separate contracts, an arbitral tribunal may examine the sale of goods obligations under the Convention [*Alain Veyron v Ambrosio; Lawn mower engines case*].
127. As demonstrated by the Ross Agreement, collaboration and licensing obligations can form an independent contract [*Ross Agreement*]. CLAIMANT has shown that the sale of GorAdCam and Base Materials constitute a sale of goods [*supra* ¶¶ 88–96]. Furthermore, the PCLA Parties’ common intention was to conclude a contract of sales [*supra* ¶¶ 112–114]. Therefore, the Tribunal can examine the sale of goods obligations under the CISG, as collaboration and licensing obligations could have formed a separate contract.
128. Excluding the entire PCLA from the scope of the CISG would be too narrow of an interpretation of “sales of goods”, and against the very spirit of the Convention. Furthermore, had the PCLA Parties intended to exclude the Convention’s application, it would have been expressly stated in the PCLA [*supra* ¶¶ 97–100]. Therefore, the CISG should apply at least to the sale of goods obligations in the PCLA.

129. Concluding **(III.)**, contrary to RESPONDENTS’ allegations, the PCLA falls within the scope of the CISG as it is a contract of sale of goods. The PCLA cannot be excluded from the scope of the Convention, as the sale of goods is the preponderant part of RESPONDENT NO. 1’s obligations, even if the PCLA’s Production Option is exercised. Alternatively, the CISG should apply at least to the sale of goods obligations of the PCLA.

IV. RESPONDENT NO. 1 has breached the PCLA pursuant to Art. 42 CISG

130. RESPONDENT NO. 1 has breached Art. 42 CISG by delivering GorAdCam that were not free from third-party rights or claims based on intellectual property, breaching its contractual obligations under the PCLA.
131. Pursuant to Art. 42 CISG, “[t]he seller must deliver goods which are free from any right or claim of a third party based on intellectual property, of which at the time of the conclusion of the contract the seller knew or could not have been unaware, provided that the right or claim is based on intellectual property”. While the definition of “right or claim” is not expressly defined in this provision, the Commentary on the Draft Convention on Contracts for the International Sale of Goods prepared by the Secretariat (“**Secretariat Commentary**”) gives it a broad definition [*Secretariat Commentary pp. 35–36*]. The purpose of Art. 42 CISG is to obligate the seller to safeguard the buyer from obtaining goods which they cannot use, or in other words to ensure that the buyer is not purchasing a lawsuit [*Beline p. 9; Honnold p. 288; Automobile case*].
132. CLAIMANT submits that RESPONDENT NO. 1 has breached the PCLA pursuant to Art. 42 CISG, as **(A.)** the delivered goods are restricted by a potential third-party right or claim based on intellectual property, and **(B.)** RESPONDENT NO. 1 was aware or could not have been unaware of the potential third-party right or claim, and cannot exclude its liability.

A. The delivered goods are restricted by a potential third-party right or claim based on intellectual property

133. Delivered GorAdCam are non-conforming goods due to a potential third-party right or claim based on intellectual property.
134. Pursuant to Art. 42 CISG, the seller is liable if the goods are restricted by third-party rights based on IPR [*Lookofsky 2000 pp. 110–111; Schwenzler p. 700; Footwear Italystyle case*]. The Supreme Court of Austria has recognised this rule in the *CD media case*, where the Court held that “the seller was liable if an attempt is made to restrict the buyer in the use of the goods. As, in general, unjustified third-party claims may already trigger the seller's liability, the same legal consequence had to be effected *a fortiori* in cases where an industrial property right actually existed” [*CD media case*].
135. In the current case, Ross Pharmaceuticals has an exclusive license to use GorAdCam for the development of vaccines for malaria and related infectious diseases [*Ross Agreement* ¶ 5.2]. There is an ongoing disagreement between Ross Pharmaceuticals and RESPONDENT NO. 2 concerning the scope of Ross Pharmaceuticals’ license and its research into vaccines against COVID-19 [*Exh. C4; PO2* ¶ 16].

136. There is a potential third-party right or claim based on IPR by Ross Pharmaceuticals, due to the rights granted under the Ross Agreement [*Exh. C4, C7, R4; Ross Agreement* ¶ 5.2]. This potential third-party right on GorAdCam provokes Art. 42 CISG, because the application of this provision does not require the claim to be **(1.)** formally raised or **(2.)** valid.

1. The application of Art. 42 CISG does not require the claim to be formally raised

137. A claim does not need to be raised for Art. 42 CISG to apply, as a buyer cannot be expected to wait until a third-party has formally raised the claim, as the mere existence of a potential right threatens the buyer [*Honnold p. 296; Kiraz pp. 75, 85; Saidov pp. 214–215*].

