TWENTY-EIGHTH ANNUAL
WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT
VIENNA, AUSTRIA – 27 MARCH TO 1 APRIL 2021

MEMORANDUM FOR RESPONDENTS

UNIVERSITY OF ZURICH

CASE NO.: 300610-2020

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

MARC BÄR • CLIO HUBER • NICOLE JAGGI • NANINA LÄTSCH • ZOË PULVER • NEDA RASSI

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AFMJ	Austrian Federal Ministry of Justice
AG	Aktiengesellschaft (Private Limited Company)
Art./Artt.	Article(s)
AS	Anonim Sirketi (Joint Stock Company)
ASA	Association Suisse de l'Arbitrage (Swiss Arbitration Association)
AUT	Austria
BBC	British Broadcasting Corporation
BV	Besloten vennootschap met beperkte aansprakelijkheid (Limited Liability Company)
CD	compact disc
cf.	confer (compare)
CFO	Chief Financial Officer
ch./chs.	chapter(s)
ChAdCam	Chimpanzee Adenovirus CamVir
CISG	United Nations Convention on Contracts for the International Sale of Goods, 1980
CISG-AC	CISG Advisory Council
CLOUT	Case Law on UNCITRAL Texts
CMR	Convention on the Contract for the International Carriage of Goods by Road, 1956
Co.	Corporation
COVID-19	Coronavirus Disease 2019
DAL	Danubian Arbitration Law
DCL	Danubian Contract Law
DHSC	UK Department of Health and Social Care
e.g.	exempli gratia (for example)
EAS	Electronic Article Surveillance
ed.	edition
Ed./Eds.	Editor/Editors
engl.	english
et al.	et alii (and others)

et seq./et seqq.	et sequens (and the following one) / et sequentes (and the following ones)
EU	European Union
EUR	Euro(s)
Exh. C	CLAIMANT's Exhibit
Exh. R	RESPONDENTS' Exhibit
FactÜ	UNIDROIT Convention on International Factoring, 1988
FGG	Federal Government of Germany
FOPH	Federal Office of Public Health (Switzerland)
FS	Festschrift (Commemorative)
gem.	gemäss (according to)
GER	Germany
ger.	german
GmbH	Gesellschaft mit beschränkter Haftung (Limited Liability Company)
GorAdCam	Gorilla Adenovirus CamVir
HKIAC	Hong Kong International Arbitration Centre
HMCTS	Her Majesty's Courts & Tribunals Service and Ministry of Justice
i.e.	id est (that is)
ibid.	ibidem (in the same source)
ICC	International Chamber of Commerce
ICC Rules	ICC Rules of Arbitration, 2021
ICCA	International Council for Commercial Arbitration
Inc.	Incorporated
IP	Intellectual Property
Ltd	Limited Company
MfC	Memorandum for CLAIMANT
mio.	million
Mr.	Mister
Ms.	Miss
NLD	the Netherlands
No.	Number

NoA	Notice of Arbitration
NY	New York
NY Convention	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958
NZZ	Neue Zürcher Zeitung
p./pp.	page(s)
para./paras.	paragraph(s)
PICC	UNIDROIT Principles for International Commercial Contracts, 2016
plc	public limited company
PO	Procedural Order
Rom I-VO	Regulation of the European Parliament and of the Council on the law applicable to contractual obligations (Rome I), 2008
S.A.	Sociedade Anônima (Public Limited Company)
S.p.A.	Società per Azioni (Public Limited Company)
SCAI	Swiss Chambers' Arbitration Institution
SchiedsVZ	Zeitschrift für Schiedsverfahren
SGP	Singapore
SUI	Switzerland
Swiss Rules	Swiss Rules of International Arbitration, 2012
TBK	Terbuka (Public Limited Company)
TETA	Triethylentetramine
U.S./USA	United States of America
UK	United Kingdom
UN/U.N.	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration, 2006
UNIDROIT	International Institute for the Unification of Private Law
v.	versus
VIAC	Vienna International Arbitral Centre
VIAC Rules	Vienna Rules of Arbitration and Mediation, 2018
Vol.	Volume

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DAL	Danubian Arbitration Law (adoption of the UNCITRAL Model Law on International Commercial Arbitration, Vienna, 21 June 1985, with the 2006 amendments, Art. 7 – Option 1)
DCL	Danubian Contract Law (adoption of the UNIDROIT Principles on International Commercial Contracts, 2016)
ICC Rules	ICC Rules of Arbitration, 2021
NY Convention	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958
PICC	UNIDROIT Principles on International Commercial Contracts, 2016
Swiss Rules	Swiss Rules of International Arbitration, 2012
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration, 2006
VIAC Rules	Vienna Rules of Arbitration and Mediation, 2018

Statement of Facts

The parties to this arbitration (**"Arbitration"**) are, first, RespiVac plc (**"CLAIMANT"**), a bio-pharmaceutical company engaged in the development of vaccines against respiratory diseases caused by viruses, registered in Mediterraneo. Second, RESPONDENTS are CamVir Ltd (**"RESPONDENT NO. 1"**) and VectorVir Ltd (**"RESPONDENT NO. 2"**). Both RESPONDENTS are 100% subsidiaries of Roctis AG (**"Roctis"**) and registered in Equatoriana. RESPONDENT NO. 1 is the contract manufacturer of Roctis for the production of pharmaceutical base materials for vaccines and RESPONDENT NO. 2 is the owner of the patent for the GorAdCam vectors (**"Viral Vectors"**).

On 15 June 2014, RESPONDENT NO. 2 and Ross Pharmaceuticals (**"Ross"**) entered into a Collaboration and License Agreement (**"Ross Agreement"**), under which Ross received an exclusive license to use the Viral Vectors for research into *"malaria and related infectious diseases"*.

In 2015, Ross discovered the Viral Vectors' potential in the field of respiratory diseases.

In Summer 2018, Ross unsuccessfully tried to acquire RESPONDENT NO. 2 in order to conduct research in the field of respiratory diseases.

On 10 September 2018, RESPONDENT NO. 2 granted RESPONDENT NO. 1 an exclusive license for the production and sublicensing of the Viral Vectors for applications not related to malaria.

On 6 December 2018, Ross contacted RESPONDENT NO. 2 with the intention to acquire a license to use the Viral Vectors in the field of respiratory diseases.

On 1 January 2019, RESPONDENT NO. 1 and CLAIMANT entered into a Purchase, Collaboration and License Agreement (**"Agreement"**) concerning a non-exclusive license to use the Viral Vectors in the field of *"infectious and non-infectious respiratory diseases"*.

On 20 April 2020, CLAIMANT was acquired by Khorana Lifescience (**"Khorana"**).

On 2 May 2020, CLAIMANT contacted RESPONDENT NO. 1 because it is of the view that Ross' license also covers research into respiratory diseases.

On 15 July 2020, CLAIMANT initiated the Arbitration against RESPONDENTS by filing the Notice of Arbitration (**"NoA"**).

On 14 August 2020, in their joint Answer to the NoA, RESPONDENTS requested the joinder of Ross in order to conclusively resolve the dispute at hand by determining not only the scope of the Agreement but also the scope of the Ross Agreement.

On 2 October 2020, RESPONDENTS, in a letter to the arbitral tribunal (**"Tribunal"**), insisted on holding the witness and expert examinations in person since CLAIMANT and RESPONDENT NO. 1 agreed on in-person hearings in their arbitration agreement (**"Arbitration Agreement"**).

Summary of Argument

Issue A: Ross should be joined to the Arbitration. By concluding an arbitration agreement that opts for the Swiss Rules, Ross consented to be joined to the Arbitration. If Ross is joined, the fact that Ross could not participate in the appointment of the Tribunal would not lead to a violation of its right to equal treatment because the Agreement as well as the Ross Agreement provide for the arbitrators to be appointed by the SCAI. Furthermore, the outcome of the dispute between CLAIMANT and RESPONDENT NO. 1 is closely connected to the interpretation of the scope of the Ross Agreement. Also, the joinder of Ross would lead to an overall increase of procedural efficiency as all potential disputes could be resolved at once. Finally, the joinder of Ross is required to prevent conflicting decisions.

Issue B: Witness and expert examinations should be conducted in person. CLAIMANT and RESPONDENT NO. 1 agreed that hearings shall be held *"in Vindobona or in the city where the Respondent has its place of business"*. The notion *"in"* implies a physical presence at the agreed location. Thus, the parties agreed on in-person hearings. Further, holding remote hearings would be a due process violation since the Arbitration involves complex witness and expert testimonies which cannot be properly assessed in remote hearings. Moreover, a remote hearing would pose a risk to the confidentiality of the Arbitration since third parties could interfere.

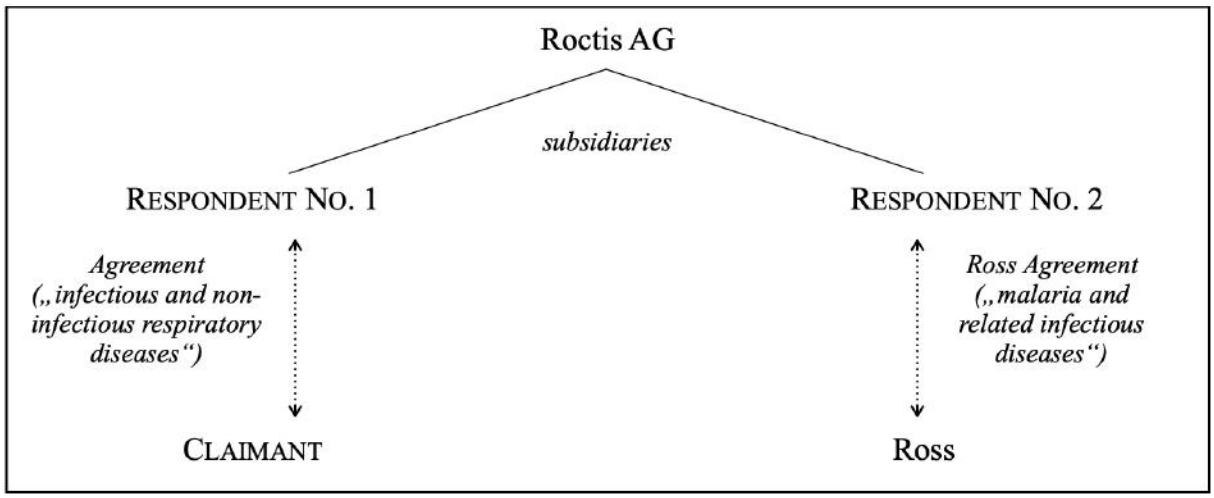
Issue C: The Agreement is not governed by the CISG since it concerns the granting of a license to use the know-how transferred within the Viral Vectors. The know-how, as the contractual object of the Agreement, does not qualify as a good in terms of Art. 1(1) CISG. Further, RESPONDENT NO. 1 only granted CLAIMANT a non-exclusive license in the field of respiratory diseases. Its use of the Viral Vectors is thus restricted, and consequently no ownership was transferred. Hence, the Agreement is not a contract of sale of goods pursuant to Art. 1(1) CISG.

Issue D: RESPONDENT NO. 1 did not breach its obligations pursuant to Art. 42 CISG since Ross does not have a conflicting IP right. Ross' mere allegation does not restrict CLAIMANT in its use of the Viral Vectors at all. On the contrary, CLAIMANT presented promising results in August 2020 and already reached the third trial stage on the way of developing a vaccine. CLAIMANT only brings the claim against RESPONDENT NO. 1 because it was recently acquired by Khorana which is able to produce the Viral Vectors and base materials necessary for the production of a vaccine independently and well below the market price. Under the Agreement CLAIMANT is obliged to purchase the base materials directly from RESPONDENT NO. 1. Thus, the Agreement no longer seems beneficial for CLAIMANT and it looks for a way to terminate or renegotiate the Agreement by accusing RESPONDENT NO. 1 of having breached its obligations.

A. ROSS SHOULD BE JOINED TO THE ARBITRATION

1 According to Art. 4(2) Swiss Rules, an arbitral tribunal may order the joinder of a third party after consulting with all of the parties, including the third party to be joined, and after taking into account all relevant circumstances.

