**IN THE MATTER OF AN ARBITRATION UNDER THE**
**SWISS CHAMBERS' ARBITRATION INSTITUTION**
SCAI CASE NUMBER 300610-2020

**CAMVIR LTD**
*RESPONDENT 1*

**VECTORVIR LTD**
*RESPONDENT 2*

*V.*

**RESPIVAC PLC**
*CLAIMANT*

WIRTSCHAFTS UNIVERSITÄT WIEN VIENNA UNIVERSITY OF ECONOMICS AND BUSINESS

# MEMORANDUM FOR RESPONDENTS

**Vienna University of Economics and Business**

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28 JANUARY 2021

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# Table of Abbreviations

| | |
|---|---|
| **%** | per cent |
| **Art** | Article |
| **CEO** | Chief Executive Officer |
| **cf** | compare |
| **CISG** | United Nations Convention on Contracts for the International Sale of Goods |
| ***e.g.*** | exempli gratia |
| **et seq** | et sequential |
| **et seqq** | et sequenties |
| **EU** | European Union |
| **Exh** | Exhibit |
| **GorAdCam** | Gorilla adenovirus CamVir |
| **HEK-294 cells** | Human Embryonic Kidney 294 cells |
| **HKIAC** | Hong Kong International Arbitration Centre |
| **HKIAC Rules** | HKIAC Rules of Arbitration |
| ***i.e.*** | id est |
| **ICC** | International Chamber of Commerce |
| **ICC Rules** | ICC Rules of Arbitration |
| **IP** | Intellectual Property |
| **LCIA** | London Court of International Arbitration |
| **LCIA Rules** | LCIA Rules of Arbitration |
| **leg cit** | legis citate |
| **Ltd** | Limited |
| **MC** | Memorandum for Claimant by Faculdade Baiana de Direito |

| | |
|---|---|
| **OECD** | Organization for Economic Cooperation and Development |
| **p** | page |
| **para** | paragraph |
| **plc** | public limited company |
| **PO1** | Procedural Order 1 |
| **PO2** | Procedural Order 2 |
| **SCAI** | Swiss Chambers' Arbitration Institution |
| **Sec** | Section |
| **UN** | United Nations |
| **UNCITRAL** | United Nations Commission on International Trade Law |
| **UNIDROIT** | International Institute for the Unification of Private Law |
| **v.** | versus |
| **WHO** | World Health Organisation |

# Table of Definitions

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| **Agreement** | Purchase, Collaboration and License Agreement concluded between CLAIMANT and RESPONDENT 1 |
| **Agreements** | Agreement and Ross Agreement |
| **Answer to NoA** | Answer to the Notice of Arbitration |
| **Arbitration Clause** | Arbitration clause stipulated in Section 14 of the Agreement |
| **CLAIMANT** | RespiVac plc |
| **Khorana** | Khorana Lifescience |
| **License Agreement** | Production, sale and sublicensing Agreement concluded between RESPONDENT 1 and RESPONDENT 2 |
| **NoA** | Notice of Arbitration |
| **NYC** | New York Convention |
| **Parties** | CLAIMANT, RESPONDENT 1 and RESPONDENT 2 |
| **RESPONDENT 1** | CamVir Ltd |
| **RESPONDENT 2** | VectorVir Ltd |
| **RESPONDENTS** | RESPONDENT 1 and RESPONDENT 2 |
| **Ross** | Ross Pharmaceuticals |
| **Ross Agreement** | Collaboration and License Agreement concluded between RESPONDENT 2 and Ross Pharmaceuticals |
| **SCAI** | Swiss Chambers' Arbitration Institution |
| **Swiss Rules** | Swiss Rules of International Arbitration 2012 |
| **Tribunal** | The arbitral tribunal in the case at hand |
| **Model Law** | UNCITRAL Model Law |
| **UNCITRAL Rules** | UNCITRAL Arbitration Rules |
| **UNIDROIT Principles** | UNIDROIT Principles on International Commercial Contracts |

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**Arbitration**

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# Statement of Facts

1. *VectorVir Ltd* ("**RESPONDENT 2**") was established in **2012** in the course of a governmentally funded project. Its field of business is research into viral vectors for vaccine development.

2. *CamVir Ltd* ("**RESPONDENT 1**") is a contract manufacturing organisation which produces and licenses biomedical base materials for vaccine development.

3. RESPONDENT 1 and RESPONDENT 2 (together "**RESPONDENTS**") are affiliated companies, which are both located in Equatoriana.

4. RESPONDENT 2 owns the patent for GorAdCam viral vectors used for the development of vaccines. On **10 September 2018**, RESPONDENT 2 granted RESPONDENT 1 an exclusive license to sublicense the GorAdCam viral vectors ("**License Agreement**") for all applications relating to respiratory diseases. In consequence, RESPONDENT 1 increased its production capacities for GorAdCam viral vectors and HEK-294 cells, which are necessary for vaccine manufacturing.

5. *RespiVac plc* ("**CLAIMANT**") is a biopharmaceutical company active in the field of vaccine research, located in Mediterraneo. In **April 2020**, CLAIMANT was acquired by Khorana Lifescience ("**Khorana**"), one of the leading life science companies in Danubia.

6. On **1 January 2019**, RESPONDENT 1 and CLAIMANT concluded a Purchase, Collaboration and Licensing Agreement ("**Agreement**"). Under the Agreement, RESPONDENT 1 grants CLAIMANT a license to use GorAdCam viral vectors for researching and developing vaccines against respiratory diseases, such as COVID-19. Further, the Agreement includes an option for CLAIMANT to have its vaccines produced by RESPONDENT 1. Lastly, under the condition that CLAIMANT successfully develops and eventually commercialises a vaccine, CLAIMANT is obliged to obtain its need of HEK-294 cells and cell growth medium from RESPONDENT 1.

7. Currently, CLAIMANT conducts research with the GorAdCam viral vectors on a COVID-19 vaccine, using the license provided by RESPONDENT 1. However, due to CLAIMANT's recent acquisition by Khorana, CLAIMANT's interests have changed. With the help of Khorana, CLAIMANT would now be able to produce the GorAdCam viral vectors and the vaccine at considerably lower costs than the payments due under the Agreement. Nevertheless, CLAIMANT must comply with its conditional purchase obligation agreed with RESPONDENT 1.

8. Ross Pharmaceuticals ("**Ross**") is a life science company located in Danubia. In **2014**, Ross approached RESPONDENT 2, as Ross was interested in the use of the GorAdCam viral vectors for research on a malaria vaccine. Therefore, Ross was granted an exclusive license to use the

GorAdCam viral vectors for research on a malaria vaccine in a Collaboration and License Agreement on **15 June 2014** ("**Ross Agreement**").