138. In cases where a third-party right or claim is potential, a mere threat of a claim is sufficient to provoke Art. 42 CISG [*Lookofsky 2012 p. 121; Saidov p. 214; Zheng p. 408*]. The reason behind this is that a mere threat of a claim can cause harm to a buyer [*Secretariat Commentary p. 36; Enderlein p. 183; Rauda & Etier* ¶ 45; *Schwerba p. 450; Gencab of Canada v Murray-Jensen*]. This potential claim can be expensive, time-consuming, and prevent the buyer from using the goods [*Secretariat commentary p. 36*]. In the context of Art. 42 CISG, claims arising from third-party IPR can be described as the ‘Sword of Damocles’, since they are potential, yet unrealised threats to the buyer [*Kiraz pp. 88–89; Rauda & Etier* ¶ 44; *VanDuzer* ¶ 15].

139. In the current case, CLAIMANT’s vaccine development relies on the use of GorAdCam [*Exh. C5*]. Ross Pharmaceuticals is known for vigorously defending its IP rights through a team of dedicated lawyers [*Exh. C5; PO2* ¶ 15]. CLAIMANT cannot be expected to continue its vaccine development, knowing that Ross Pharmaceuticals could possibly raise a claim against them. In this sense, Ross Pharmaceuticals’ potential claim is like the ‘Sword of Damocles’ as it hangs over CLAIMANT’s head.

140. Therefore, a potential third party right, such as Ross Pharmaceuticals’ alleged one, does not need to be formally raised for Art. 42 CISG to apply.

2. A claim does not need to be valid to trigger Art. 42 CISG

141. A third-party right or claim does not need to be valid to trigger Art. 42 CISG.

142. According to the Secretariat Commentary, “the seller has also breached his obligation if a third party makes a claim in respect of the goods [...] even though the seller can assert that the third-party claim is not valid” [*Secretariat Commentary p. 36*]. Furthermore, CISG scholars and case law recognise that infringing third-party rights fall in the seller’s sphere of risk regardless of their nature [*Rauda & Etier* ¶ 53; *Saidov p. 214, 216; VanDuzer* ¶ 15; *Zheng p. 408; CD media case*].

143. In the current case, there is an ongoing disagreement between RESPONDENT NO. 2 and Ross Pharmaceuticals on the scope of the license granted in the Ross Agreement for the use of GorAdCam. [Exh. C7, R4]. Therefore, regardless of the outcome of this disagreement, or validity of Ross Pharmaceuticals' claim, Art. 42 CISG is triggered.

144. The Tribunal should find that, in order to provoke Art. 42 CISG, **(i.)** even frivolous or obviously unjustified claims can provoke this provision. And in any case, **(ii.)** the potential third-party claim would not be completely frivolous.

i. Even frivolous or obviously unjustified claims can provoke Art. 42 CISG

145. Even frivolous or obviously unjustified claims can provoke Art. 42 CISG. The Convention makes no distinction on the nature, relevance, or validity of the third-party right or claim [*Secretariat Commentary p. 36*].

146. Infringing third-party rights, regardless of their nature, fall into the responsibility of the seller, as the buyer can reasonably expect to receive undisturbed possession and ownership of the goods [*Kröll p. 640; Lookofsky 2012 p. 122; Rauda & Etier ¶ 53*]. The Supreme Court of Austria has held, in accordance with several CISG scholars, that Art. 42 CISG can be provoked at any rate, if an infringing third-party right exists, even when its being unrightfully claimed, as third-party rights fall to the seller's sphere of risk [*Kröll p. 640; Saidov p. 214; Zheng p. 408; CD media case*]. Furthermore, even frivolous, or obviously unjustified claims can provoke the provision, as they could hamper buyer's right to use the goods for a non-defined period of time [*Enderlein p. 180; Kirazı pp. 76–77, 85, 87; Rauda & Etier ¶ 52; VanDuzer ¶ 14; Zheng p. 408*]. Distinguishing claims by their nature would be unreliable, as determining their nature would be arbitrary [*Janal pp. 208–209*].

147. Ross Pharmaceuticals has alleged that its exclusive license to use GorAdCam extends to “infectious respiratory diseases” [Exh. R4]. This interpretation is in contradiction with CLAIMANT's undisturbed possession and use of GorAdCam [Exh. C5; *Ross Agreement ¶ 5.2*]. Therefore, any potential claim by Ross Pharmaceuticals, would fall into the scope of Art. 42 CISG, as the nature of a claim is irrelevant.

ii. In any case, the potential third-party claim would not be completely frivolous

148. Should the Tribunal disagree with CLAIMANT on **(IV.A.2.i)**, and hold that frivolous claims cannot provoke Art. 42 CISG, the Tribunal should find that the potential third-party claim is not completely frivolous in this case.