2 The following graphic illustrates the connection between all parties concerned.



3 The Tribunal should join Ross to the Arbitration between CLAIMANT and RESPONDENTS because Ross consented to the Tribunal's jurisdiction by agreeing, albeit in the context of a separate arbitration agreement, to the joinder mechanism in Art. 4(2) Swiss Rules [**I**]. CLAIMANT's objection to the joinder is irrelevant as CLAIMANT initially consented to joinders by also agreeing to the joinder mechanism in Art. 4(2) Swiss Rules [**II**]. Further, the equal treatment of Ross concerning the appointment of the Tribunal is guaranteed if Ross is joined [**III**]. Moreover, the joinder of Ross would lead to an overall increase of procedural efficiency [**IV**] and is required to prevent conflicting decisions [**V**]. Finally, there is also no legitimate reason against the joinder of Ross [**VI**].

I. The Tribunal has jurisdiction over Ross

4 The Tribunal has jurisdiction over Ross based on the arbitration agreement Ross concluded with RESPONDENT NO. 2 because, in that agreement, Ross and RESPONDENT NO. 2 opted for the Swiss Rules and thus agreed on the joinder mechanism in Art. 4(2) Swiss Rules.

5 The arbitral tribunal must have jurisdiction over a third party in order to join that third party to pending proceedings *(PT First Media Case [SGP, 2013], para. 181; REDFERN/HUNTER, p. 91 para. 2.59; SCHRAMM, p. 493 para. 38)*. For the arbitral tribunal to have jurisdiction, parties must have consented to resolve a dispute by arbitration, where such dispute has arisen or may arise in connection with a defined legal relationship *(ICC Case 5721 [ICC, 1990], p. 1024; Banque Arabe Case [ad hoc, 1994], p. 18 para. 7; CHOI, p. 33; GIRSBERGER/VOSER, p. 63*

para. 264; GÓMEZ CARRIÓN, p. 481). The arbitration agreement will often include a choice of specific arbitration rules *(BORN, ch. 2.02(C); REDFERN/HUNTER, p. 91 para. 2.59)*.

6 The Swiss Rules entail a broad approach regarding joinders *(BORN, ch. 18.02(C)(3)(b); HANOTIAU, p. 332 para. 816; VON SCHLABRENDORFF, p. 430)*. They even provide for the possibility to join non-signatories *(BORN, ch. 18.02(C)(3)(b); WAINCYMER, p. 566; WEHRLI/STACHER, p. 367; cf. BÄRTSCH/PETTI, p. 65 para. 49)*, whereas the ICC Rules, for instance, require that the third party to be joined is a signatory to the arbitration agreement on which the arbitration is based *(BORN, ch. 18.02(C)(2)(b); CONEJERO ROOS, p. 425; VERBIST/SCHÄFER/IMHOOS, p. 54)*. Moreover, pursuant to the Swiss Rules, the consent to a joinder does not need to be given in writing *(BAMFORTH/MAIDMENT, p. 12; cf. CONEJERO ROOS, p. 424)*. Thus, a third party can consent to be joined in any form. Considering the broad approach the Swiss Rules take on joinders, if the parties agreed to the Swiss Rules with the joinder mechanism of Art. 4(2) Swiss Rules, the parties are deemed to have consented to joinders and the associated consequences, including the jurisdiction of the arbitral tribunal deciding on the joinder *(BORN, ch. 18.02(C)(3)(b); SCHRAMM, p. 484 para. 4)*. Hence, where a third party has agreed on Art. 4(2) Swiss Rules, the third party consented to be joined to other Swiss Rules arbitrations, rendering a subsequent objection to the joinder irrelevant *(GÓMEZ CARRIÓN, p. 496; HANOTIAU, p. 333 para. 816; PUST, p. 75 para. 59; SCHRAMM, p. 484 para. 4 and p. 492 para. 33; WAINCYMER, p. 566; cf. REDFERN/HUNTER, p. 91 para. 2.59)*.

7 Against CLAIMANT's allegation *(MfC, paras. 11 et seqq.)*, Ross consented to joinders because it concluded an arbitration agreement with RESPONDENT NO. 2 opting for the Swiss Rules with the joinder mechanism of Art. 4(2) Swiss Rules *(Exh. R 3, p. 33 para. 14.1)*. As a consequence, Ross also consented in advance to the jurisdiction of any arbitral tribunal conducting proceedings in accordance with the Swiss Rules, *i.e.* also to the Tribunal's jurisdiction *(ibid.)*. Since Ross initially consented to joinders, the fact that Ross now objects to participate in the Arbitration *(Letter Sinoussi, p. 46 para. 4)* is irrelevant. Moreover, contrary to CLAIMANT's view *(MfC, para. 6)*, the Swiss Rules do not require Ross to be a signatory to the Arbitration Agreement between CLAIMANT and RESPONDENT NO. 1 in order for Ross to be joined to the Arbitration. Therefore, Ross effectively gave its consent to the jurisdiction of the Tribunal by agreeing to arbitrate under the Swiss Rules.

8 Contrary to CLAIMANT's view *(MfC, para. 9)*, basing an arbitral tribunal's jurisdiction on the third party's consent to arbitrate under the Swiss Rules does not automatically lead to the arbitral tribunal actually joining any third party that consented to the Swiss Rules to any proceedings conducted under the Swiss Rules. Rather, according to Art. 4(2) Swiss Rules, the arbitral

tribunal will, after establishing its jurisdiction, take all relevant circumstances into account in order to decide on a joinder. Therefore, the Tribunal can base its jurisdiction on the parties' agreement on the joinder mechanism of Art. 4(2) Swiss Rules.

9 In conclusion, the Tribunal has jurisdiction over Ross.

II. CLAIMANT's objection to the joinder of Ross is irrelevant as CLAIMANT initially consented to joinders

10 Contrary to CLAIMANT's view *(MfC, para. 4)*, also CLAIMANT has consented to the joinder of third parties, such as Ross, by signing an arbitration clause opting for the Swiss Rules in the Agreement, thus accepting the joinder mechanism of Art. 4(2) Swiss Rules.

11 When deciding on a joinder, an arbitral tribunal has to consult with the initial parties to the pending arbitration pursuant to Art. 4(2) Swiss Rules *(BORN, ch. 18.02(C)(3)(b); CONEJERO ROOS, p. 425)*. The initial parties are deemed to have consented to the joinder of third parties if they signed an arbitration agreement opting for the Swiss Rules without excluding Art. 4(2) Swiss Rules *(GILLIÉRON/PITTET, Art. 4 para. 12; PUST, p. 75 para. 59; WAINCYMER, p. 566)*. Even if the non-requesting party later objects to the joinder, Art. 4(2) Swiss Rules allows the arbitral tribunal to nevertheless order the joinder of a third party *(PT First Media Case [SGP, 2013], para. 176 [references to the Swiss Rules]; GÓMEZ CARRIÓN, p. 496; HANOTIAU, p. 333 para. 816; WAINCYMER, p. 566; WEHRLI/STACHER, p. 367)*.

12 In the case at hand, CLAIMANT objects to the joinder of Ross *(Letter Langweiler, p. 48 para. 1)*. However, CLAIMANT's objection is irrelevant because the Arbitration Agreement explicitly refers to *"[...] arbitration in accordance with the Swiss Rules of International Arbitration [...]" (Exh. C 3, p. 16 para. 14.1)*. Since Art. 4(2) Swiss Rules was not excluded, CLAIMANT has consented to the joinder of third parties, such as Ross. Therefore, the fact that CLAIMANT now objects to the joinder of Ross is of no relevance.

13 In conclusion, CLAIMANT's objection to the joinder of Ross is irrelevant as CLAIMANT initially consented to the joinder of third parties.

III. The joinder of Ross does not affect Ross' right to equal treatment regarding the appointment of the Tribunal

14 Contrary to CLAIMANT's view *(MfC, paras. 33 et seqq.)*, Ross' right to equal treatment regarding the appointment of the Tribunal is not infringed if Ross is joined to the Arbitration.

15 It is undisputed *(MfC, para. 33)* that, in the context of discussing joinders in arbitral proceedings, a major and recurring concern in scholarly writing is the equal treatment of the parties *(BORN, chs. 18.01 and 18.02(D); CHOI, p. 54; GÓMEZ CARRIÓN, p. 482; HANOTIAU, p. 325*

para. 795; LEW/MISTELIS/KRÖLL, p. 380 para. 16-11). If the initial parties to the arbitration have already appointed the arbitral tribunal prior to the joinder, the third party does not have the opportunity to participate in the appointment of the arbitrators *(BORN, chs. 18.01 and 18.02(D); VOSER, p. 386)*. Consequently, the third party's right to equal treatment would be affected *(BORN, ch. 18.02(D)(1); PUST, p. 58 para. 6; SCHRAMM, p. 483 para. 2)*.

16 However, contrary to CLAIMANT's view *(MfC, paras. 33 et seqq.)*, the situation is entirely different if the parties have provided for an institution to appoint the arbitrators *(BORN, ch. 18.02(D)(1); SCHRAMM, pp. 498 et seq. para. 57)*. Since this appointment mechanism means that no party can appoint its own arbitrator, the third party will not be treated differently from the initial parties, even if it is joined after the constitution of the arbitral tribunal *(BORN, ch. 18.02(D); PUST, p. 75 para. 59; SCHRAMM, p. 498 para. 57).*

17 The concern of a violation of the parties' equal treatment regarding the appointment of the arbitral tribunal is not an issue in the case at hand. The Arbitration Agreement between CLAIMANT and RESPONDENT NO. 1 states that *"All arbitrators are to be appointed by the Institution […]" (Exh. C 3, p. 16 para. 14.1)*. The exact same wording is contained in the arbitration clause between Ross and RESPONDENT NO. 2 *(Exh. R 3, p. 34 para. 14.1)*. Hence, all parties concerned chose the SCAI to appoint the arbitrators *(Exh. C 3, p. 16 para. 14.1; Exh. R 3, p. 34 para. 14.1)*. Thus, CLAIMANT's assertion that Ross cannot be joined to the Arbitration because Ross did not participate in the constitution of the Tribunal is unfounded *(MfC, para. 34)*.

18 In conclusion, the joinder of Ross to the Arbitration does not infringe Ross' right to equal treatment regarding the appointment of the Tribunal.

IV. The joinder of Ross would lead to an overall increase of procedural efficiency

19 Joining Ross would lead to an overall increase of procedural efficiency because a joinder would allow the Tribunal to conclusively decide on two closely connected claims.

20 Art. 4(2) Swiss Rules is an instrument to promote procedural efficiency *(BÄRTSCH/PETTI, Art. 4 para. 19; SCHRAMM, p. 491 para. 30; cf. VOSER, p. 350)* which is a guiding principle of arbitration underlined in Art. 15(7) Swiss Rules. By joining third parties, a dispute can be put in its broader context and can be resolved comprehensively by a single arbitral tribunal at once, instead of being dispersed across multiple proceedings *(BÄRTSCH/PETTI, Art. 4 para. 19; PUST, p. 61 para. 13; WAINCYMER, pp. 496 et seq.)*. This holds all the more true if there is a close connection between different claims, *i.e.* if common issues of fact and law have to be assessed in multiple proceedings in case the third party is not joined *(BÄRTSCH/PETTI, Art. 4 para. 50; BAMFORTH/MAIDMENT, p. 13; SCHRAMM, p. 500 para. 62; VOSER/MEIER, p. 116)*.

21 Under the Agreement, RESPONDENT NO. 1 granted CLAIMANT a non-exclusive license to use the Viral Vectors for research into respiratory diseases *(cf. graphic, para. 2; Exh. C 3, pp. 12 et seq. para. 2)*. RESPONDENT NO. 1 had received the right to sublicense the Viral Vectors in that field from RESPONDENT NO. 2 *(NoA, pp. 5 et seq. para. 10)*. Prior to that, under the Ross Agreement, RESPONDENT NO. 2 had granted Ross an exclusive license for the use of the same Viral Vectors but for research in regards to other types of diseases *(cf. graphic, para. 2; Exh. R 3, pp. 32 et seq. para. 2)*. Ross now alleges that CLAIMANT infringes Ross' exclusive license *(Exh. R 4, p. 35 para. 2)*.