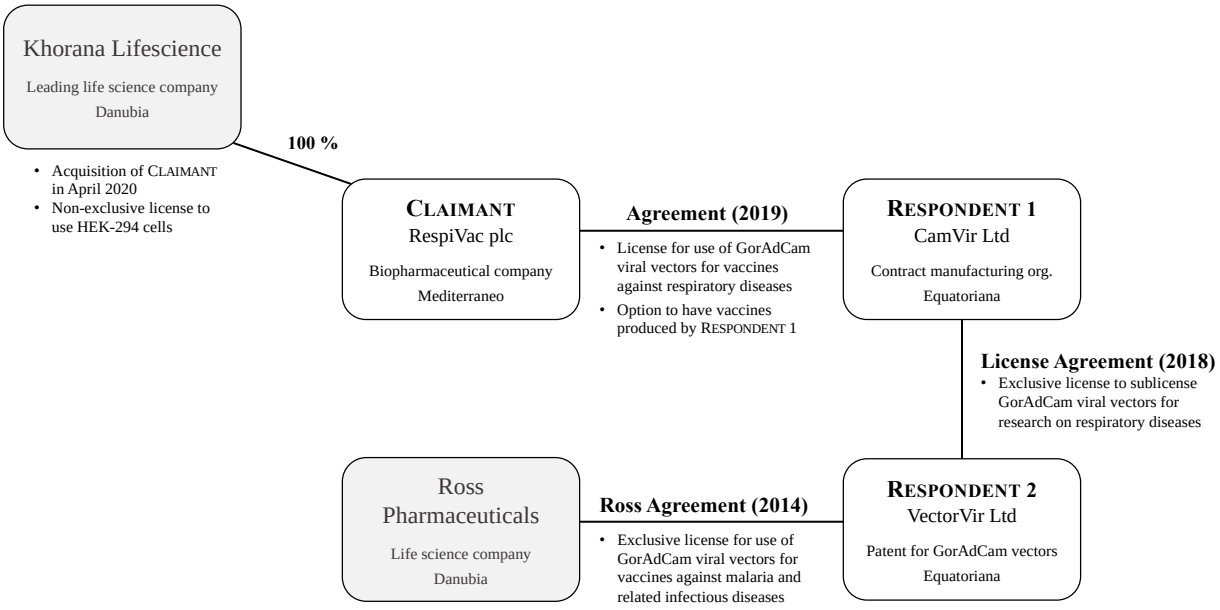
9. Four years later, Ross started contending that the Ross Agreement includes an exclusive license to use the GorAdCam viral vectors in the field of respiratory diseases. This would collide with the license granted to CLAIMANT under the Agreement. Ross' allegations to the extension of its license to respiratory diseases were first publicly mentioned in the popular journal Biopharma Science in **December 2018**, *i.e.* before the Agreement was concluded.

10. RESPONDENTS were appalled to hear that Ross had started research into COVID-19 vaccines using the GorAdCam viral vectors during the **last days of 2019**. However, Ross has made no attempt to initiate any legal actions against RESPONDENTS or CLAIMANT.

11. On **15 July 2020**, CLAIMANT surprisingly filed a Notice of Arbitration ("**NoA**") against RESPONDENTS for an alleged breach of contract, contending the materials are burdened with a third-party claim. CLAIMANT bases its claim on Art 42 CISG. On **14 August 2020**, RESPONDENTS established in their answer to the NoA ("**Answer to NoA**") that the CISG is not applicable to the Agreement, as it is a license agreement.

12. RESPONDENTS offered to join Ross to the proceedings based on Art 4 (2) Swiss Rules. This would help resolve the dispute comprehensively. However, CLAIMANT objects to Ross' joinder.

13. The arbitral tribunal in the case at hand ("**Tribunal**") consulted with CLAIMANT and RESPONDENTS (together "**Parties**") whether they object to conduct the hearings remotely. While RESPONDENTS agree to hold the hearings in **March 2021** remotely to speed up the proceedings, they prefer to at least conduct the examination of witnesses and experts in **May 2021** in person.



# Summary of Arguments

14. **ISSUE 1:** Ross shall be joined to the present arbitral proceedings. First, the Tribunal has jurisdiction to order Ross' joinder. The Tribunal's jurisdiction is based on Art 4 (2) Swiss Rules, which does not require the Tribunal to gather consent of the Parties or of Ross. In any case, the Parties and Ross have concluded completely identical arbitration clauses in related contracts – this constitutes consent to Ross' joinder. Second, "*all relevant circumstances*" speak for the joinder of Ross. Ross' joinder ensures procedural efficiency, safeguards consistency with other potential awards and contributes to a comprehensive resolution of the present proceedings.

15. **ISSUE 2:** The examination of witnesses and experts shall be held in person. First, the Arbitration Clause in the Agreement provides for in-person examinations. Second, the Swiss Rules do not enable the Tribunal to order remote examinations over RESPONDENTS' objection. Third, the relevant circumstances speak for in-person examinations. Fourth, remote examinations endanger the enforceability of the award due to a violation of the parties' right to be heard.

16. **ISSUE 3:** The CISG does not apply to the Agreement. The main prerequisite for the application of the CISG – a sale of goods – is not fulfilled. The parties to the Agreement never agreed on such a sale. In fact, they agreed on a license. The Agreement is thus a license agreement. The only potential sale it includes is merely conditional and not effective. Should the Tribunal, however, consider that the Agreement contains effective sale elements, these are merely ancillary. The preponderant part of the Agreement is a license and service. In any case, the Agreement is not governed by the CISG.

17. **ISSUE 4:** RESPONDENT 1 fulfilled its contractual duty to deliver GorAdCam viral vectors free from any third-party right or claim. First, CLAIMANT is not restricted in its use of the GorAdCam viral vectors since Ross never raised a claim against CLAIMANT. Second, any claim by Ross would be obviously unjustified and raised in bad faith, as Ross does not have the right to use the viral vectors for research on COVID-19. Such obviously unjustified claims raised in bad faith do not trigger Art 42 CISG. Third, CLAIMANT must have known about the discussions concerning the Ross Agreement, thus excluding RESPONDENT 1's liability under Art 42 CISG. Finally, with Khorana's help, CLAIMANT is now able to produce the GorAdCam viral vectors and the vaccine significantly cheaper than under the Agreement. Tempted by this financial benefit, CLAIMANT tries to twist its way out of the Agreement.

## Background Information to the Arbitral Proceedings

18. In the following, RESPONDENTS will reveal CLAIMANT's true intention behind the proceedings. CLAIMANT is not looking to solve an actual dispute. In fact, CLAIMANT is trying to find a creative way to terminate the Agreement, as complying is no longer the most profitable option.

19. Throughout its submission, CLAIMANT incorrectly states that it is still a small start-up with limited resources [*MC, p 32, para 161; NoA, p 1, para 1; NoA, p 8, para 28*]. However, CLAIMANT was recently acquired by Khorana and therefore now has a parent company which is one of the leading life science firms in Danubia [*Answer to NoA, p 25, para 2; Exh R1, p 29*].

20. Just like RESPONDENTS, Khorana has a license on HEK-294 cells and its own cell growth medium [*PO2, p 53, para 2*]. Additionally, Khorana has recently installed several new bioreactors to enable the production of HEK-294 cells at costs well below the market price [*Exh R1, p 29*]. This makes Khorana one of the few companies possessing two out of the three base materials required for the production of a COVID-19 vaccine. The only material which is missing are the GorAdCam viral vectors [*PO2, p 53, para 3*]. CLAIMANT has a license for the use of GorAdCam viral vectors and has already received these from RESPONDENT 1 under the Agreement. This is exactly what made CLAIMANT so attractive to Khorana [*NoA, p 6, para 16*].

21. The Agreement obliges CLAIMANT to purchase its need of HEK-294 cells and the cell growth medium from RESPONDENT 1 [*Exh C3, p 17, Sec, 16.1*]. This conditional purchase would soon be due, as CLAIMANT is successfully progressing in its vaccine development [*Exh R1, p 29; PO2, p 55, para 16*]. However, CLAIMANT does not want to comply with the Agreement anymore. Instead, CLAIMANT prefers the HEK-294 cells and the cell growth medium provided by Khorana at costs which would be 50 % lower than the payments due under the Agreement [*PO2, p 53, para 3*]. Additionally, Khorana can produce the vaccine cost-efficiently in its own production facilities or provide financing to CLAIMANT for building its own facilities [*Exh R1, p 29; PO2, p 53, para 3*]. Therefore, contrary to CLAIMANT's argumentation [*MC, p 22 et seq, para 111*], a termination of the Agreement would be indeed highly profitable for CLAIMANT. Tempted by this financial benefit, CLAIMANT tries to sneak out of the Agreement.