149. A claim is considered frivolous when it lacks legal justification and a certain degree of seriousness [*Kiraz pp. 76–77; Kröll p. 640*]. Generally, claims which can be anticipated by the seller at the time of contract’s conclusion, cannot be viewed as completely frivolous [*VanDuzer ¶ 16*].
150. In the case at hand, the potential claim by Ross Pharmaceuticals results from ambiguous wording in the Ross Agreement concerning the license granted [*Exh. R4; Ross Agreement ¶ 5.2*]. Ross Pharmaceuticals alleges that they have an exclusive license to use GorAdCam in the field of respiratory diseases [*Exh. R4*]. They have communicated this allegation to RESPONDENT NO. 2 [*Exh. C4; Ross Agreement ¶ 5.2*].
151. The Tribunal should find that the potential claim by Ross Pharmaceuticals cannot be viewed as completely frivolous, as the potential claim was sufficiently foreseeable to RESPONDENTS, at the time of the conclusion of the PCLA.
152. Concluding **(IV.A)**, the delivered GorAdCam are non-conforming goods due to a potential third-party right or claim based on IPR. These rights or claims invoke Art. 42 CISG, even if they are not formally raised, and regardless of their nature.

B. RESPONDENT NO. 1 was aware or could not have been unaware of the potential third-party right or claim, and cannot exclude its liability

153. As CLAIMANT has shown above, the delivered GorAdCam are non-conforming [*supra ¶¶ 133-152*]. RESPONDENT NO. 1 is not exempted of its liability under Art. 42 CISG, as it was aware or could not have been unaware of the non-conformity.
154. Pursuant to Art. 42 CISG, the seller is required to have a sufficient level of knowledge on the goods being sold, and especially on potential third-party rights restricting them [*Honnold p. 270; Kröll p. 644; Schwenzler p. 700*]. Connected to this, the seller has a responsibility to investigate potential third-party rights, which could restrict the goods, and to inform the buyer on such third-party rights [*Rauda & Etier ¶ 53; Saidov pp. 214, 216; Schwenzler p. 701; VanDuzer ¶ 15; Zheng p. 408; CD media case*].
155. As the seller, RESPONDENT NO. 1’s is obliged to be aware of Ross Pharmaceuticals’ rights and claims regarding GorAdCam [*ANA ¶ 51; PCLA ¶ 11.1.3*].
156. RESPONDENT NO. 1 is not exempt from liability under Art. 42 CISG, as **(1.)** it knew or could not have been unaware of the right or claim by Ross Pharmaceuticals at the time of PCLA’s conclusion, and **(2.)** its liability is not excluded by CLAIMANT’s actions.

1. RESPONDENT NO. 1 knew or could not have been unaware of the right or claim by third party at the time of PCLA’s conclusion

157. RESPONDENT NO. 1 knew or could not have been unaware of Ross Pharmaceuticals’ right at the time of the conclusion of the PCLA. According to Art. 42 CISG, the seller is liable for those third-party rights or claims that the seller knew or could not have been unaware of at the time of contract’s conclusion [*Lookofsky 2000 pp. 110–111; Schlechtriem 1986 p. 74; Schwenzler p. 700; CD media case; Spanish furniture case*].

158. RESPONDENT NO. 1 is liable as it **(i.)** knew about Ross Pharmaceuticals’ right or claim, or **(ii.)** could not have been unaware of it.

i. RESPONDENT NO. 1 knew about the potential third-party right or claim

159. RESPONDENT NO. 1 knew about the potential third-party right or claim, as Mr. Doherty, its representative, was aware of Ross Pharmaceuticals’ alleged right.

160. The English High Court in the *Kingspan case* recognises a *de facto* -knowledge test where seller will have the relevant knowledge if “he knew or where his knowledge of the defect reasonably can be inferred, if not proven, from the circumstances in the particular case” [*Kingspan v Borealis*]. This test means that, when the seller’s knowledge of a non-conformity can be inferred from the facts of the case, then the seller’s liability can be established on those facts [*Fogt p. 70*]. In practice, the seller’s knowledge can be established in all cases where a third party has contacted the seller directly before the seller has delivered the goods [*Kröll p. 644; Saidov p. 219*].