22 The Arbitration concerns an alleged breach of Art. 42 CISG by RESPONDENT NO. 1 towards CLAIMANT in light of Ross' allegation *(cf. graphic, para. 2; PO 1, p. 51 para. III.1.d)*. Whether RESPONDENT NO. 1 has breached Art. 42 CISG is connected to the interpretation of the scope of Ross' license *(cf. paras. 117 et seqq.)*. In order to define the scope of Ross' license, RESPONDENTS want to join Ross to the Arbitration *(Answer to NoA, p. 28 para. 22)*. If Ross is not joined, RESPONDENT NO. 1 is willing to enforce its own license granted by RESPONDENT NO. 2 against Ross in court *(Exh. R 5, p. 36 para. 3)*. This would lead to two separate proceedings, *i.e.* one between CLAIMANT and RESPONDENTS and one between RESPONDENT NO. 1 and Ross. Since, in both of these proceedings, the scope of the Ross Agreement would have to be assessed, the disputes are closely connected.

23 Moreover, also the Agreement and the Ross Agreement are connected because both were negotiated by Mr. Doherty *(Exh. R 2, p. 30 paras. 5 and 7; NoA, p. 6 para. 12)*. A joinder of Ross would allow Mr. Doherty to testify once and for all instead of having to testify in two separate proceedings. In addition, the Agreement concluded between CLAIMANT and RESPONDENT NO. 1 was based on the same template used for the Ross Agreement *(Exh. R 2, p. 30 paras. 5 and 7)*. Thus, a joinder would allow the Tribunal to assess the content of both agreements at once instead of a different arbitral tribunal or court having to start from scratch.

24 In light of the close connection between the claim in this Arbitration and the potential claim of RESPONDENT NO. 1 against Ross, it is more efficient to resolve the disputes at once by joining Ross rather than resolving the disputes in two separate proceedings.

25 In conclusion, a joinder of Ross would lead to an overall increase of procedural efficiency for all parties involved.

V. The joinder is required to prevent conflicting decisions

26 The joinder of Ross is required to prevent conflicting decisions.

27 Under Art. 4(2) Swiss Rules, the arbitral tribunal should consider the likelihood of separate proceedings with the third party in case the arbitral tribunal does not order the joinder and whether the decisions in these two proceedings could be conflicting *(BÄRTSCH/PETTI, Art. 4 para. 50; PUST, p. 61 paras. 13 et seq.; SCHRAMM, p. 500 para. 64)*. Separate proceedings are particularly problematic if the findings of the first arbitral tribunal have to be reconsidered by an arbitral tribunal or a court in subsequent proceedings *(PUST, p. 62 para. 16; SCHRAMM, p. 491 para. 30; WAINCYMER, p. 497)*.

28 This is precisely what would happen if Ross were not joined. The Tribunal has to assess the scope of the Ross Agreement in order to determine whether RESPONDENT NO. 1 has breached its obligation pursuant to Art. 42 CISG *(cf. paras. 117 et seqq.)*. Since RESPONDENT NO. 1 is willing to enforce its license against Ross in court *(Exh. R 5, p. 36 para. 3)*, subsequent proceedings, in which the scope of the Ross Agreement would have to be assessed as well, are very likely. This poses the risk of conflicting decisions. Yet this risk would be prevented by joining Ross. The joinder of Ross would allow the Tribunal to render a final decision on the scope of the Agreement as well as the Ross Agreement.

29 In conclusion, by joining Ross to the Arbitration, the Tribunal can decide on the scope of the Agreement as well as the Ross Agreement conclusively and prevent conflicting decisions.

VI. There is no legitimate reason not to join Ross

30 There is also no legitimate reason against the joinder of Ross since the Arbitration is still at an early stage and CLAIMANT's business secrets are not at risk.

31 When deciding on a joinder, the arbitral tribunal must consider the progress already made in the arbitration, *i.e.* whether the proceedings are already at an advanced stage *(BAMFORTH/MAIDMENT, p. 13; SCHRAMM, p. 500 para. 65).*

32 The current stage of the Arbitration does not speak against a joinder of Ross. In fact, there was no earlier point in time for RESPONDENTS to request a joinder of Ross than in the Answer to the NoA *(Answer to NoA, p. 28 para. 23.a)*. Further, the first hearing is only scheduled for 27 March to 1 April 2021 *(PO 1, p. 52 para. IV)*. Therefore, the Arbitration is still at an early stage.

33 Moreover, in the further course of the proceedings, CLAIMANT might allege that, because Ross is CLAIMANT's competitor, a joinder of Ross would pose the risk of CLAIMANT's business secrets being revealed. However, this issue should not be overemphasized because measures can be taken to avoid that business secrets are disclosed *(BAIZEAU/RICHARD, pp. 54 et seqq.; VOSER, p. 352)*. For instance, the arbitral tribunal may limit the production of documents to selected

extracts only *(BAIZEAU/RICHARD, p. 55; WAINCYMER, p. 800)*. Also, documents can be redacted *(ibid.; COOK/GARCIA, p. 264 para. 3.3.2)*. Further, if necessary, the access to sensitive information can be limited to the arbitral tribunal only *(BAIZEAU/RICHARD, p. 56; WAINCYMER, p. 800; cf. COOK/GARCIA, pp. 264 et seq. para. 3.3.4)*.

34 In the case at hand, in order to ensure that CLAIMANT's business secrets are not disclosed, there are sufficient means available to meet CLAIMANT's possible concerns. Any sensitive information in the exhibits could be redacted. The Tribunal could also grant CLAIMANT permission to only produce selected extracts and access to particularly sensitive information could be limited to the Tribunal only. Therefore, the disclosure of CLAIMANT's business secrets is a concern that could effectively be addressed in the present case.

35 In conclusion, there is no legitimate reason not to join Ross to the Arbitration.

36 **Conclusion**: Since Ross concluded an arbitration agreement with RESPONDENT NO. 2 opting for the Swiss Rules, including the joinder mechanism of Art. 4(2) Swiss Rules, Ross consented to be joined to the Arbitration. Also CLAIMANT consented to the joinder of third parties by agreeing on Art. 4(2) Swiss Rules. Further, if Ross is joined, the equal treatment of Ross concerning the appointment of the Tribunal is guaranteed. Moreover, the joinder of Ross would lead to an overall increase of efficiency and is required to prevent conflicting decisions. Finally, there is also no legitimate reason against the joinder of Ross.

B. THE WITNESS AND EXPERT EXAMINATIONS SHOULD BE HELD IN PERSON

37 Contrary to CLAIMANT's view *(MfC, paras. 51 et seqq.)*, the witness and expert examinations should be held in person because the Tribunal has no discretion to order remote witness and expert examinations [**I**]. In any event, the Tribunal should not order remote witness and expert examinations [**II**].

I. The Tribunal has no discretion to order remote witness and expert examinations

38 The Tribunal has no discretion to order remote witness and expert examinations because CLAIMANT and RESPONDENT NO. 1 agreed to conduct hearings in person.

39 In the case at hand, all parties concerned chose to arbitrate in accordance with the Swiss Rules *(cf. paras. 7 and 12)* and agreed on Vindobona, Danubia, being the seat of the Arbitration *(Exh. C 3, p. 16 para. 14.1; Exh. R 3, p. 34 para. 14.1)*. Thus, the DAL, which is a verbatim adoption of the UNCITRAL Model Law, is the *lex arbitri (PO 1, p. 52 para. III.3)*. Furthermore, all relevant countries in the present case are signatories to the NY Convention *(PO 1, p. 52 para. III.3)*.

40 It is undisputed that, according to Art. 25(4) Swiss Rules, the arbitral tribunal generally has discretion to decide on the manner in which hearings shall be conducted, including the possibility of videoconferencing *(MfC, paras. 80 et seqq.)*. However, the cornerstone of arbitration is the principle of party autonomy *(BERGER/KELLERHALS, p. 3; BORN, ch. 18.01; POUDRET/BESSON, pp. 458 et seq. para. 525; REDFERN/HUNTER, p. 355 para. 6.07)*. Thus, even if the parties agreed on a set of arbitration rules, they can still adapt the procedural conduct according to their preferences by deviating from provisions in said arbitration rules *(BORN, ch. 15.02(D); GIELEN/WAHNSCHAFFE, p. 260; GÓMEZ/ULLAH, Art. 19 para. 2.2; cf. NATER-BASS/PFISTERER, Art. 25 para. 46)*. The arbitral tribunal is bound to comply with the terms of the parties' arbitration agreement *(BORN, ch. 15.02(E)(1); GIELEN/WAHNSCHAFFE, p. 260; cf. BINDER, Art. 24 para. 5-104)*. Thus, Art. 25(4) Swiss Rules does not apply if the parties explicitly agreed on the manner in which hearings shall be held. In case the arbitral tribunal were to disregard the parties' agreement, it would run the risk of the award being set aside according to Art. 34(2)(a)(iv) UNCITRAL Model Law or denied recognition and enforcement pursuant to Art. 36(1)(a)(iv) UNCITRAL Model Law and Art. V(1)(d) NY Convention.

41 In the Arbitration Agreement, CLAIMANT and RESPONDENT NO. 1 agreed to hold hearings *"[…] in Vindobona or in the city where the Respondent has its place of business." (Exh. C 3, p. 16 para. 14.1)*. However, the parties disagree on the meaning of that clause *(MfC, paras. 80 et seqq.; Letter Fasttrack, p. 49 para. 3)*.

42 In order to determine what the parties agreed on in the arbitration agreement, it must be interpreted according to the law applicable to it *(BORN, ch. 4.03; POUDRET/BESSON, pp. 264 et seq. para. 304)*. If the parties chose a specific law to be applicable to the arbitration agreement, the arbitration agreement is governed by that law *(Sulamérica Case [UK, 2012], para. 10; Enka Case [UK, 2020], paras. 29 et seqq.; BRAVO ABOLAFIA, p. 65)*. Absent any specific choice of law for the arbitration agreement, it is disputed whether the arbitration agreement is governed by the law the parties agreed on for the underlying contract *(Sulamérica Case [UK, 2012], para. 12; BRAVO ABOLAFIA, pp. 65 et seq.; REDFERN/HUNTER, pp. 158 et seq. paras. 3.12 et seqq.)* or by the law of the seat of the arbitration *(Sulamérica Case [UK, 2012], para. 65; BORN, ch. 4.04(A)(1)(b)(iv))*.

43 In the case at hand, CLAIMANT and RESPONDENT NO. 1 did not include a specific choice of law for the Arbitration Agreement. However, CLAIMANT and RESPONDENT NO. 1 chose Danubian law to be applicable to the underlying Agreement *(Exh. C 3, p. 16 para. 15.2)*. Danubia is a Contracting State to the CISG *(PO 1, p. 52 para. III.3)*, which is why the CISG is part of Danubian law. Nevertheless, the Agreement is not governed by the CISG *(cf. paras. 76 et seqq.)*.

Hence, the general contract law of Danubia (**"DCL"**), which is a verbatim adoption of the PICC *(PO 1, p. 52 para. III.3)*, applies to the Agreement. Moreover, CLAIMANT and RESPONDENT NO. 1 chose Danubia to be the seat of the Arbitration *(Exh. C 3, p. 16 para. 14.1)*. Thus, the law of the seat of the Arbitration is the DAL *(cf. para. 39)*. The DAL does not contain any provisions on the interpretation of agreements, which is why the Arbitration Agreement can only be interpreted according to the DCL.

44 Pursuant to Art. 4.1(1) PICC, the common intention of the parties is decisive when interpreting their agreement. If the common intent cannot be established, the understanding of a reasonable third person of the same kind under the same circumstances is decisive according to Art. 4.1(2) PICC *(VOGENAUER, Art. 4.1 para. 15)*. For the interpretation, all relevant circumstances pursuant to Art. 4.3 PICC must be considered *(PICC 2010, Art. 4.1 para. 3 and Art. 4.3 para. 1)*.