22. This is the background against which the present arbitration proceedings initiated by CLAIMANT have to be seen. They are thinly concealed effort by CLAIMANT to prepare for the termination of a contract which no longer appears to be favourable in light of its acquisition by Khorana. Although CLAIMANT is already one of the few big profiteers of the current pandemic, it is still trying to squeeze out further profits in an unworthy manner.

# Arguments

## I. Ross shall be joined to the present arbitral proceedings

23. CLAIMANT filed the NoA against both RESPONDENTS [*NoA, p 4*]. Although RESPONDENT 2 is not a party to the Agreement, it agreed to participate in the present arbitral proceedings as an act of good faith in order to speed up the proceedings and to solve the dispute comprehensively [*Answer to NoA, p 28, para 17*].

24. RESPONDENTS offered to join Ross to the arbitral proceedings pursuant to Art 4 (2) Swiss Rules because CLAIMANT's legal actions depend solely on fictitious claims that could potentially be raised by Ross [*Answer to NoA, p 28, para 21 et seqq*]. As a result, joining Ross is the only possibility to resolve CLAIMANT's claims finally and entirely [*Answer to NoA, p 28, para 17*]. Illogically, CLAIMANT now "*strongly objects*" to Ross' joinder [*MC, p 2, para 2; Letter by Langweiler, p 48*]. Thus, CLAIMANT is obviously not interested in entirely clarifying the underlying facts. Rather, CLAIMANT's objection can only be interpreted as a false pretence to sneak out of the Agreement (**Background Information, para 22**).

25. In the following, RESPONDENTS submit that the Tribunal shall join Ross to the present arbitral proceedings between CLAIMANT and RESPONDENTS. First, (**A**) the Tribunal has jurisdiction to adjudicate proceedings between Ross and the Parties. Second, (**B**) the Tribunal shall execute its jurisdiction since "*all relevant circumstances*" speak for joining Ross. Third, (**C**) CLAIMANT's objection to Ross' joinder is an act of bad faith.

### A. The Tribunal has jurisdiction to adjudicate proceedings between Ross and the Parties

26. CLAIMANT argues that the Tribunal does not have jurisdiction to join Ross to the present arbitral proceedings [*MC, p 2, para 3*]. CLAIMANT thereby misjudges the legal situation for the following reasons: First, (**1**) Art 4 (2) Swiss Rules provides an explicit legal basis to join Ross. Second, (**2**) the Parties and Ross have agreed on identical arbitration clauses in related contracts – this constitutes consent to joint proceedings.

#### 1. Art 4 (2) Swiss Rules provides an explicit legal basis to join Ross

27. The Swiss Rules provide an explicit legal basis to join Ross. First, (**a**) Art 4 (2) Swiss Rules follows a very liberal approach on joinders. Second, (**b**) Art 4 (2) Swiss Rules does not require the Tribunal to gather the explicit consent of the Parties or of Ross.

### a. *Art 4 (2) Swiss Rules follows a very liberal approach on joinders*

28. CLAIMANT seeks to draw conclusions on the inadmissibility of Ross' joinder from joinder provisions contained in different institutional rules. CLAIMANT therefore cites the ICC Rules, the LCIA Rules and the HKIAC Rules [*MC, p 6, para 24*]. However, none of these rules apply to the case at hand. CLAIMANT and RESPONDENT 1 agreed that their dispute „*shall be resolved by arbitration in accordance with the Swiss Rules*" [*Exh C3, p 16, Sec 14.1*].

29. It is evident that the Swiss Rules are exceptional in comparison to other institutional rules, since they follow the "*most liberal approach on joinder*" [*Roos, p 525*]. More precisely, Art 4 (2) Swiss Rules is a very expansive provision that enables joinders of third parties without consent of the parties to the arbitration as well as of the third party [*Born, § 18, p 16; Carrión, p 496 et seq; Roos, p 423; Schramm, p 497; Smith, p 179*]. Therefore, other institutional rules cannot serve as comparative figures.

30. CLAIMANT contends that the parties to an arbitration clause governed by the Swiss Rules cannot assume that a third party will be joined to the proceedings [*MC, p 5, para 19*]. However, this assertion is inaccurate. This results from the fact that the Swiss Rules contain its broad joinder provision since 2004 [*Brunner, p 443; Carrión, p 495*]. Thus, there has been long practice of third-party joinders under the Swiss Rules, which is why the Parties and Ross should not be surprised by Ross' joinder [*Schramm, p 499*].

### b. *Art 4 (2) Swiss Rules does not require the Tribunal to gather the explicit consent of the Parties or of Ross*

31. "*The incorporation of institutional rules, including these mechanisms for consolidation, joinder and intervention into arbitration agreements provides the parties' consent to the use of these mechanisms.*" [*Born, § 18, p 2; cf Lafarge v. Shephard Hill; cf Smith, p 175*].

32. In the case at hand, Art 4 (2) Swiss Rules is pivotal for deciding on RESPONDENTS' joinder request [*Exh C3, p 16, Sec 14.1*]. CLAIMANT admits that Art 4 (2) Swiss Rules is a very broad joinder provision [*MC, p 3, para 6*]. However, CLAIMANT seems to overlook the fact that the Swiss Rules provide an explicit legal basis for joinders of non-signatories to an arbitration agreement without consent [*MC, p 3, para 6; Born, § 18, p 16 et seq*].

33. Legal scholars almost unanimously establish that joinders under the Swiss Rules do not require consent of the parties or of the third party [*Born, § 18, p 16 et seq; Carrión, p 496 et seqq; Kleinschmidt, p 148; Roos, p 423; Schramm, p 491 et seqq*]. Further, the third party neither needs to be a proper party to the arbitration clause nor of any arbitration agreement governed

by the Swiss Rules [*Born, § 18, p 17*]. As a result, Ross even exceeds the prerequisites as it is a party to the arbitration clause in the Ross Agreement, which is governed by the Swiss Rules [*Exh R3, p 33 et seq, Sec 14.1*]. Therefore, CLAIMANT's and Ross' objections do not withstand scrutiny.

34. In addition, CLAIMANT brings forward that the Tribunal's jurisdiction is limited to the scope of the Arbitration Clause [*MC, p 3, para 9 et seq*]. RESPONDENTS acknowledge that this is correct. However, CLAIMANT seems to overlook that in the Arbitration Clause, it has agreed to arbitrate under the Swiss Rules, including Art 4 (2) [*Exh C3, p 16, Sec 14.1*]. The Arbitration Clause must not be regarded as a vacuum, but it must be evaluated in connection with the Swiss Rules, resulting in the admissibility of Ross' joinder [*Roos, p 415*].

35. For the sake of completeness, it shall be noted that CLAIMANT and Ross could have opted out of Art 4 (2) Swiss Rules, as this is not a mandatory provision [*Dickenmann, p 555; Schramm, p 484]*. However, CLAIMANT and Ross decided against an exclusion of Art 4 (2) Swiss Rules in their agreements with RESPONDENTS [*Exh C3, p 16, Sec 14.1; Exh R3, p 33 et seq, Sec 14.1*]. Thus, "*the parties are deemed to have consented in advance, by agreeing on the Swiss Rules, to possible (…) joinder and the associated consequences*" [*Schramm, p 484*].