161. Mr. Peter Doherty was responsible for negotiating the PCLA on behalf of RESPONDENT NO. 1 [*Exh. R2 ¶ 8*]. He was aware of Ross Pharmaceuticals’ right or claim for two reasons. First, in 2014, he negotiated the Ross Agreement as the legal director of RESPONDENT NO. 2 [*Exh. R2; Ross Agreement*]. In December 2018, he also negotiated the PCLA on behalf of RESPONDENT NO. 1, using the same template used in the Ross Agreement. [*Exh. R2, R3*]. Second, during the negotiations of the PCLA, the Head of Contract and IP of Ross Pharmaceuticals, directly contacted Mr. Doherty, claiming that Ross Pharmaceuticals had an exclusive license on GorAdCam for infectious respiratory diseases [*Exh. R4*].

162. As shown above, RESPONDENT NO. 1’s representative, Mr. Doherty, knew of the potential right or claim by Ross Pharmaceuticals at the time of the PCLA’s conclusion. Therefore, RESPONDENT NO. 1 knew about Ross Pharmaceuticals’ potential right or claim.

ii. In any case, RESPONDENT NO. 1 could not have been unaware of the potential right or claim by a third party

163. RESPONDENT NO. 1 could not have been unaware of the potential right or claim by Ross Pharmaceuticals, as they should have investigated whether conflicting third-party rights on GorAdCam exist.
164. Art. 42 CISG obliges the seller to inquire on third-party IPR regarding the goods, and inform the buyer, whether such rights or claims exist [*Mullis p. 176; Saidov p. 219; Schwenzler p. 701; Shinn Jr. p. 124*]. The seller has a duty to investigate, at least, relevant IPR published in the countries in question [*Honnold p. 295; Secretariat Commentary p. 37*]. This duty to investigate is generally accepted to require the seller to learn of rights through information that is routinely or uniquely in its possession, such as those regarding licenses [*Shinn Jr. pp. 125–126*]. The seller’s failure to meet this obligation leads to its liability [*Honnold p. 118; Kröll p. 645; Rauda & Etier ¶ 91; Schwenzler p. 701; Schwerha p. 459; “Bonaventure” v SPAE*].
165. RESPONDENT NO. 1 was based and operational in Equatoriana when the information regarding the Ross Agreement and its license implications was published in Nasdaq Equatoriana [*Exh. C1; PO2 ¶ 1*]. Furthermore, RESPONDENT NO. 1 is closely affiliated with the patent owner, RESPONDENT NO. 2, as they are sister companies [*Exh. C2*]. Therefore, RESPONDENT NO. 1 was in a unique position to further investigate the scope of said license grant before the PCLA was concluded.
166. Considering that in a situation where RESPONDENT NO. 1 would have fulfilled its obligations to inquire about third party rights, it would have certainly found out about Ross Pharmaceuticals’ rights to GorAdCam, either through its sister company or at least relevant press releases. Therefore, it can be deduced that RESPONDENT NO. 1 did not fulfil its obligations to inquire on third party rights as required by Art. 42 CISG, and it could not have been unaware of Ross Pharmaceuticals’ potential third party rights or claims.

2. RESPONDENT NO. 1’s liability is not excluded by Arts. 42(2)(a) or 43 CISG

167. RESPONDENT NO. 1 cannot rely on Arts. 42(2)(a) or 43 CISG to exclude its liability due to CLAIMANT’s level of knowledge or lack of action.
168. RESPONDENT NO. 1’s liability is not excluded, as **(i.)** CLAIMANT was not aware of any third-party right or claim when the PCLA was concluded. In addition, even if the Tribunal considers that RESPONDENT NO. 1 was not aware of a potential third-party right or claim, it cannot rely on

Art. 43 CISG as **(ii.)** CLAIMANT notified it in a reasonable time, after becoming aware of the potential right or claim.

i. CLAIMANT did not know of any potential right or claim by a third party at the time of the conclusion of the PCLA

169. CLAIMANT was not aware of any third-party right or claim at the time of the conclusion of the PCLA, and thus RESPONDENT NO. 1 cannot rely on Art. 42(2)(a) CISG to exclude its liability.

170. Pursuant to Art. 42(2)(a) CISG, the obligation of the seller to deliver goods free from third-party rights based on IPR “does not extend to cases where: at the time of the conclusion of the contract the buyer knew or could not have been unaware of the right or claim”. However, the buyer does not have a duty to investigate third party rights, unless it has assumed such duties in the contract [*Kröll p. 647; Saidov p. 226; Schwenzler p. 702*]. Furthermore, when the seller has warranted that the goods will not be infringed by a potential third-party right or claim based on IPR, the buyer has a right to rely on the warranties given [*Magnus p. 480; Schwerba p. 442*].