45 When the Agreement was concluded, CLAIMANT and RESPONDENT NO. 1 did not further discuss the arbitration clause *(PO 2, p. 57 para. 32)*. CLAIMANT accepted the arbitration clause in the template provided by RESPONDENT NO. 1 without objections *(NoA, p. 8 para. 24; PO 2, p. 57 para. 32)*. Thus, there are no indications to establish the common intent of the parties according to Art. 4.1(1) DCL. Consequently, the understanding of a reasonable third person pursuant to Art. 4.1(2) DCL must be determined.

46 As stated above *(cf. para. 41)*, CLAIMANT and RESPONDENT NO. 1 agreed on holding hearings *"[…]* ***in*** *Vindobona or* ***in*** *the city where the Respondent has its place of business." (Exh. C 3, p. 16 para. 14.1, emphasis added)*. Mentioning two possible locations in the Arbitration Agreement where the hearings shall take place strongly suggests a physical presence. According to the understanding of a reasonable third person, it can hardly be assumed that the parties intended only for a main server to be located in Vindobona or in the city where the respective respondent has its place of business whereas the participants could join the hearing from their homes. It is more reasonable to assume that the parties intended for the participants of the hearing to physically appear at the agreed location.

47 This intention is further corroborated by the fact that the model clause of the Swiss Rules only suggests that the parties agree on the seat of the arbitration. However, in the case at hand, CLAIMANT and RESPONDENT NO. 1 not only agreed on the seat of the Arbitration but also on the exact location of possible hearings *(Exh. C 3, p. 16 para. 14.1)*. Therefore, CLAIMANT and RESPONDENT NO. 1 agreed to hold hearings in person in one of the two provided locations.

48 Consequently, the Tribunal has no discretion regarding the manner in which the witness and expert examinations shall be held as the Tribunal is bound by the Arbitration Agreement. If the Tribunal were to disregard the parties' agreement on in-person hearings, it would run the risk

of the award being set aside according to Art. 34(2)(a)(iv) DAL or denied recognition and enforcement pursuant to Art. 36(1)(a)(iv) DAL and Art. V(1)(d) NY Convention.

49 In conclusion, the Tribunal has no discretion to decide in favor of remote witness and expert examinations.

II. In any event, the Tribunal should conduct the witness and expert examinations in person

50 Even if the Tribunal had discretion to decide on the manner in which the hearings shall be conducted, it should hold the witness and expert examinations in person.

51 When deciding on whether or not to hold a remote hearing over one party's objection, an arbitral tribunal must consider all relevant factors *(SCHERER, p. 82; STEIN, p. 172; cf. ABDEL WAHAB, p. 21)*.

52 Remote witness and expert examinations are unjustified in the case at hand because they would lead to a due process violation [**1**]. Furthermore, they would pose a serious risk to the confidentiality of the Arbitration due to a lack of cyber security [**2**]. Moreover, the *Remote Hearing Case* is not comparable to the case at hand [**3**]. Finally, the current COVID-19 pandemic is not a sufficient reason to conduct remote witness and expert examinations [**4**].

1. Remote witness and expert examinations would cause a due process violation

53 Considering that the Arbitration involves complex witness and expert examinations, RESPONDENTS' right to be heard would be violated in case of remote witness and expert examinations.

54 Pursuant to Art. V(1)(b) NY Convention as well as Artt. 34(2)(a)(ii) and 36(1)(a)(ii) UNCITRAL Model Law, the arbitral tribunal must ensure the parties' right to be heard in order to grant a due process *(FERRARI/ROSENFELD/CZERNICH, pp. 3 et seq.; UNCITRAL Model Law Commentary, p. 177 para. 23)*. The right to be heard according to Art. V(1)(b) NY Convention and Art. 18 UNCITRAL Model Law entitles a party to a full and fair opportunity to present its case in an effective manner *(FERRARI/ROSENFELD/CZERNICH, p. 4; Guide on the NY Convention, Art. V(1)(b) para. 32; LAHLOU/POPLINGER/WALTERS, p. 125)*. The right to be heard is also guaranteed under Art. 15(1) Swiss Rules *(JERMINI/GAMBA, Art. 15 para. 10)*. In case the arbitral tribunal does not allow a party to effectively present its case, the arbitral tribunal runs the risk of rendering an award that might be set aside according to Art. 34(2)(a)(ii) UNCITRAL Model Law or denied recognition and enforcement pursuant to Art. 36(1)(a)(ii) UNCITRAL Model Law and Art. V(1)(b) NY Convention *(FERRARI/ROSENFELD/CZERNICH, pp. 3 et seq.; UNCITRAL Model Law Commentary, p. 177 para. 23)*.

55 In general, remote hearings are more suitable for legal arguments than for the taking of evidence *(SCHERER, p. 83; cf. STEIN, p. 172)*. This is because the loss of non-verbal cues and the inability to analyze the person's demeanor in remote examinations make it more difficult to assess the credibility of a witness or expert *(SCHERER, p. 84; cf. BORN/DAY/VIRJEE, p. 146)*. Further, *"Zoom Fatigue"*, *i.e.* the tiredness, worry or burnout associated with overusing virtual platforms of communication, speaks against conducting difficult and long-lasting remote witness and expert examinations *(LEE; NAPPERT/APOSTOL; SKLAR)*. If remote examinations of witnesses and experts are held for multiple days in a row, the participants are deemed to lose focus *(FOSSLIEN/WEST DUFFY; SKLAR)*. In addition, in a survey from 2020, remote hearings were consistently rated as being less useful to effective advocacy and the arbitral tribunal's understanding of the case was considered to be less good than in in-person hearings *(BORN/DAY/VIRJEE, p. 146)*. Finally, the arbitral tribunal must also consider whether all remote participants have a good internet connection and hardware setup *(BATESON, p. 161; LO, p. 89; SCHERER, p. 88)*. This is important since any lagging, break or interruption of the connection would cause testimonies, questions and instructions to be missed, which would hinder the parties from effectively arguing their case *(ABDEL WAHAB, p. 21; LO, p. 89)*.

56 Contrary to CLAIMANT's view *(Letter Langweiler, p. 48 para. 2)*, the dispute at hand is not fairly straight forward but involves a highly controversial issue related to questions of scientific nature. Experts, in turn, will have to be examined on matters such as the operating mode of viral vectors, their ways of production and the differences between the various applications of viral vectors *(Letter Fasttrack, p. 49 para. 4)*. Furthermore, RESPONDENTS will have to present various witnesses, including Mr. Doherty, to argue that there is no relevant overlap between CLAIMANT's and Ross' license *(cf. paras. 117 et seqq.; Exh. R 2, pp. 30 et seq.; Letter Fasttrack, p. 49 para. 4)*.

57 Moreover, the witness and expert examinations are scheduled for multiple days, *i.e.* from 3 to 7 May 2021 *(PO 1, p. 51 para. II)*. Hence, it is likely, considering the complexity of the case, that the participants will lose focus over these days in case of remote witness and expert examinations. Thus, RESPONDENTS would be hindered from effectively arguing their case.

58 Finally, the technical equipment of RESPONDENTS is inferior to the one of CLAIMANT *(PO 2, p. 58 para. 38)*. That inferior equipment promotes the risk of RESPONDENTS' witness and expert examinations being interrupted and important information being lost. These interruptions would violate RESPONDENTS' right to be heard.

59 Considering all these circumstances, only in-person witness and expert examinations allow RESPONDENTS to effectively argue their case. Conducting remote witness and expert examinations would therefore violate RESPONDENTS' right to be heard.

60 In conclusion, remote witness and expert examinations would cause a due process violation.

2. Remote witness and expert examinations would pose a serious risk to the confidentiality of the Arbitration due to a lack of cyber security

61 Holding remote witness and expert examinations would, due to a lack of cyber security, pose a serious risk to the confidentiality of the Arbitration.

62 The confidentiality of arbitral proceedings is one of the main reasons why parties choose to arbitrate *(BORN, ch. 1.02(B)(8); REDFERN/HUNTER, p. 124 para. 2.161)*. Given the confidential nature of arbitration, which is also guaranteed in Art. 44 Swiss Rules, the arbitral tribunal must ensure that any software used in remote hearings is highly secure with sufficient encryption *(ABDEL WAHAB, p. 21; GÜRZUMAR, pp. 20 et seq. para. 46; LO, pp. 89 et seq.)*. In particular, it must be guaranteed that webcams and microphones cannot be hacked and that data from the hearing cannot be hijacked *(BATESON, p. 167; LO, pp. 89 et seq.)*.

63 In the case at hand, RESPONDENTS are concerned about the protection of their data and fear that remote witness and expert examinations could endanger the confidentiality of the Arbitration *(PO 2, p. 58 para. 38)*. These concerns are justified considering the fact that, in the present case, it can never be guaranteed that third parties will not interfere and gain access to the hearing *(PO 2, p. 57 para. 35)*. This interference would jeopardize the confidentiality of the Arbitration. Even if the Tribunal were to hire an outside provider to organize the required safety features, the data would not be sufficiently protected *(PO 2, p. 57 para. 35)*, leaving a serious risk for the confidentiality of the Arbitration.

64 In conclusion, due to the lack of cyber security, remote witness and expert examinations would pose a serious risk to the confidentiality of the Arbitration.

3. The *Remote Hearing Case* is not comparable to the case at hand

65 Contrary to CLAIMANT's view *(MfC, paras. 92 and 118)*, the *Remote Hearing Case* cannot be compared to the case at hand, which is why the Tribunal's decision should not be influenced by the considerations of said case.

66 In the *Remote Hearing Case*, an arbitral tribunal operating under the VIAC Rules rendered a procedural order to conduct a remote hearing which was then contested by one of the parties before the Austrian Supreme Court *(Remote Hearing Case [AUT, 2020], pp. 12 et seq. paras. 11.1.1 et seq.)*. The court considered that the arbitral tribunal had discretion to decide on

the manner of the hearing because there was no respective agreement between the parties *(Remote Hearing Case [AUT, 2020], p. 13 para. 11.1.1)*. Furthermore, the objecting party had agreed to participate by means of videoconference in a previous hearing and had even requested a remote hearing itself prior to the aforementioned procedural order *(ibid.)*. At last, the arbitral tribunal had already rendered a procedural order to conduct remote witness and expert examinations to which none of the parties had objected *(ibid.)*. In light of all these considerations, the Austrian Supreme Court decided that holding a remote hearing was justified.

67 However, the considerations of the Austrian Supreme Court cannot be applied to the case at hand. First, the Arbitration is conducted in accordance with the Swiss Rules and not the VIAC Rules *(Exh. C 3, p. 16 para. 14.1)*. Second, in contrast to the *Remote Hearing Case*, the Tribunal has no discretion to decide on the manner in which hearings shall be conducted because CLAIMANT and RESPONDENT NO. 1 have agreed on in-person hearings *(cf. paras. 38 et seqq.)*. Finally, RESPONDENTS never requested a remote hearing. On the contrary, RESPONDENTS objected to the first procedural order that provided for remote witness and expert examinations *(Letter Fasttrack, p. 49 para. 1)*. Thus, at no point in time did RESPONDENTS consent to remote witness and expert examinations.

68 In conclusion, taking into account the numerous differences, the considerations of the *Remote Hearing Case* cannot be applied to the case at hand and the Tribunal's decision should not be influenced by the same.

4. The COVID-19 pandemic is not a sufficient reason to hold remote witness and expert examinations

69 Contrary to CLAIMANT's view *(MfC, paras. 52 et seqq.)*, the current COVID-19 pandemic is not a sufficient reason to hold remote witness and expert examinations.