36. To conclude, a joinder according to Art 4 (2) Swiss Rules does not require consent of the Parties or of Ross. CLAIMANT and RESPONDENT 1 accepted third-party joinders by agreeing to arbitrate under the Swiss Rules. Equally, Ross and RESPONDENT 2 agreed to joinders when concluding the Ross Agreement. Therefore, the Tribunal shall order Ross' joinder.

### 2. The Parties and Ross have agreed on identical arbitration clauses in related contracts – this constitutes consent to joint proceedings

37. In the alternative that the Tribunal does not already allow Ross' joinder based on the Swiss Rules, the joinder shall still be allowed based on the arbitration clauses in the Agreement and the Ross Agreement, respectively (together "**Agreements**"). This is because first, (**a**) the Agreements contain the exact same arbitration clauses and second, (**b**) the Agreements are related contracts.

#### a. *The Agreements contain the exact same arbitration clauses*

38. According to case law and legal scholars, signing "*parallel and substantially identical*" arbitration clauses constitutes consent to joint proceedings between the parties that signed any of the relevant arbitration clauses [*Energy Transp v. MV San Sebastian; Clothing Case;*

*Contractor v. Employers A and B; Maxum Found v. Salus; Born, § 18, p 8; Brunner, p 443; Carrión, p 502; de Ly, p 69; Gilliéron, p 43; Kleinschmidt, p 148; Lew/Mistelis/Kröll, p 394; Platte, p 69 et seqq; Rog, p 38 et seqq; Schramm, p 499*].

39. In the present case, the Parties and Ross even exceed the requirement of signing "*parallel and substantially identical*" arbitration clauses. In fact, the Parties and Ross agreed to completely identical arbitration clauses in the Agreements [*Exh C3, p 16, Sec 14.1; Exh R3, p 33 et seq, Sec 14.1*]. Therefore, there is no doubt that these arbitration clauses are naturally compatible [*cf Berger/Kellerhals, p 133 et seq; cf Pair, p 1075 et seqq*].

40. CLAIMANT acknowledges the synchronism of the arbitration clauses [*MC, p 3, para 9 et seq*]. However, it seeks to argue that the arbitration clauses are only identical because they were adopted from the Swiss Rules model arbitration clause [*MC, p 4, para 11*]. Nevertheless, the arbitration clauses are not identical to the model arbitration clause. First, the Parties and Ross completed the model arbitration clause with the exact same content, using the exact same wording. Second, both arbitration clauses contain the same additional provision stating that "*(a)ll arbitrators are to be appointed by the Institution and should have good knowledge in the field of intellectual property and the developments of vaccines.*" [*Exh C3, p 16, Sec 14.1; Exh R3, p 34, Sec 14.1*]. All of this represents a deviation from the model clause.

41. Further, even if it was true that both arbitration clauses are an exact verbatim adoption of the Swiss Rules model arbitration clause, the requirement of "*parallel and substantially identical*" arbitration clauses would still be met [*Born, § 18, p 8 et seq*]. Therefore, CLAIMANT's line of argumentation is doomed to fail.

**b. *The Agreements are related contracts***

42. Whether the underlying contracts to an arbitration clause are related is another decisive reason to enable the joinder of a third party to arbitral proceedings [*Brunner, p 443; Carrión, p 496; Grierson/van Hooft, p 108; Platte, p 67 et seqq; Rog, p 29 et seq; Schramm, p 497*].

43. CLAIMANT raises a blanket allegation stating that it has no connection to Ross [*MC, p 2, para 4*]. The only explanation thereto provided by CLAIMANT is that the Agreements have "*distinct performances (which) demonstrate that they are objectively and subjectively diverse [Milan Case]*" [*MC, p 3 et seq, para 10*]. However, this is misconceived. The legal assessment in the *Milan Case* is not comparable to the present case at all. The *Milan Case* is governed by the Arbitration Rules of the Milan Chamber of Arbitration, which do not even

include a joinder provision, not to mention a joinder provision that would be comparable to the Swiss Rules. Therefore, the *Milan Case* must remain disregarded.

44. In fact, the Agreement and the Ross Agreement are related contracts which are both governed by the laws of Danubia. CLAIMANT and Ross have a strong factual connection as both companies are licensees to the same patent for the use of the GorAdCam viral vectors owned by RESPONDENT 2 [*Exh C3, p 12, Sec 2; Exh R3, p 32, Sec 2; NoA, p 4, para 3*]. Moreover, both CLAIMANT and Ross conduct research on a COVID-19 vaccine using the same viral vectors [*NoA, p 7, para 18; PO2, p 54, para 14*]. In addition, even the structure of both Agreements strongly resembles each other [*Exh C3, p 11 et seqq; Exh R3, p 32 et seqq*]. Further, Ross has been a competitor of Khorana, CLAIMANT's parent company, since 2010 [*PO2, p 54, para 13*]. Lastly, Ross has an interest in the outcome of the proceedings (**B.1, para 48-50**). Considering all circumstances, the Agreements are strongly intertwined.

45. In conclusion, CLAIMANT and Ross not only consented to Ross' joinder by agreeing on the Swiss Rules, but also by signing identical arbitration clauses in related contracts.

## B. The Tribunal shall execute its jurisdiction since "*all relevant circumstances*" speak for joining Ross

46. In the following, RESPONDENTS establish why the Tribunal shall execute its jurisdiction and join Ross. According to Art 4 (2) Swiss Rules, the Tribunal shall consult with all Parties and take into account "*all relevant circumstances*" [*Schramm, p 500; Smith, p 194*].

47. In the case at hand, "*all relevant circumstances*" speak for joining Ross. First, (**1**) the award will have an impact on Ross. Second, (**2**) Ross' joinder ensures procedural efficiency. Third, (**3**) Ross' joinder is indispensable to ensure consistency with other awards. Fourth, (**4**) the award will be valid and enforceable if Ross is joined.

### 1. The award will have an impact on Ross

48. It is CLAIMANT's contention that the present arbitration only concerns the interpretation of the Agreement and the alleged breach of contract [*MC, p 7, para 29*]. However, this is misconceived. The Tribunal's decision on the merits of CLAIMANT's claims indeed depends on the interpretation of the exclusive license granted to Ross under the Ross Agreement [*Answer to NoA, p 28, para 21; NoA, p 8, para 25 et seqq;*]. Thus, the award will affect Ross.

49. According to *Trelleborg v. Anel*, the Tribunal shall consider whether the award will have an impact on the third party and, if it does, join the third party [*Schramm, p 500*]. CLAIMANT

wrongly alleges that Ross does not have an interest in the outcome of the present dispute, citing a letter from the presiding arbitrator [*MC, p 3, para 7*]. However, CLAIMANT misinterprets the letter, ignoring the fact that Ross "*wants to be informed about the progress of the proceedings*" [*Letter by Sinoussi, p 46*]. This clearly speaks for Ross' interest in the proceedings.

50. Further, an award rendered without Ross' joinder certainly affects Ross' factual standing. Naturally, RESPONDENT 2 will rely on the Tribunal's interpretation of the Ross Agreement in further negotiations with Ross. This will extensively weaken Ross' bargaining position.

### 2. Ross' joinder ensures procedural efficiency

51. Contrary to CLAIMANT's allegations, joining Ross does not violate the principle of procedural economy and efficiency [*MC, p 7, para 32*]. Rather, it ensures this principle. In general, joinder provisions serve to make proceedings more efficient and avoid multiple separate proceedings [*Schramm, p 491*]. The Swiss Rules are particularly effective, as they allow joinder without explicit consent (**A.1.b, para 32-34**) [*Smith, p 176*]. This is aligned with Art 17 (5) Swiss Rules, which obliges the Parties and the Tribunal to contribute to efficient proceedings.