171. CLAIMANT did not have knowledge of any infringing third-party rights based on IPR before 1 May 2020, nor it had assumed any duties to investigate such rights in the PCLA [*NA ¶ 19*]. Furthermore, RESPONDENT NO. 1 warranted that it was “not aware of any Third Party’s [IPR] that might be infringed” and it had “not received notice that any such claims, judgements or settlements are threatened”, creating a justified impression, which CLAIMANT has trusted [*PCLA ¶¶ 11.1.3–11.1.4*].

172. Contrary to RESPONDENT NO. 1’s allegations, Rosaly Hübner, CLAIMANT’s current CFO, was not aware of any conflicting rights resulting from the conclusion of the PCLA and the Ross Agreement [*Exh. C6, C7*]. Furthermore, Rosaly Hübner was not a part of CLAIMANT’s organisation at the time of the conclusion of the PCLA [*Exh. C7; PO2 ¶ 12*].

173. As shown above, CLAIMANT did not know of Ross Pharmaceuticals’ potential right or claim at the time of the conclusion of the PCLA. Therefore, RESPONDENT NO. 1 cannot rely on Art. 42(2)(a) CISG.

ii. CLAIMANT gave notice to RESPONDENT NO. 1 in a reasonable time, after it became aware or ought to have become aware of the right or claim

174. RESPONDENT NO. 1 cannot exclude its liability pursuant to Art. 43 CISG, as CLAIMANT notified RESPONDENT NO. 1 in a reasonable time after becoming aware of the potential right or claim.

175. According to Art. 43 CISG, the buyer is not entitled to rely on the provisions of Art. 42 CISG if the buyer “does not give notice to the seller specifying the nature of the right or claim of the third party within a reasonable time after [it] has become aware or ought to have become aware of the right or claim”. In contrast, when the seller knew about the right or claim, it cannot rely on Art. 43 CISG to exclude its liability [*Kröll p. 652; Lookofsky 2017 p. 101; Saidov p. 231; Schwenzler p. 710*].
176. CLAIMANT became aware of Ross Pharmaceuticals’ potential right or claim on 1 May 2020, when Mr. Paul Metschnikow, CLAIMANT’s COO, received an article regarding potential third party IPR on GorAdCam [*Exh. C4*]. On 2 May 2020, CLAIMANT contacted RESPONDENT NO. 1, and notified it of the potential third-party right or claim by Ross Pharmaceuticals [*Exh. C5*]. CLAIMANT further specified the third-party right to be an “earlier exclusive [...] license in relation to the GorAdCam viral vector” [*Exh. C5*]. This potential third-party right or claim was downplayed by RESPONDENT NO. 1 on 4 May 2020 [*Exh. C6*].
177. RESPONDENT NO. 1 cannot rely on Art. 43 CISG for two reasons. First, as shown above, it knew of Ross Pharmaceuticals’ potential right or claim at the time of the conclusion of the PCLA [*Supra ¶ 159-162*]. Second, even if the Tribunal would consider that RESPONDENT NO. 1 did not know of Ross Pharmaceuticals’ potential right or claim, RESPONDENT NO. 1 cannot nevertheless rely on Art. 43 CISG to exclude its liability, as CLAIMANT notified it the very next day after learning of the potential right or claim [*Exh. C5*].
178. Considering the above, the Tribunal should find that RESPONDENT NO. 1 cannot rely on Art. 43 CISG to exclude its liability.

179. Concluding **(IV.)**, RESPONDENT NO. 1 has breached the PCLA pursuant to Art. 42 CISG by delivering goods, which were not free from third-party rights or claims. Furthermore, RESPONDENT NO. 1 knew or could not have been unaware of such rights or claims when the PCLA was concluded, and thus, cannot exclude its liability.

REQUEST FOR RELIEF

In light of the submission above, counsel for CLAIMANT respectfully invites the Tribunal to declare that:

- I. Ross Pharmaceuticals should not be joined to the Proceedings;
- II. The Hearing can be conducted remotely, should it become necessary;
- III. The CISG applies to the Purchase, Collaboration and License Agreement;
- IV. RESPONDENT NO. 1 has breached its contractual obligations pursuant to Art. 42 CISG by delivering non-conforming GorAdCam viral vectors.

In addition, counsel for CLAIMANT respectfully invites the Tribunal to order RESPONDENTS to bear the costs of the Arbitration and cover CLAIMANT's legal fees.

CERTIFICATE

We hereby confirm that only the persons whose names are listed below have written this memorandum.

Respectfully submitted on 10 December 2020 by



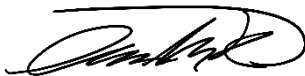
Jukka Heinemaa



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