70 A court in Danubia decided that remote hearings could be held against one party's objection if so required by public interest *(PO 2, pp. 57 et seq. para. 37)*. Another court in Equatoriana held that remote hearings can generally be conducted against one party's objection *(PO 2, p. 58 para. 37)*. However, these considerations were rendered in regards to state court proceedings and are thus not applicable to arbitration. In arbitration, if one party objects to remote hearings, an arbitral tribunal must carefully consider whether remote hearings jeopardize due process and the confidentiality of the arbitration *(ABDEL WAHAB, p. 21; BATESON, p. 167; LO, pp. 89)*. Further, the arbitral tribunal must consider whether there is a substantial reason to conduct remote witness and expert examinations and whether rescheduling the hearing would entail unwarranted or excessive delays *(Indus Waters Kishenganga Case [ad hoc, 2013], p. 100; Bachmeer*

Capital Case [SGP, 2018], para. 4; SCHERER, pp. 82 et seq. and p. 89; STEIN, p. 172; WILSKE, p. 29).

71 If the Tribunal considers an in-person hearing impossible or inappropriate in May, the Tribunal should postpone the witness and expert examinations rather than conduct remote witness and expert examinations. Otherwise, as stated above *(cf. paras. 53 et seqq. and 61 et seqq.)*, due process would be violated and the confidentiality of the Arbitration would be at risk. Therefore, if an in-person hearing is not possible in May, the only appropriate solution is to postpone it.

72 Furthermore, postponing the witness and expert examinations would not lead to an excessive delay of the Arbitration. Since many countries have already started their vaccination programs, the likelihood of travel restrictions being in place decreases every day *(NY Times, Vaccine; NZZ; DHSC)*. Moreover, a lot of measures, such as the use of plexiglass, the wearing of face-masks, and the duty to conduct social distancing, have been implemented to ensure the participants' safety in in-person hearings *(AFMJ; HKIAC; HMCTS)*. Additionally, none of the participants in the Arbitration suffer from health issues that may prevent them from attending an in-person hearing *(PO 2, p. 57 para. 34)*. Therefore, holding witness and expert examinations in person will most likely be possible soon and not result in an excessive delay.

73 Meanwhile, CLAIMANT is not at all restricted in its research with the Viral Vectors. This is demonstrated by the fact that, only in December 2020, CLAIMANT reached a new trial phase in the development of a vaccine *(PO 2, p. 55 para. 16)*. Therefore, CLAIMANT is still able to conduct its research regarding the COVID-19 vaccine regardless of whether the witness and expert examinations are postponed.

74 In conclusion, the witness and expert examinations should be postponed if they are not possible in person in May because COVID-19 is not a sufficient reason that warrants remote witness and expert examinations in May.

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75 **Conclusion:** By agreeing that hearings shall be held in Vindobona or in the city where the respective respondent has its place of business, CLAIMANT and RESPONDENT NO. 1 agreed on in-person hearings. Thus, the Tribunal has no discretion to decide on the manner in which the hearings shall be conducted. In any event, the Tribunal should conduct the witness and expert examinations in person because remote witness and expert examinations would constitute a due process violation in the case at hand. Moreover, remote witness and expert examinations would pose a serious risk for the confidentiality of the Arbitration. Finally, the COVID-19 pandemic is not a sufficient reason to hold remote witness and expert examinations in the present case.

C. THE CISG IS NOT APPLICABLE TO THE AGREEMENT BETWEEN CLAIMANT AND RESPONDENT NO. 1

76 Contrary to CLAIMANT's view *(MfC, paras. 128 et seqq.)*, the Agreement is not governed by the CISG.

77 Whether the CISG applies to a contract is to be determined autonomously in application of the terms and concepts of the CISG itself *(CLOUT Case No. 447 [USA, 2002], para. B.2; CISG-Online 2013 [SUI, 2009], para. 5.2.1; CISG-Online 2438 [AUT, 2012], p. 10 para. 1; GEBAUER, pp. 685 et seq.; PERALES VISCASILLAS, Art. 7 para. 13)*. Consequently, even though RESPONDENTS are of the view that the CISG does not apply to the Agreement, RESPONDENTS will hereinafter use the interpretation principles of the CISG in order to establish that the Agreement is not governed by the CISG.

78 The CISG is not applicable to the Agreement since the Agreement does not qualify as a sale of goods in the sense of Art. 1(1) CISG [**I**]. Even if the Agreement were a mixed contract containing a sale of goods, its non-sales part would be preponderant according to Art. 3(2) CISG [**II**].

I. The Agreement does not qualify as a sale of goods in the sense of Art. 1(1) CISG

79 Contrary to CLAIMANT's assertion *(MfC, paras. 130 et seqq.)*, the Agreement does not qualify as a sale of goods in the sense of Art. 1(1) CISG. This is because the contractual object of the Agreement is the know-how transferred within the Viral Vectors, which does not qualify as a *"good"* [**1**] and the Agreement is not a *"contract of sale"* in terms of Art. 1(1) CISG [**2**].

1. The know-how transferred within the Viral Vectors is the contractual object and does not qualify as a *"good"* in terms of Art. 1(1) CISG

80 Against CLAIMANT's allegation *(MfC, paras. 131 et seqq.)*, the contractual object of the Agreement is the know-how transferred within the Viral Vectors, which does not qualify as a good in terms of Art. 1(1) CISG.

81 Under the CISG, *"goods"* are qualified as objects that are moveable and tangible at the time of delivery *(CISG-Online 117 [AUT, 1994], p. 3; BRUNNER/MEIER/STACHER, engl., Art. 2 para. 2; FERRARI, Art. 1 para. 34; MISTELIS, Art. 1 para. 37; SCHWENZER/HACHEM, Art. 1 para. 16)*. Incorporeal things, *e.g.* rights such as patents and licenses do not fall under the CISG's notion of *"goods" (BRUNNER/MEIER/STACHER, ger., Art. 2 para. 3; FERRARI, Art. 1 para. 36; SCHWENZER/HACHEM, Art. 1 para. 22)*. Accordingly, know-how as an incorporeal thing does not constitute a good in the sense of the CISG *(BRUNNER/MEIER/STACHER, engl., Art. 2 para. 3; HONNOLD/FLECHTNER, Art. 2 para. 56; SCHWENZER/HACHEM, Art. 1 para. 19)*.

82 Contrary to CLAIMANT's view *(MfC, para. 137)*, know-how does not automatically qualify as a good if it is embodied in an object in order to be handed over to the customer *(CISG-Online 132 [GER, 1994]; MISTELIS, Art. 1 para. 38; SCHWENZER/HACHEM, Art. 1 para. 19)*. Rather, if know-how is embodied in a tangible medium, the applicability of the CISG regarding the transfer of such know-how depends on the true purpose of the respective contract (*CISG-Online 132 [GER, 1994]; SCHWENZER/HACHEM, Art. 1 para. 19)*. In fact, whether the know-how is embodied in a physical medium is irrelevant if the true purpose of the contract lies within the transfer of the know-how *(CISG-Online 132 [GER, 1994]; MISTELIS, Art. 1 para. 38; MOWBRAY, p. 125; SCHLECHTRIEM, Art. 1 para. 21a; SCHWENZER/HACHEM, Art. 1 para. 19)*.

83 CLAIMANT argues that the Viral Vectors are goods in the sense of the CISG and that the necessary granting of the license to use them does not affect this qualification *(MfC, paras. 131 et seqq.)*. However, CLAIMANT fails to recognize that the true object of the Agreement is not the Viral Vectors but the know-how transferred within them, according to the interpretation of the Agreement.

84 The Agreement has to be interpreted according to Art. 8 CISG. Pursuant to Art. 8(1) CISG, it is primarily the parties' common intention that is relevant for the interpretation of an agreement *(CISG-Online 1012 [SUI, 2005], para. 3.2; CISG-Online 2967 [ICC, 2012], p. 22; CISG-Online 2560 [SUI, 2013], para. 3.2.1; SCHMIDT-KESSEL, Art. 8 para. 21)*. If the parties' common intention cannot be established, an agreement must be interpreted pursuant to the understanding of a reasonable third party according to Art. 8(2) CISG *(CISG-Online 1740 [SUI, 2008], para. 3.1.2; CISG-Online 2747 [GER, 2015], para. B.II.2aa; SCHMIDT-KESSEL, Art. 8 para. 21)*. For the purposes of interpretation, all circumstances, including the negotiations, must be taken into consideration pursuant to Art. 8(3) CISG *(CISG-Online 342 [USA, 1998], p. 6; CISG-Online 669 [AUT, 2002], p. 3; SCHMIDT-KESSEL, Art. 8 para. 31)*.

85 Due to a lack of indications, the common intent of the parties to the Agreement according to Art. 8(1) CISG cannot be established. Thus, the Agreement must be interpreted pursuant to the understanding of a reasonable third party according to Art. 8(2) CISG.

86 The Agreement concerns the use of the Viral Vectors for the research, development and subsequent production of a vaccine *(Exh. C 3, pp. 12 et seq. para. 2)*. The Viral Vectors are complex in their creation *(Exh. C 2, p. 10)*. Many companies involved in the production of vaccines lack the necessary know-how to breed the Viral Vectors themselves *(ibid.)*. RESPONDENT NO. 1, however, has the necessary know-how for the production of greater quantities of the Viral Vectors *(ibid.)*. CLAIMANT is only able to produce the Viral Vectors itself after receiving the

respective know-how embodied in the first batch of Viral Vectors *(PO 2, p. 53 para. 4)*. In addition, in order to produce a vaccine, CLAIMANT requires an additional transfer of know-how about the best procedures to amplify the Viral Vectors *(PO 2, p. 55 para. 17)*. Thus, CLAIMANT, in its attempt to develop a vaccine, strongly relies on RESPONDENT NO. 1's know-how. Even though this know-how is embodied in the Viral Vectors handed over to CLAIMANT, according to the understanding of a reasonable third party, the essential part of the exchange and the intention behind the Agreement remains the transfer of the underlying know-how.

87 Moreover, the conditional purchase obligation in the Agreement relating to the base materials *(Exh. C 3, p. 17 para. 16.1)* cannot be of relevance for the characterization of the Agreement. Whereas CLAIMANT qualifies the base materials as goods *(MfC, paras. 132 et seq.)*, the purchase obligation of these base materials only comes into effect upon commercialization of a vaccine *(Exh. C 3, p. 17 para. 16.1)*. It is, thus, not part of the initial transaction between CLAIMANT and RESPONDENT NO. 1 that is relevant for characterizing the Agreement. CLAIMANT has not yet commercialized its vaccine *(PO 2, p. 55 para. 16)* and the likelihood of a commercialization decreases each day since there are already several vaccines approved by authorities and many countries have already started their vaccination programs *(BBC; FGG; FOPH)*. Consequently, the purchase obligation is unlikely to come into effect. The contract characterization cannot depend on conditional obligations, in particular if they are unlikely to materialize. Therefore, the base materials are of no relevance for the qualification of the Agreement.

88 In conclusion, the Agreement does not concern goods in the sense of Art. 1(1) CISG because its true purpose lies in the transfer of know-how.

2. The Agreement is not a *"sale"* in the sense of Art. 1(1) CISG

89 Contrary to CLAIMANT's view *(MfC, paras. 134 et seqq.)*, the Agreement between CLAIMANT and RESPONDENT NO. 1 does not constitute a contract of *"sale"* in the sense of Art. 1(1) CISG.

90 The CISG does not explicitly define what constitutes a sales contract *(GILLETTE/WALT, p. 43; HUBER/MULLIS, p. 43; MISTELIS, Art. 1 para. 25)*. However, a definition can be derived from Artt. 30 and 53 CISG *(BRUNNER/MEIER/STACHER, ger., Art. 2 para. 7; GILLETTE/WALT, p. 43; MISTELIS, Art. 1 para. 25)*. According to Art. 30 CISG, the seller is obliged to deliver goods and transfer ownership to the buyer. In exchange, the buyer must pay the purchase price and take delivery pursuant to Art. 53 CISG. Thus, the CISG's notion of a *"sale"* requires the transfer of ownership of goods to the buyer. In contrast, the contract does not qualify as a *"sale"* in that sense and the CISG does not apply if the parties intended to merely grant a license *(HUBER/MULLIS, p. 43; SCHWENZER/HACHEM, Art. 1 para. 18; SCHWENZER/HACHEM/KEE, p. 105 para. 7.32)*.