52. Ross' joinder prevents additional proceedings that could arise if Ross decided to file a lawsuit to clarify the scope of the license granted in the Ross Agreement. Therefore, joining Ross is first, (**a**) time-efficient and second, (**b**) cost-efficient.

#### a. *Joining Ross is time-efficient as it prevents additional proceedings*

53. CLAIMANT wrongly alleges that RESPONDENTS' request for joinder is intended to delay the proceedings [*MC, p 7, para 32*]. First, CLAIMANT's suspicion is not justified by any concrete factual basis. In fact, RESPONDENTS aim at reaching a binding award that Ross' exclusive license does not include respiratory diseases [*PO2, p 57, para 33*]. This should also be in CLAIMANT's best interest. Nevertheless, CLAIMANT counteracts RESPONDENTS' well-meant attempt to resolve the issue by objecting to Ross' joinder [*MC, p 2, para 2*]. Thereby, CLAIMANT unravels its real intentions. CLAIMANT is in fact not interested in resolving the issue, but apparently initiated proceedings based on mere speculations to sneak out of the Agreement.

54. Second, contrary to CLAIMANT's accusations, joining Ross will not necessarily delay the proceedings [*MC, p 2, para 2*]. The joinder will not add any substantial complexity to the proceedings. In any case, the Tribunal will have to assess the scope of the Ross Agreement in order to render a decision (**B.1, para 49**). Therefore, the Tribunal will not have to assess any additional legal questions if Ross is joined. Either way, RESPONDENTS will present witnesses

and experts to prove that the Ross Agreement does not include the use of GorAdCam viral vectors for respiratory diseases [*Letter by Fasttrack, p 49*]. Even if Ross were to provide additional witnesses, this would not add any complexity but rather contribute to a comprehensive interpretation of the scope of the Ross Agreement.

55. Third, CLAIMANT failed to provide any substantive reason why joining Ross would delay the proceedings. Contrary to CLAIMANT's assertions, joining Ross might in fact be even more time-efficient than separate proceedings. By joining Ross, CLAIMANT would rapidly receive a binding award on the scope of Ross' exclusive license. Also, CLAIMANT asserts to expect charges by Ross anyway [*MC, p 28, para 141*]. Therefore, the Tribunal could decide earlier if it allows Ross' joinder. By doing so, CLAIMANT could avoid its alleged uncertainty and would not have to deal with Ross in separate proceedings.

56. Finally, the Tribunal shall consider the stage of the proceedings when deciding on Ross' joinder [*Schramm, p 497 et seqq*]. This is the very reason why RESPONDENTS have requested Ross' joinder at the earliest possible stage of the proceedings [*Answer to NoA, p 28, para 21 et seq*].

**b. *Joining Ross is cost-efficient as it prevents additional proceedings***

57. An arbitral tribunal will evaluate the cost-efficiency of the proceedings [*Meier, p 2509*]. CLAIMANT alleges that joining Ross will increase the costs of the arbitration. CLAIMANT wrongly assumes that such an increase in costs would be "*caused by the enlarged panel and amount of the controversy that was not expected before*" [*MC, p 8, para 34*]. However, this is misconceived. In fact, the panel would not be enlarged since the Tribunal has already been constituted in accordance with both Agreements [*Exh C3, p 16, Sec 14.1; Exh R3, p 33 et seq, Sec 14.1*]. Also, the controversy would not be increased since the scope of the Ross Agreement is a decisive issue for the present arbitration (**B.1, para 49**).

58. Early on, CLAIMANT emphasised that it "*cannot devote any resources to fending off IP-claims by third parties*" [*Exh C5, p 19*]. However, even if the costs slightly increased, Ross' joinder would still be the most cost-efficient way for CLAIMANT to obtain legal certainty. Otherwise, CLAIMANT might be facing Ross' claims all by itself later on, which it is obviously afraid of [*MC, p 28, para 141*].

59. To conclude, Ross' joinder will prevent additional proceedings regarding the scope of the Ross Agreement. Therefore, Ross' joinder is time-efficient and cost-efficient.

### 3. Ross' joinder is indispensable to ensure consistency with other awards

60. CLAIMANT asserts that there is no risk of conflicting rights should a dispute between Ross and RESPONDENTS arise, because other measures could be taken to avoid inconsistent awards [*MC, p 6 et seq, para 27 et seq*]. It proposes that the SCAI could appoint the same arbitrators [*MC, p 7, para 28*]. While it is true that the SCAI has the power to appoint all arbitrators, the SCAI is not bound to its choice of arbitrators in the present proceedings [*Exh R3, p 33 et seq, Sec 14.1; King, p 1 et seqq*]. Therefore, it could appoint other arbitrators who might have a different legal opinion on the interpretation of the Ross Agreement, as arbitrators are not obliged to follow earlier awards [*King, p 1 et seqq*]. Or alternatively, an appointed arbitrator may object to its nomination for various reasons (*e.g.* lack of time).

61. Further, even if the same arbitrators were appointed, the tribunal could arrive at a different interpretation of the Ross Agreement based on evidence provided by Ross. Evidence from Ross could otherwise be inadmissible due to confidentiality constraints. As a result, CLAIMANT's allegation that RESPONDENTS' request to join Ross is "*unnecessary*" is completely baseless [*MC, p 7, para 30*]. In fact, it is the Parties' duty to enable the Tribunal to render a decision that reflects the facts of the case [*Lew/Mistelis/Kröll, p 378; Rog, p 13*]. However, CLAIMANT actually prevents the presentation of necessary evidence by trying to omit Ross' joinder. Enabling the Tribunal to see the bigger picture by joining Ross would contribute to a correct decision, which should not only be in RESPONDENTS', but also in CLAIMANT's best interest. This issue is even more delicate should Ross decide to file a lawsuit against CLAIMANT in front of a state court. Then, appointing the same arbitrators as judges is not even a possibility.

62. To conclude, should a subsequent proceeding be initiated, the arbitrators or judges could interpret the license differently. This leads to inconsistent awards, which must be avoided at any time [*Rog, p 12 et seq*]. Inconsistent awards do not only violate the parties' right to obtain a just decision, but also subvert the advantages of arbitration. Further, the enforceability of awards that confer conflicting rights is naturally impossible [*Pair, p 1063; Rog, p 13*].

### 4. The award will be valid and enforceable if Ross is joined

63. CLAIMANT submits that Ross' joinder "*might create grounds for a potential challenge of the arbitral award*" [*MC, p 5, para 22*]. Contrary to this incorrect assertion, RESPONDENTS will present that the award rendered under Ross' joinder will in fact be valid and enforceable. First, (**a**) Ross' joinder does not violate the principle of equal treatment as both arbitration

clauses allow the SCAI to appoint all arbitrators. Second, (**b**) Ross' joinder does not violate the principle of party autonomy as the Tribunal has broad discretion under Art 4 (2) Swiss Rules.

### a. *Ross' joinder does not violate the principle of equal treatment as both arbitration clauses allow the SCAI to appoint all arbitrators*

64. CLAIMANT alleges that Ross' joinder "*violates equal treatment (…), as Ross will not be able to participate in the choice of arbitrators*" [*MC, p 9, para 40*]. However, this is misconceived.