91 In the case at hand, RESPONDENT NO. 1 merely intended to grant CLAIMANT a license to use the know-how transferred under the Agreement, rather than transferring ownership. CLAIMANT needs the Viral Vectors for its research, development and subsequent production of a vaccine against respiratory diseases *(Exh. C 3, pp. 12 et seq. para. 2)*. Hence, CLAIMANT must be able to use them accordingly. To be in that position, RESPONDENT NO. 1 granted CLAIMANT the respective non-exclusive license *(Exh. C 3, p. 13 para. 5.2)*. The license to use the Viral Vectors is limited to certain diseases, *i.e.* infectious and non-infectious respiratory diseases *(Exh. C 3, p. 12 para. 2)*. CLAIMANT is not allowed to use the Viral Vectors for any other desired application. Thus, CLAIMANT did not receive an exclusive and unrestricted right to use the Viral Vectors. Moreover, the Agreement states that if CLAIMANT terminates the contract during the royalty term, it loses its right to use the Viral Vectors completely *(Exh. C 3, p. 16 para. 13.1)*. Therefore, the parties intended to grant a license to use the know-how rather than to transfer ownership.

92 Furthermore, the Agreement refers to the parties as *"**licensor**"* and *"**licensee**" (Exh. C 3, pp. 11 et seqq., emphasis added)*. This confirms the parties' intention to conclude a license agreement rather than a sales agreement. Even CLAIMANT itself calls a patent owner that sells and delivers batches of viral vectors a *"**licensor**"*, not a seller *(NoA, p. 6 para. 14, emphasis added)*. The only reason why the Agreement was called *"Purchase, Collaboration and License Agreement" (Exh. C 3, p. 11)* was the purchase obligation concerning the base materials. However, as mentioned above *(cf. para. 87)*, this conditional purchase obligation only enters into force if the vaccine is commercialized and is, therefore, irrelevant for the qualification of the Agreement.

93 In conclusion, the Agreement between CLAIMANT and RESPONDENT NO. 1 does not constitute a contract of sale in the sense of Art. 1(1) CISG.

II. Even if the Agreement contained a sale of goods, its non-sales part would be preponderant according to Art. 3(2) CISG

94 Even if the Tribunal came to the conclusion that the Agreement partly concerned a sale of goods, the Agreement, as a mixed contract, would still fall outside the scope of the CISG.

95 According to Art. 3(2) CISG, the CISG does not apply to mixed contracts if the preponderant part consists of non-sales aspects, *e.g.* license parts *(FERRARI, Art. 3 para. 19; HUBER/MULLIS, p. 42; SONO, p. 518)*.

96 If the Agreement were to be considered a mixed contract, it nevertheless would not be governed by the CISG because the license part of the Agreement would be preponderant according to the economic value criterion [**1**] as well as the intent of the parties [**2**].

1. According to the economic value criterion, the granting of the license is the preponderant part of the Agreement

97 Contrary to CLAIMANT's view *(MfC, paras. 140 et seqq.)*, the granting of the license would be the preponderant part of the Agreement according to the economic value criterion.

98 In order to determine the preponderant part of a contract, the criterion to be primarily considered is the economic value criterion *(CISG-Online 2026 [SUI, 2009], p. 17 para. 2; CISG-Online 2351 [GER, 2010], para. 24; CISG-AC No. 4, para. 3.3; FERRARI, Art. 3 para. 13; MISTELIS/RAYMOND, Art. 3 para. 18)*. According to this criterion, the non-sales part is preponderant if the value of the non-sales part exceeds 50% of the total economic value of the contract *(CISG-Online 954 [AUT, 2004], p. 3; FEIT, Art. 3 para. 7; FERRARI, Art. 3 para. 15; MISTELIS/RAYMOND, Art. 3 para. 18; SAENGER, Art. 3 para. 6)*. The relevant time to assess the value is the time of conclusion of the contract *(CISG-AC No. 4, para. 3.3; FEIT, Art. 3 para. 7; FERRARI, Art. 3 para. 13)*.

99 In the Agreement, CLAIMANT and RESPONDENT NO. 1 concluded that a payment of EUR 2,500,000 is due upon delivery of the Viral Vectors *(Exh. C 3, p. 13 para. 9.2)*. CLAIMANT alleges that the sum of EUR 2,500,000 constitutes the value of the Viral Vectors *(MfC, para. 150)*. It is undisputed that this is the only payment in exchange for the Viral Vectors *(ibid.)*. However, CLAIMANT fails to recognize that, according to the Agreement, EUR 2,500,000 cover the delivery of the Viral Vectors as well as the granting of access to the respective license *(Exh. C 3, p. 13 para. 9.2)*. Since the individual values of the sales and license components cannot be derived from that sum, this payment cannot be considered in order to establish the preponderant part of the Agreement.

100 However, CLAIMANT and RESPONDENT NO. 1 agreed on license payments that can be considered in order to establish the preponderant part of the Agreement. These payments are due upon reaching certain milestones *(Exh. C 3, p. 14 paras. 9.3 et seq.)*. Reaching the milestones depends on entering different trial phases on the way of developing a vaccine *(ibid.)*. In total, the milestone payments amount to EUR 3,000,000 *(Exh. C 3, p. 14 para. 9.4)*. It is undisputed that these milestone payments are license payments as CLAIMANT itself refers to them as such *(ibid.; NoA, pp. 6 et seq. para. 16)*. For the assessment of the economic value of the individual parts of the Agreement, it cannot be of relevance that CLAIMANT, as of now, only reached three out of four milestones. This is because the decisive factor is the economic value the parties assigned to the various components at the time of conclusion of the Agreement. Thus, EUR 3,000,000

have to be considered as license payments when determining the preponderant part of the Agreement.

101 Moreover, in case of commercialization of the vaccine, royalty payments on annual net sales are due and an obligation to purchase the base materials in the value of EUR 2,000,000 per batch comes into effect *(Exh. C 3, p. 14 para. 9.5 and p. 17 para. 16)*. However, the calculation of the royalties as well as the total payment due in exchange for the base materials depend on two unknown factors. First, the amount of these payments is only based on estimates *(PO 2, pp. 53 et seq. paras. 5 et seq.; PO 2 Appendix 1, p. 59)*. Second, the percentage due as royalties and the price of the base materials depend on CLAIMANT's choice to either produce the vaccine itself or request RESPONDENT NO. 1 to produce it *(Exh. C 3, p. 14 para. 9.5 and p. 17 para. 16)*. Therefore, the value of the royalties as well as the value of the purchase obligation cannot be assessed conclusively.

102 Even if the Tribunal were to compare the royalties and the purchase obligation, it would come to the conclusion that the purchase obligation of EUR 2,000,000 per batch of base materials is a small sum compared to the royalties which would be due in case of commercialization *(Exh. C 3, p. 14 para. 9.5.1 and p. 17 para. 16.1)*. If CLAIMANT successfully develops the vaccine and decides to commercialize it, CLAIMANT needs to acquire approximately 100 batches of the base materials *(PO 2, p. 53 para. 5)*. This would amount to a total purchase price of EUR 200,000,000 for the base materials. In comparison, the total amount of the estimated royalty payments for the 10-year royalty term is between EUR 800,000,000 (100 mio. dosages per year x EUR 20 x 4% x 10 years) and EUR 1,600,000,000 (100 mio. dosages per year x EUR 40 x 4% x 10 years) *(Exh. C 3, p. 14 para. 9.5.1; PO 2, pp. 53 et seq. para. 6)*. Thus, in case CLAIMANT successfully develops and commercializes the vaccine, the license part is still preponderant when comparing it to the sales part.

103 Therefore, the milestone payments indicate that CLAIMANT and RESPONDENT NO. 1 assigned a higher economic value to the license part than to the sales part. The same holds true when looking at the estimated payments that CLAIMANT would have to make if it were to commercialize the vaccine.

104 In conclusion, the license part is the preponderant part of the Agreement according to the economic value criterion.

2. According to the intent of the parties, the granting of the license is the preponderant part of the Agreement

105 In addition to the economic value criterion, the granting of the license is also the preponderant part of the Agreement according to the intent of the parties.

106 When evaluating the preponderant part of a contract, the parties' intention and their interests should also be considered *(CISG-Online 1735 [AUT, 2007], p. 26; CISG-Online 1740 [SUI, 2008], para. 3.1.1; CISG-Online 2026 [SUI, 2009], p. 17 para. 2; FERRARI, Art. 3 para. 14)*. In order to establish the intention of the parties at the time of conclusion of the contract, the relevant factors to be considered include the denomination and entire content of the contract, the weight given by the parties to the different obligations under the contract as well as the interests of either party *(ICC Case 7153 [ICC, 1992]; Cylinder Case [GER, 1998]; CISG-Online 1740 [SUI, 2008], para. 3.1.1; CISG-AC No. 4, para. 3.4)*.

107 CLAIMANT argues that because the Agreement contains the notion *"purchase"* in the heading, the sales part is preponderant *(MfC, para. 146)*. However, the Agreement between CLAIMANT and RESPONDENT NO. 1 is named *"Purchase, Collaboration and License Agreement" (Exh. C 3, p. 11)*. The heading considers all three aspects of the Agreement, *"purchase"* being only one of them. In addition, as stated above *(cf. para. 92)*, the Agreement refers to CLAIMANT and RESPONDENT NO. 1 as *"licensee"* and *"licensor"*. Thus, the wording of the Agreement speaks for the preponderance of the license part.

108 The preponderance of the license part is also confirmed by the negotiation history. CLAIMANT rejected the template originally introduced by RESPONDENT NO. 1 as not sufficiently taking into account the IP-element involved *(Exh. R 2, p. 30 para. 7)*. For this reason, the parties then took over the original template from RESPONDENT NO. 2 for its Collaboration and License Agreements *(NoA, p. 6 para. 12)*. It was thus CLAIMANT that insisted on primarily concluding a Collaboration and License Agreement. The parties only made minor changes and added the conditional purchase obligation *(NoA, p. 6 para. 13)*. The Agreement essentially remained a Collaboration and License Agreement, in line with CLAIMANT's express request. Six out of the seven pages of the Agreement regulate the license granted to CLAIMANT as well as the collaboration activities *(Exh. C 3, pp. 11 et seqq.)*. Only two subparagraphs concern the purchase of the base materials and thus, the sales part *(Exh. C 3, p. 17 paras. 16.1 et seq.)*. This demonstrates that, at the time of conclusion of the Agreement, the license obligation was of vital importance for both RESPONDENT NO. 1 and CLAIMANT. Therefore, the content of the Agreement predominantly entails the license obligation and collaboration activities.

109 CLAIMANT further argues that the Agreement is predominantly a sales contract because RESPONDENT NO. 1 and CLAIMANT included a conditional purchase obligation for base materials in the Agreement *(MfC, paras. 150 et seqq.)*. As stated above *(cf. para. 87)*, the purchase obligation cannot be of relevance for the characterization of the Agreement because it is conditional and unlikely to materialize. Even if the purchase obligation were to be considered, CLAIMANT and RESPONDENT NO. 1 still did not intend to predominantly conclude a sales contract. RESPONDENT NO. 1 only suggested the additional purchase obligation in order to incentivize CLAIMANT to let RESPONDENT NO. 1 produce the vaccine, instead of merely buying the base materials and then produce the vaccine itself *(Exh. C 2, p. 10; Exh. R 2, p. 31 para. 11; PO 2, p. 56 para. 26)*. CLAIMANT only wanted to include the purchase obligation because it was not able to produce the base materials necessary for the production of a vaccine at the time of conclusion of the Agreement itself *(NoA, p. 6 para. 15)*. Therefore, CLAIMANT and RESPONDENT NO. 1 did not intend to predominantly conclude a sales agreement by including the purchase obligation.

110 In conclusion, according to the intention of the parties, the license part of the Agreement is preponderant.

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111 **Conclusion:** The Agreement is not governed by the CISG because the Agreement does not concern a sale of goods but the granting of a license to use the know-how transferred within the Viral Vectors. The contractual object, *i.e.* the know-how, does not qualify as a *"good"* in terms of Art. 1(1) CISG. Furthermore, the Agreement does not constitute a contract of sale according to Art. 1(1) CISG because no ownership was transferred. Even if the Agreement were a mixed contract containing a sale of goods, the license part of the Agreement is preponderant according to Art. 3(2) CISG.

D. RESPONDENT NO. 1 DID NOT BREACH ITS OBLIGATION TO DELIVER CONFORMING GOODS PURSUANT TO ART. 42 CISG

112 Assuming, for the purposes of this issue, that the CISG is applicable, RESPONDENT NO. 1 did not breach its obligations arising out of Art. 42 CISG. According to Art. 42(1) CISG, the seller must deliver goods which are free from any right or claim of a third party based on IP.

113 RESPONDENT NO. 1 complied with this obligation because the Viral Vectors delivered to CLAIMANT are free from any right or claim of Ross [**I**]. Even if Ross had a right or claim in the sense of Art. 42 CISG, RESPONDENT NO. 1 was not and did not have to be aware of it at the time of conclusion of the Agreement [**II**]. In any event, CLAIMANT would have lost any right to rely on Art. 42 CISG as it failed to comply with the notice requirement under Art. 43 CISG [**III**].

I. The Viral Vectors are free from any right or claim in accordance with Art. 42 CISG

114 Both CLAIMANT and Ross received a license to use the same Viral Vectors but for different fields of application *(cf. graphic, para. 2)*. However, after Ross became aware that the Viral Vectors also had potential for research into the field of respiratory diseases, it started alleging towards RESPONDENT NO. 2 that it has a prevailing IP right in the same field of application as CLAIMANT does *(Answer to NoA, p. 26 para. 7; Exh. C 2, p. 10; Exh. R 4, p. 35 para. 2; PO 2, p. 54 para. 14)*. Due to Ross' allegation, CLAIMANT now wrongfully asserts that RESPONDENT NO. 1 breached its obligation pursuant to Art. 42(1) CISG *(MfC, paras. 162 et seqq.)*.

115 A breach of Art. 42 CISG requires either a right or a claim of a third party based on IP. The burden of proof for the existence of a defect of title lies with the buyer *(CISG-Online 1290 [NLD, 1996], para. 19; CISG-Online 1364 [AUT, 2006], p. 5; CISG-Online 2346 [SUI, 2012], para. 2.3; SCHWENZER, ger., Art. 42 para. 29; TEBEL, engl., Art. 42 para. 28)*. Thus, CLAIMANT bears the burden of proof for the existence of a prevailing IP-right of Ross.

116 RESPONDENT NO. 1 did not breach Art. 42 CISG because the Viral Vectors are free from any right of Ross as there is no relevant overlap between Ross' and CLAIMANT's license [**1**]. Furthermore, Ross' allegation is not sufficient for a claim in the sense of Art. 42 CISG since the risk of CLAIMANT being sued by Ross is not fairly likely [**2**].

1. The Viral Vectors are free from any right of Ross as there is no relevant overlap between Ross' and CLAIMANT's license

117 Contrary to CLAIMANT's view *(MfC, paras. 175 et seqq.)*, the Viral Vectors are free from any right of Ross. Even though Ross and CLAIMANT received a license for the same patent, there is no relevant overlap between the licenses because they were granted for different fields of application.

118 Under the Agreement concluded in 2019, RESPONDENT NO. 1 granted CLAIMANT a non-exclusive license *"[…] with respect to the GorAdCam vectors for the indication of infectious and non-infectious respiratory diseases […]" (cf. graphic, para. 2; Exh. C 3, p. 11, p. 12 para. 2 and p. 13 para. 5.2)*. RESPONDENT NO. 1 itself is the licensee of RESPONDENT NO. 2 *(NoA, pp. 5 et seq. para. 10)*. RESPONDENT NO. 2 holds the patent for the GorAdCam vectors, *i.e.* the Viral Vectors, and granted an exclusive license to Ross in 2014 under the Ross Agreement *(ibid.; Exh. R 3, pp. 32 et seqq.)*. The Ross Agreement grants Ross an exclusive license to use the Viral Vectors for *"[…] the indication of malaria and related infectious diseases […]" (cf. graphic, para. 2; Exh. R 3, p. 32 para. 2)*.

119 First, the scope of the Ross Agreement does not cover respiratory diseases. Shortly before concluding the Ross Agreement, Ross tried to acquire RESPONDENT NO. 2 in order to get access to both its patents, *i.e.* the patent concerning the Viral Vectors and the one concerning the ChAdCam vectors *(Answer to NoA, p. 26 para. 5; Exh. C 7, p. 21 para. 4)*. At that time, the Viral Vectors' primary field of application was in the field of vaccines against malaria whereas the ChAdCam vectors had high potential for all kinds of respiratory diseases *(NoA, p. 5 para. 6; PO 2, p. 55 para. 20)*. RESPONDENT NO. 2 was not interested in selling the company to Ross since RESPONDENT NO. 2 was concerned that Ross was only interested in the use of the Viral Vectors for a possible malaria vaccine and would not seriously continue the research with the ChAdCam vectors, neglecting research into respiratory diseases *(Answer to NoA, p. 26 para. 5)*. Consequently, RESPONDENT NO. 2 only intended to grant the license for the Viral Vectors in the field of malaria to Ross but never in the field of respiratory diseases.

120 This is further corroborated by the fact that, before concluding the Ross Agreement, RESPONDENT NO. 2 was looking to monetize its know-how only in regards to malaria and focused its own research activities on the field of respiratory diseases *(NoA, p. 5 para. 7)*. RESPONDENT NO. 2 even made the intention to focus its own research on respiratory diseases public in a press release *(Exh. C 1, p. 9 para. 2)*. Therefore, RESPONDENT NO. 2 never had the intention to grant Ross a license to use the Viral Vectors in the field of respiratory diseases. COVID-19, as a respiratory disease *(PO 2, p. 55 para. 23)*, consequently falls outside the scope of the license granted under the Ross Agreement.

121 Second, Ross' conduct demonstrates that Ross itself was convinced that the license granted under the Ross Agreement does not cover respiratory diseases. When Ross realized the potential of the Viral Vectors for respiratory diseases three years after concluding the Ross Agreement, it tried to acquire RESPONDENT NO. 2 and its patents again *(Answer to NoA, p. 26 paras. 6 et seq.; Exh. C 2, p. 10; PO 2, p. 54 para. 14)*. The reason behind Ross' attempt was to use the Viral Vectors also in the field of respiratory diseases *(cf. PO 2, p. 54 para. 14)*. If Ross had been of the opinion that respiratory diseases were already covered by its license, such an attempt would have been pointless.

122 Third, COVID-19 is not a malaria-related infectious disease and, thus, not covered by Ross' license. It is true that Ross was willing to pay an additional EUR 600,000 to extend the scope of its license beyond malaria to *"malaria and **related** infectious diseases" (Exh. R 2, p. 30 para. 5; Exh. R 3, p. 32 para. 2, emphasis added; Exh. R 4, p. 35 para. 2; PO 2, p. 55 para. 20)*. Ross requested the expansion of its license because it wanted to be able to use the knowledge acquired during its research in the field of malaria for the development of vaccines against other

infectious diseases in developing countries *(PO 2, p. 55 para. 20)*. RESPONDENTS do not contest that COVID-19 is an infectious disease. However, it is not related to malaria in the sense of the Ross Agreement. Ross and RESPONDENT NO. 2 expressly mentioned cholera as an example for an infectious disease that is related to malaria *(PO 2, p. 55 paras. 20 et seq.)*. By including cholera as an example for related infectious diseases, Ross and RESPONDENT NO. 2 expanded the scope to infectious diseases that are mostly discovered when conducting research in developing countries *(PO 2, p. 55 para. 20)*. However, COVID-19 was not discovered in this context *(NY Times, Timeline Coronavirus; The Guardian)*. Therefore, COVID-19 is not related to malaria in the sense of the Ross Agreement.

123 In conclusion, the Viral Vectors are free from any right of Ross because there is no relevant overlap between Ross' and CLAIMANT's license.

2. The risk of CLAIMANT being sued by Ross is not fairly likely

124 Ross' allegation is not sufficient for a claim in the sense of Art. 42 CISG since the risk of CLAIMANT being sued by Ross is not fairly likely.

125 For an allegation to qualify as a claim in the sense of Art. 42 CISG, there must be a fairly likely risk of the buyer being sued by the third party that claims an IP right *(KRÖLL, Art. 42 para. 10)*. The third party must seek to assert a right against the use of the purchased item *(ACHILLES, FS Schwenzer, p. 5; GRUBER, Art. 41 para. 7; SCHWENZER, ger., Art. 41 para. 11)*. For this purpose, the third party must approach the buyer with regard to the use of the purchased goods instead of merely approaching the seller *(ACHILLES, FS Schwenzer, pp. 5 et seq.; BENICKE, Art. 41 para. 6; HUBER, p. 501; TEBEL, ger., Art. 42 para. 4)*. The deciding factor is that the third party is so confident of the claim that the buyer is impaired in his free use of the item *(ACHILLES, FS Schwenzer, p. 10; BENICKE, Art. 41 para. 6; SCHWENZER, ger., Art. 42 para. 6; SCHWENZER/TEBEL, pp. 3 et seq. para. 10)*.

126 CLAIMANT's view that it is impaired in its use of the Viral Vectors because of Ross' mere allegation *(MfC, paras. 169 et seqq.)* is not supported by facts. CLAIMANT was never contacted by Ross. In contrast, Ross did hold discussions with RESPONDENT NO. 2 for over two years instead of simply asserting its claim in court *(Exh. R 4, p. 35 paras. 2 et seqq.; Exh. R 5, p. 36)*. Ross even was amenable to mediation in regard to the problem and suggested to simply obtain a newly granted non-exclusive license from RESPONDENT NO. 1 to use the Viral Vectors in the field of respiratory diseases *(Exh. R 5, p. 35 para. 4)*. Ross' numerous attempts to resolve the issue in an amicable way with RESPONDENT NO. 2, without directly contacting CLAIMANT, suggest that Ross has no intention to involve CLAIMANT.

127 Even CLAIMANT itself does not seem to be overly concerned about the risk of being sued by Ross. This is supported by the fact that CLAIMANT announced promising results of its research into a COVID-19 vaccine in August 2020, *i.e.* after becoming aware of Ross' allegation *(Answer to NoA, p. 25 para. 3; Exh. C 5, p. 19)*. It was even able to reach a new milestone by starting a new research phase in December 2020 *(PO 2, p. 55 para. 16)*. If CLAIMANT were convinced that Ross will enforce its allegation, it would not have invested any further financial assets and manpower in the development of a vaccine against COVID-19 since a successful claim of Ross would make such investments useless.

128 In conclusion, the risk of CLAIMANT being sued by Ross is not fairly likely.

II. Even if Ross had a right or claim, RESPONDENT NO. 1 was not and did not have to be aware of it at the time of conclusion of the Agreement in accordance with Art. 42(1) CISG

129 According to Art. 42(1) CISG, the seller is only liable if he knew or could not have been unaware of a third-party right or claim at the time of conclusion of the contract.

130 RESPONDENT NO. 1, however, was not aware of Ross' allegation [**1**] and did not have to be aware of it at the time of conclusion of the Agreement [**2**].

1. RESPONDENT NO. 1 was not aware of Ross' allegation

131 RESPONDENT NO. 1 was not aware of Ross' allegation at the time of conclusion of the Agreement.

132 A seller is considered to know about the third party's right or claim if the third party directly contacted him regarding the right or claim before the delivery of the goods to the buyer *(KRÖLL, Art. 42 para. 26; RAUDA/ETIER, p. 48)*.

133 In the case at hand, the discussions about the scope of the Ross Agreement were first conducted by RESPONDENT NO. 2 and later taken over by Roctis, the mother company of both RESPONDENTS *(PO 2, p. 53 para. 1)*. RESPONDENT NO. 1 was not involved in the discussions concerning the scope of the Ross Agreement *(ibid.)* and, therefore, did not know about them before the delivery of the Viral Vectors to CLAIMANT.