65. RESPONDENTS acknowledge that there are arbitration rules that allow joinder only up to the point of the consolidation of the arbitral tribunal. However, the Swiss Rules do not include any temporal restrictions [*Smith, p 191*]. Further, the case at hand is characterised by special circumstances. According to the arbitration clauses in both Agreements, all arbitrators are to be appointed by the SCAI [*Exh C3, p 16, Sec 14.1; Exh R3, p 33, Sec 14.1*]. The Parties and Ross have thereby waived their right to choose the arbitrators themselves. According to legal scholars, the fact that a third person did not nominate the arbitrators does not violate the principle of equal treatment if the arbitrators were appointed by the institution instead [*Meier, p 2523; Schramm, p 498*]. Therefore, Ross would not be treated unequally with regard to the nomination of arbitrators compared to the Parties.

66. Moreover, Art 10 Swiss Rules grants Ross the right to still challenge the composition of the Tribunal in case of impartiality concerns after being joined to the proceedings. There is, however, no evidence why Ross should in fact have such concerns regarding the impartiality of the arbitrators. Ross is presently involved in two IP-litigations and one arbitration against other parties. None of these disputes involves the arbitrators nor are there any other connections between Ross and the arbitrators in the present proceedings [*PO2, p 54, para 15*].

67. In addition, CLAIMANT bases its concerns on other institutional arbitration rules, citing the ICC Rules, apparently not being aware that those are not applicable [*MC, p 6, para 24*]. However, Art 4 (2) Swiss Rules – which is in fact applicable – does not restrict the joinder of a third party to the time before the composition of the arbitral tribunal. In fact, the Swiss Rules model arbitration clause even stipulates that the arbitrators shall be appointed by the institution to prevent an unequal treatment of third parties [*Smith, p 200*].

### b. *Ross' joinder does not violate the principle of party autonomy*

68. CLAIMANT questions the enforceability of the award. This is because CLAIMANT assumes that by agreeing on the Swiss Rules, it has done nothing but acknowledge "*the fact that it (the SCAI) is a respected and neutral institution*" [*MC, p 6, para 25*]. However, agreeing on institutional

rules undisputedly leads to a submission to arbitrate under the governance of these rules, including all provisions except expressly stated otherwise in the arbitration clause [*Born, § 18, p 2*]. If CLAIMANT now objects to the joinder, it shall be reminded of the basic principle *pacta sunt servanda*. This principle obliges all parties to an agreement – thus also CLAIMANT – to fulfil their contractual duties and allows deviations only upon consent [*Groh*]. Should CLAIMANT for whatever reason not have been aware of the Tribunal's jurisdiction to order Ross' joinder, it remains its own responsibility [*Kodek, p 25 et seqq*].

69. According to legal scholars, agreeing on institutional rules including a joinder provision – like Art 4 (2) Swiss Rules – constitutes acceptance of joinders also with regard to Art V (1) (d) New York Convention ("**NYC**") [*Austmann, p 341 et seqq; Chiu, p 53 et seqq; Leboulanger, p 43 et seqq; Poudret/Besson, p 249; Van den Berg, p 367; Van den Berg I, p 259*]. Therefore, Ross' joinder does not endanger the enforceability of the award.

70. In fact, joinder provisions in arbitration rules do not endanger the enforceability of awards, they actually "*make the arbitral procedure efficient and effective, while respecting the boundaries of party autonomy*" [*Roos, p 416*]. More precisely, Art 4 (2) Swiss Rules does not undermine the principle of party autonomy, but it "*exercises and enforces*" this principle [*Roos, p 415*].

## C. CLAIMANT's objection to Ross' joinder is an act of bad faith

71. CLAIMANT is obliged to act in good faith throughout the Agreement as well as the Swiss Rules:

"*This Agreement shall be executed by the Parties in good faith.*" [*Exh C3, p 16, Sec 15.1*].

"*All participants (…) shall act in good faith*" [*Art 15 (7) Swiss Rules*].

72. CLAIMANT violates this duty by acting in bad faith. Bad faith is a widely used term in private international law [*Broedermann, p 55 et seqq*]. It is defined as "*manifestly dishonest or vexatious acts or omissions*" by a party – *e.g.* behaving inconsistently [*Vogenauer/Rios, p 19 et seqq*].

73. CLAIMANT behaves irrationally by refusing Ross' joinder – the only solution that would allow to settle the dispute with ease. Further depicting the inconsistencies, CLAIMANT – loving to portray itself as a victim which cannot afford a lawsuit – initiated the present proceedings in the first place [*NoA, p 8, para 28*]. This demonstrates CLAIMANT's unlawful behaviour to only feel bound by a contract as long as it is beneficial (**Background Information, para 22**).

74. Therefore, CLAIMANT's course of action must be classified as an act of bad faith. CLAIMANT thereby breaches Sec 15.1 of the Agreement and violates Art 15 (7) Swiss Rules.

**Conclusion to Issue I**

75. To conclude, the Tribunal shall join Ross to the present proceedings. The Tribunal has jurisdiction to order Ross' joinder based on Art 4 (2) Swiss Rules and based on the identical arbitration clauses contained in the related Agreements. Further, "*all relevant circumstances*" speak for joining Ross. First, the award has an impact on Ross. Second, Ross' joinder ensures procedural efficiency. Third, Ross' joinder is indispensable to ensure consistency with other potential awards. Fourth, the award will be valid and enforceable if Ross is joined. Finally, CLAIMANT's objection to Ross' joinder is an act of bad faith.

## II. The examination of witnesses and experts shall be held in person

76. In September 2020, the Tribunal consulted with the Parties whether they have objections to conduct hearings remotely due to the COVID-19 pandemic [*Letter by Sinoussi, p 46 et seq*]. RESPONDENTS acknowledge the difficult situation. Therefore, RESPONDENTS have agreed to hold the hearings on legal questions in March 2021 remotely to speed up the proceedings [*PO1, p 51, II*]. However, RESPONDENTS request that at least witness and expert examinations in May 2021 are held in person to ensure a fair trial. To render that possible, RESPONDENTS are willing to take every measure necessary and available. Moreover, the current situation is not as uncertain as it was back in September. It is now possible to get tested cheaply, fast and regularly. Further, vaccinations have started around the globe and are progressing at a high pace [*Bloomberg; NYT I*]. Furthermore, in the meantime it has become possible to travel for professional reasons without severe restrictions [*NYT; POLITICO; WSJ*]. In the following, CLAIMANT will illustrate why the Tribunal shall conduct the examinations of witnesses and experts in person.

77. First, (**A**) the Tribunal does not have jurisdiction to conduct the examinations of witnesses and experts remotely over RESPONDENTS' objection. Second, (**B**) remote examinations over the objection of RESPONDENTS endanger the enforceability of the award.

### A. The Tribunal does not have jurisdiction to order remote examinations over RESPONDENTS' objection

78. The Tribunal has arranged two hearings for this arbitration. The first one takes place in March 2021 and the second one at the beginning of May 2021 [*PO1, p 51, II*]. RESPONDENTS strongly prefer in-person hearings instead of remote hearings [*Letter by Langweiler, p 49*]. Nonetheless, RESPONDENTS have already agreed to hold the hearing in March remotely

[*PO1, p 51, II*]. Thereby, RESPONDENTS have proven their intention to contribute to efficient proceedings and that they have no interest in any sort of delay. Further, the hearing in March will only concern legal questions and is therefore suitable to be conducted remotely [*PO1, p 51, II*]. However, the second hearing aims at examining witnesses and experts, which is why the situation is completely different. The content of examinations of witnesses and experts is not suitable for virtual hearings [*Scherer I, p 83 et seq*]. Therefore, RESPONDENTS strongly object to conducting the examinations of witnesses and experts remotely.

79. The Tribunal can order remote hearings only upon parties' consent [*Scherer I, p 77*]. In the Arbitration Clause, the parties have consented to conduct the examination of witnesses and experts in person [*Exh C3, p 16, Sec 14.1*]. Only in case of a missing agreement of the parties in the arbitration clause, an explicit legal basis in institutional rules could grant a tribunal jurisdiction to order remote hearings [*Moses, p 5 et seq; Scherer I, p 72 et seq*]. However, the Swiss Rules do not contain a provision that grants the Tribunal jurisdiction to conduct a hearing remotely over the objection of one party. As a last resort and only under special conditions, an evaluation of all relevant circumstances could constitute a legal basis for allowing remote hearings [*Scherer I, p 80 et seqq*]. In the case at hand, however, all relevant circumstances speak for in-person examinations (**A.3, para 88-93**).

80. RESPONDENTS would like to stress that the Tribunal has jurisdiction to order Ross' joinder based on the Swiss Rules, while the case is different when it comes to remote hearings. The Arbitration Clause is silent on the issue of third-party joinders. Therefore, the Tribunal must recourse to Art 4 (2) Swiss Rules when deciding on Ross' joinder. In contrast, the Arbitration Clause explicitly provides for in-person hearings and therefore derogates the Swiss Rules. Concerning the hearings in March, it is only due to RESPONDENTS' acceptance that these hearings may be held remotely.

81. The Ross Agreement also provides for in-person hearings, as the arbitration clauses in both Agreements are identical (**I.A.2.a, para 39-40**) [*Exh C3, p 16, Sec 14.1; Exh R3, p 33 et seq, Sec 14.1*]. Therefore, all of RESPONDENTS' statements with regard to the conduct of hearings are similarly applicable if Ross is joined.

82. First, (**1**) the Arbitration Clause provides for in-person hearings. Second, (**2**) the Swiss Rules do not enable the Tribunal to order remote hearings over the objection of a party. Third, (**3**) all relevant circumstances speak for an in-person examination.

### 1. The Arbitration Clause provides for in-person examinations

83. Pursuant to the Arbitration Clause, "*hearings shall be held, at the Arbitral Tribunal's discretion, either in Vindobona or in the city where the Respondent has its place of business*" [*Exh C3, p 16, Sec 14.1*]. The Arbitration Clause explicitly grants the Tribunal jurisdiction to decide between two locations for holding hearings. Therefore, hearings are to be held in person.

84. Further, CLAIMANT and RESPONDENT 1 did not discuss the possibility of virtual hearings [*PO2, p 57, para 32*]. Therefore, the will of the parties at the time the Agreement was concluded did definitely not include an option for remote hearings. CLAIMANT argues that there is no agreement on hearings and deduces the Tribunal's jurisdiction to conduct the examinations remotely from this missing agreement [*MC, p 10, para 43*]. CLAIMANT fails to see that the parties have a valid agreement to conduct hearings on site [*Exh R3, p 34, Sec 14.1*].

### 2. The Swiss Rules provide no legal basis for ordering remote examinations over the objection of RESPONDENTS

85. Should the Tribunal not consider the Arbitration Clause to be decisive for prohibiting remote examinations, the Swiss Rules provide no legal basis to order remote examinations over the objection of one party either [*Moses, p 5 et seq*].

86. CLAIMANT relies on Art 25 (4) Swiss Rules to assert that the Tribunal may hold virtual hearings against RESPONDENTS' will [*MC, p 11, para 49*]. However, Art 25 (4) Swiss Rules only states: "*The arbitral tribunal may direct that witnesses or expert witnesses be examined through means that do not require their physical presence at the hearing (…)*." In fact, Art 25 (4) Swiss Rules does not grant the Tribunal jurisdiction to order remote hearings against RESPONDENTS' will [*Arroyo, p 693 et seqq*].

87. Apart from Art 25 (4), no other provision in the Swiss Rules regulates the possibility to conduct remote hearings. As a rule, the Tribunal has the duty to consult with the Parties whether they have any objections to taking evidence through videoconferencing [*Arroyo, p 693 et seqq*]. This makes it clear that the Tribunal places great importance on the parties' will. As a result, the Tribunal shall take into consideration that RESPONDENTS do not consent to remote examinations [*Letter by Fasttrack, p 49*].

### 3. All relevant circumstances speak against remote examinations

88. CLAIMANT alleges that the Tribunal has jurisdiction to conduct remote examinations based on Art 25 (4) Swiss Rules [*MC, p 11, para 49*]. In the unlikely case that the Tribunal follows

CLAIMANT's submission, it shall consider all relevant circumstances [*Scherer I, p 82*]. RESPONDENTS will present that all relevant circumstances speak for in-person examinations.

89. First, the content of a hearing is decisive for evaluating whether a hearing may be held remotely. Legal arguments can be a suitable content for remote hearings. However, the relevant hearings in May concern the taking of evidence. As a rule, in-person witness testimonies remain the most effective method for the Tribunal to take evidence and be able to ascertain the facts of the case truthfully [*Arroyo, p 693; Scherer I, p 84 et seqq; Susskind*].

90. Case law confirms that tribunals have difficulties assessing whether a witness is genuinely honest, as the reactions might not be seen because of interruptions of the video or the audio feed [*Lo, p 90*]. The Supreme Court of Western Australia ruled that remote hearings are not suitable for taking evidence [*JKC Australia v. CH2M Hill*]. Further, the New South Wales Supreme Court established that taking evidence remotely from an absent witness was unfair, as the credibility could not be assessed properly [*Haiye v. Commercial Centre*]. In addition, a study has shown that remote hearings were consistently rated worse than in-person hearings with regard to the assessment of evidence of witnesses and experts [*Born/Day, p 146*].

91. Second, one of the main reasons why parties choose arbitration over state courts is the confidentiality of the proceedings [*Born, § 20, p 1 et seqq*]. Nevertheless, CLAIMANT denounces RESPONDENTS' data security concerns "*baseless*" [*MC, p 15, para 74*]. In fact, it was the Tribunal which stated that there is a risk that third parties interfere with or get access to the hearing and that data security cannot be ensured [*PO2, p 57, para 35*]. Naturally, the risk of information leakages definitely increases in a remote hearing compared to an in-person hearing [*Gielen, p 261; cf Waincymer I, p 16 et seq*]. A recent example was a highly confidential video conference of all EU ministers of defence, which was hacked by a journalist [*BBC*].

92. Third, when evaluating all relevant circumstances, the Tribunal shall consider the costs of the hearings as well [*Scherer I, p 89*]. According to Art 15 (7) Swiss Rules, the Tribunal shall make "*every effort to (…) avoid unnecessary costs*" [*Ehle, p 173; Lim/Markert; Scherer I, p 89*]. The Tribunal states that in the case at hand, the costs of remote examinations "*may even be higher*" than the costs of in-person examinations [*PO2, p 57, para 35*].

93. Overall, all relevant circumstances speak for in-person examination of witnesses and experts.

## B. Remote examinations endanger the enforceability of the award

94. A decisive reason why parties choose arbitration over national courts is that awards of arbitral tribunals are enforceable almost everywhere [*Voser, p 381 et seqq*]. The main duty of arbitral tribunals is to render enforceable awards [*Waincymer, p 97*]. The enforceability is ensured through the NYC [*Binder, p 521; Gaillard, p 490*].

95. The right to be heard is one of the basic principles of every fair trial and contains in its core the right of a party to present its case [*Arroyo, p 348 et seq*]. The Tribunal is obliged to ensure the parties' "*right to be heard*" according to Art 15 (2) Swiss Rules. If the parties' right to be heard is violated, the award is not enforceable pursuant to Art V (1) (b) NYC and Art 18 Model Law [*Born, § 26, p 46 et seqq*].