134 In conclusion, RESPONDENT NO. 1 was not aware of Ross' allegation.

2. RESPONDENT NO. 1 did not have to be aware of Ross' allegation

135 RESPONDENT NO. 1 did not have to be aware of Ross' allegation when concluding the Agreement with CLAIMANT.

136 Under Art. 42(1) CISG, the seller is also liable if he could not have been unaware of the possible infringement of an IP right at the time of conclusion of the contract *(KRÖLL, Art. 42 para. 25; SCHWENZER, engl., Art. 42 para. 15)*. Contrary to CLAIMANT's view *(MfC, para. 216)*, this does not mean that the seller is obliged to investigate any unregistered IP rights *(ACHILLES, Art. 42 para. 9; METZGER, p. 860; PILTZ, para. 5-132; RAUDA/ETIER, p. 47; SCHWENZER, ger., Art. 42 para. 14)*. The seller is only liable if he closed his eyes to the relevant facts or was grossly negligent regarding the information at hand *(ACHILLES, Art. 42 para. 8; JANAL, p. 213; KRÖLL, Art. 42 para. 28; SHINN, pp. 126 et seq.)*.

137 In the case at hand, there are no indications that Ross' license is registered. Thus, RESPONDENT NO. 1 was not obliged to investigate Ross' IP right.

138 Furthermore, RESPONDENT NO. 1, as a legally independent entity, was never directly contacted by Ross *(PO 2, p. 53 para. 1)*. As stated above, the discussions with Ross in order to resolve the matter were first conducted by RESPONDENT NO. 2 in December 2018 and later continued by Roctis *(cf. para. 133; Exh. R 4, p. 35).* In light of the wording of the Ross Agreement as well as its drafting history *(cf. paras. 107 et seq.)*, RESPONDENT NO. 2 never even considered the coverage of respiratory diseases by Ross' license as an issue *(Answer to NoA, p. 27 para. 12; Exh. R 2, p. 30 para. 5)*. Moreover, Roctis did not see an issue either since it had its IP-lawyers look into the matter, who assured once more in January 2020 that Ross' allegation is completely baseless *(Exh. R 5, p. 36 para. 2)*. This view is further supported by the fact that Ross' conduct suggests that Ross itself is not entirely convinced of its allegation *(cf. para. 126)*. Thus, Roctis and RESPONDENT NO. 2 did not see the necessity to involve RESPONDENT NO. 1, especially since these IP-related decisions are taken at a group level *(PO 2, p. 53 para. 1)*. The only information that RESPONDENT NO. 1 had, was that Ross has a prevailing license in the field of malaria *(ibid.)*. Therefore, RESPONDENT NO. 1 was not grossly negligent by not being aware of the discussions between RESPONDENT NO. 2, Roctis and Ross.

139 Moreover, in order to construe RESPONDENT NO. 1's gross negligence, CLAIMANT mentions the Biopharma Science article published on 14 December 2018 which refers to the alleged dispute between RESPONDENT NO. 2 and Ross *(MfC, para. 175).* However, Biopharma Science is a local journal of the start-up scene published in Danubia *(NoA, p. 7 para. 19; PO 2, p. 54 para. 8)*. RESPONDENT NO. 1, as a successful contract manufacturing organization seated in Equatoriana, is not involved in the start-up scene of Danubia *(NoA, p. 5 para. 4)* and, thus, cannot be expected to be aware of the content of such a journal. Furthermore, RESPONDENT NO. 1 cannot reasonably be expected to be aware of every article published concerning the alleged dispute

between RESPONDENT NO. 2 and Ross. This holds all the more true since RESPONDENT NO. 1 was not part of that dispute.

140 Contrary to CLAIMANT's view *(MfC, paras. 228 et seqq.),* this is not changed by the fact that Ross contacted Mr. Doherty on 6 December 2018, who, at the time, worked for RESPONDENT NO. 2 *(Exh. R 2, p. 30 para. 1; Exh. R 4, p. 35)*. Mr. Doherty's main focus was labor and company law *(Exh. R 2, p. 30 para. 1)*. Thus, he simply forwarded the e-mail to Roctis, also considering that strategic decisions are taken at a group level *(Exh. R 5, p. 36; PO 2, p. 53 para. 1)*.

141 In conclusion, RESPONDENT NO. 1 did not have to be aware of Ross' claim.

III. In any event, CLAIMANT did not comply with Art. 43 CISG

142 Even if Ross had a right or claim in the sense of Art. 42 CISG, CLAIMANT would have lost any right to rely on Art. 42 CISG as CLAIMANT failed to comply with the notice requirement under Art. 43 CISG.

143 In order to rely on a seller's breach of contract, the buyer must give notice about the third-party right or claim pursuant to Art. 43(1) CISG.

144 CLAIMANT was obliged to give notice pursuant to Art. 43(2) CISG [**1**]. However, CLAIMANT did not give notice within a reasonable time pursuant to Art. 43(1) CISG [**2**].

1. CLAIMANT was obliged to give notice pursuant to Art. 43(2) CISG

145 According to Art. 43(2) CISG, the seller cannot rely on the buyer's failure to give notice if the seller knew of the right or claim of a third party and the nature thereof. In order to exclude the seller's reliance on a failure to give notice, Art. 43(2) CISG requires the seller's actual knowledge of the claim *(CISG-Online 1200 [GER, 2006], p. 5 para. 7; ENDERLEIN/MASKOW, Art. 43 para. 5; KRÖLL, Art. 43 para. 25; SCHWENZER, engl., Art. 43 para. 10; TEBEL, ger., Art. 43 para. 17)*.

146 As explained above, RESPONDENT NO. 1 had no actual knowledge of the dispute about the scope of the Ross Agreement *(cf. paras. 131 et seqq.)*. Therefore, CLAIMANT's obligation to give notice is not excluded pursuant to Art. 43(2) CISG.

2. CLAIMANT did not give notice within a reasonable time pursuant to Art. 43(1) CISG

147 CLAIMANT did not comply with Art. 43(1) CISG because it did not give notice within a reasonable time.

148 Art. 43(1) CISG requires the buyer to give notice of the third-party right or claim within a reasonable time after he becomes aware or ought to have become aware of it. The buyer ought

to have become aware of the right or claim if the indications that the third party has rights or will raise claims against the buyer are so clear that a diligent buyer would either draw the necessary conclusions or investigate the issue further *(GRUBER, Art. 43 para. 9; KRÖLL, Art. 43 para. 15; SCHWENZER, engl., Art. 43 para. 4; TEBEL, engl., Art. 43 para. 9)*. Irrespective of the circumstances of the case, a notice period of one month is considered reasonable *(CISG-Online 1200 [GER, 2006], p. 4 para. 5; KRÖLL, Art. 43 para. 20; SCHWENZER, ger., Art. 43 para. 3; TEBEL, ger., Art. 43 para. 11)*.

149 In the case at hand, CLAIMANT gave notice on 2 May 2020 and argues that it only became aware of Ross' allegation on 1 May 2020 *(Exh. C 5, p. 19)*. It must be noted that CLAIMANT was acquired by Khorana on 20 April 2020, *i.e.* shortly before giving notice *(Exh. R 1, p. 29)*. Khorana is able to produce the base materials and Viral Vectors independently and well below the market price *(Exh. R 1, p. 29; PO 2, p. 53 para. 2)*. Thus, the Agreement is no longer beneficial for CLAIMANT. Having this in mind, it seems like CLAIMANT now only looks for a way to terminate or renegotiate the Agreement *(cf. Answer to NoA, p. 25 para. 3)*. Irrespective of these circumstances, there are numerous indications that CLAIMANT ought to have become aware of the discussions long before 1 May 2020 and did not give notice within a reasonable time.

150 First, Ms. Hübner, who previously worked for Ross as a Senior Financial Advisor in the Contract Division responsible for negotiating the Ross Agreement, started working for CLAIMANT as CFO in June 2019 *(Exh. C 7, p. 21 para. 2; PO 2, p. 54 para. 12)*. As former Senior Financial Advisor of Ross, Ms. Hübner maintains connections to her former colleagues who are currently discussing the scope of the Ross Agreement with Roctis *(Exh. C 7, p. 21 para. 6; NoA, p. 7 para. 22)*. Ms. Hübner stated that her former colleagues *"[…] have been reported to have confirmed […]"* the discussions with Roctis *(Exh. C 7, p. 21 para. 6)*. Since CLAIMANT itself confirms that Ms. Hübner contacted Ross in order to get hold of the Ross Agreement for CLAIMANT *(NoA, p. 7 para. 22)*, it appears evident that she has heard about the discussions first hand from her former colleagues. Thus, Ms. Hübner must have already been aware of the negotiations about the scope of the Ross Agreement when she started working for CLAIMANT in June 2019. Therefore, CLAIMANT ought to have known about Ross' allegation in June 2019.

151 Second, the Biopharma Science journal brought up the dispute about the scope of the Ross Agreement on 14 December 2018 for the first time *(Exh. C 4, p. 18; PO 2, p. 54 para. 8)*. At that time, RESPONDENT NO. 1 and CLAIMANT were still negotiating the Agreement *(Exh. C 3, p. 11; NoA, p. 6 para. 12)*. The same dispute was then again mentioned in a second article in the Biopharma Science journal on 19 December 2019 *(Exh. C 4, p. 18)*. Even though CLAIMANT had already terminated its subscription to the journal, it is a popular journal amongst the start-up

scene *(PO 2, p. 54 para. 8)*. CLAIMANT, as a start-up, would likely have heard about the articles. Even more so since the Agreement concerns the same Viral Vectors that were subject to the discussions mentioned in the articles *(Exh. C 3, p. 12 para. 2; PO 2, p. 54 para. 8)*. Therefore, CLAIMANT ought to have become aware of the discussions on 19 December 2019 at the latest, *i.e.* at least four months prior to giving notice of Ross' allegation *(Exh. C 5, p. 19 para. 2)*.

152 Given these indications, a diligent buyer in the shoes of CLAIMANT would have been aware of the discussions about the scope of the Ross Agreement or would at least have made further investigations as of December 2019.

153 In conclusion, CLAIMANT did not give notice within a reasonable time pursuant to Art. 43(1) CISG by contacting RESPONDENT NO. 1 on 2 May 2020 since it ought to have known about the discussions about the scope of the Ross Agreement at least five months before giving notice to RESPONDENT NO. 1.

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154 **Conclusion:** RESPONDENT NO. 1 did not breach its obligation pursuant to Art. 42 CISG since RESPONDENT NO. 1 provided CLAIMANT with Viral Vectors which are free from conflicting rights or claims of Ross based on IP. Ross does not have a conflicting IP right because there is no relevant overlap between Ross' and CLAIMANT's license. Moreover, Ross' allegation does not qualify as a claim in the sense of Art. 42(1) CISG since CLAIMANT is unlikely to be sued by Ross. In any event, RESPONDENT NO. 1 did not know about the conflict with Ross at the time of conclusion of the Agreement and did not have to be aware of it. CLAIMANT, in any case, cannot rely on a breach pursuant to Art. 42 CISG because it did not give notice within a reasonable time after it ought to have become aware of Ross' allegation.

Requests

In light of the submissions above, on behalf of RESPONDENTS, we herewith respectfully request the Tribunal:

a. to join Ross Pharmaceuticals to the Arbitration Proceedings;

b. to postpone the examination of witnesses and experts in case an in-person hearing will not be possible on 3 to 7 May 2021;

c. to find that the Agreement concluded between CLAIMANT and RESPONDENT NO. 1 is not governed by the CISG;

d. to order Ross Pharmaceuticals to refrain from making any further allegations that it holds an exclusive license for the use of the GorAdCam vectors in relation to any research into vaccines for respiratory diseases;

e. to reject CLAIMANT's claim for a declaratory relief that RESPONDENT NO. 1 breached its contractual obligation to provide GorAdCam vectors which are free from any third-party rights or claims;

f. to order CLAIMANT to bear the costs of this Arbitration.

Respectfully submitted on 28 January 2021 by

MARC BÄR CLIO HUBER NICOLE JAGGI

NANINA LÄTSCH ZOË PULVER NEDA RASSI

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