96. *Born* establishes that "*(…) it is almost uniformly accepted and reflects sensible policy (that) the opportunity to present its case, typically in person and in the physical presence of the tribunal, has been a basic, irreducible aspect of the adjudicative process which ought in virtually all cases be fully respected.*" [*Born, § 15, p 58*].

97. Many courts principally consider remote examinations sufficient to meet a parties' right to be heard [*Scherer, p 439*]. Nonetheless, the case at hand is different. RESPONDENTS' right to be heard is not only determined by the Swiss Rules and general principles, but also by the Arbitration Clause (**A, para 80**) [*Exh C3, p 16, Sec 14.1*]. In theory, it might be possible to hold virtual examinations according to the Swiss Rules, but not if one party objects or if an agreement precludes from doing so. In the present case, RESPONDENTS object and in addition, the Agreement provides for in-person hearings (**II, para 76; A.1, para 83**) [*Exh C3, p 16, Sec 14.1*]. Therefore, RESPONDENTS' right to be heard and present their case includes physical examinations. As a result, any deviation without consent would constitute an infringement of every fair trial – adhering to the rules that the parties agreed upon. Such a course of action would fail to comply with the minimum requirements necessary to render an enforceable award [*Arroyo I, p 223*].

98. Additionally, there is no comparability to a recent case before the Austrian Supreme Court. In its decision, the court held that under the Austrian Code of Civil Procedure, remote examinations against the will of a party are not necessarily inadmissible. It stated that the Austrian Code of Civil Procedure allows videoconferencing for proceedings before national courts and that this is frequently used [*Case 18 ONc 3/20s (Austria)*].

99. In contrast, such a basis does not exist under the Danubian Code of Procedure. On the contrary, Danubia's legislators have consciously not incorporated the possibility of remote examinations in their latest revision of their Code of Procedure [*PO2, p 57, para 37*]. With an emergency act in the wake of the pandemic, Danubia has created the possibility to conduct remote examinations only if both parties agree or if "*required by public interest*" [*PO2, p 57, para 37*]. Following this development, the highest court in Danubia ruled in July 2020 that videoconferencing must not be used if one parties disagrees or if there is no public interest [*PO2, p 57 et seq, para 37*]. In fact, RESPONDENTS object and there is no such public interest.

100. A key distinction of the Austrian case to the present case is that the parties in the Austrian case had not concluded an agreement on how to conduct the examinations [*Case 18 ONc 3/20s (Austria)*]. In contrast, CLAIMANT and RESPONDENT 1 have provided for such an agreement in the Arbitration Clause (**A.1, para 83**) [*Exh C3, p 16, Sec 14.1*].

101. Finally, it shall be taken into consideration that the pandemic situation and its predictability have dramatically changed for the better since April and May 2020, when the question whether the tribunal could hold virtual examinations arose in the Austrian case (**II, para 76**). Overall, the Austrian case cannot serve as comparative figure to the present case.

102. RESPONDENTS' position is further strengthened by the Swiss Federal Supreme Court. In a recent case, the court had to evaluate the reach of the jurisdiction of a commercial court to order remote examinations without legal basis against the will of one party. In its ruling it made clear that a court cannot go beyond its legal authorization – this would be *ultra vires* and therefore endanger the enforceability of the award [*Case 146 III 194 (Switzerland)*]. This applies even more to the case at hand, since the Arbitration Clause requires physical hearings.

103. To summarize, disregarding RESPONDENTS' fundamental right to be heard by ordering remote examinations and contradicting the Agreement would jeopardise the enforceability of the award pursuant to the NYC. Therefore, the Tribunal shall prohibit remote examinations.

**Conclusion to Issue II**

104. To conclude, the examination of witnesses and experts shall be held in person. First, the Arbitration Clause provides for in-person examinations. Second, the Swiss Rules do not enable the Tribunal to order remote examinations against the objection of RESPONDENTS. Third, all relevant circumstances speak for in-person examinations. Fourth, remote examinations endanger the enforceability of the award due to a violation of the fundamental right to be heard.

# III. The CISG does not apply to the Agreement

105. Pursuant to the Agreement, RESPONDENT 1 grants CLAIMANT a license to use GorAdCam viral vectors to research, develop and produce a vaccine against respiratory diseases [*Exh C3, p 13, para 5.2*]. In case CLAIMANT successfully develops and commercialises a vaccine, it is obliged to obtain the necessary base materials for the vaccine production from RESPONDENT 1 [*Exh C3, p 17, Sec 16.1*]. CLAIMANT relies on this obligation to assert that the Agreement is a sales contract governed by the CISG [*MC, p 20, para 101*]. However, this is misconceived.

106. In the following, RESPONDENTS will demonstrate that the Agreement falls outside the scope of the CISG. First, (**A**) the Agreement is not a sales contract pursuant to Art 1 CISG, but a license agreement. Second, (**B**) even if the Tribunal finds the Agreement to be a mixed contract, the service and licensing part of the Agreement outweighs the sales part.

## A. The Agreement is not a sales contract, but a licensing contract

107. Pursuant to Art 1 CISG, the CISG applies to contracts of sale of goods between parties whose places of business are in different states, when the states are contracting states [*Huber/Mullis, p 41*]. It seems to be important for CLAIMANT to stress that the CISG only applies "*when the parties have their place of business in a Contracting State*" [*MC, p 18, para 87 et seqq; MC, p 19, para 91*]. CLAIMANT's statement is correct but not relevant. It is undisputed that CLAIMANT's and RESPONDENT 1's places of business are in different contracting states, *i.e*. Mediterraneo and Equatoriana [*Exh C3, p 11*]. In the following, RESPONDENTS will focus on the truly disputed prerequisite of Art 1 CISG – the sale of goods.

108. RESPONDENTS will demonstrate that the Agreement is not a sales contract and therefore not governed by the CISG. First, (**1**) the parties agreed to a license for the use of the GorAdCam viral vectors. Second, (**2**) the purchase obligation of the HEK-294 cells is merely conditional and thus not effective. Therefore, (**3**) there was no need to exclude the CISG.

### 1. The parties agreed to a license for the use of the GorAdCam viral vectors

109. Under the Agreement, CLAIMANT and RESPONDENT 1 agreed to a license for the GorAdCam viral vectors [*Exh C3, p 13, Sec 5.2*]. The Agreement thus represents a licensing contract.

110. The Agreement is governed by Danubian law [*Exh C3, p 16, Sec 15.2*]. The contract law of Danubia is a verbatim adoption of the UNIDROIT Principles on International Commercial Contracts ("**UNIDROIT Principles**") [*PO1, p 52, para 3*]. Pursuant to Art 4.1 (1) UNIDROIT

Principles, a contract shall be interpreted according to the common intention of the parties. The common intention of CLAIMANT and RESPONDENT 1 was to conclude a license agreement.

111. RESPONDENT 1's obligation under the Agreement is to grant CLAIMANT a license to use the GorAdCam viral vectors, as set forth in Sec 5.2 [*Exh C3, p 13*]. Nowhere in the Agreement is there any mention of a sale of the GorAdCam viral vectors. CLAIMANT itself at multiple times admits that the GorAdCam viral vectors are licensed and not sold [*MC, p 1; MC, p 24, para 120; MC, p 25, para 124*]. Also, CLAIMANT leaves out the GorAdCam viral vectors when arguing that the Agreement includes a sale [*MC, p 20 et seq, para 101 et seq*]. CLAIMANT only submits that the HEK-294 cells and cell growth medium were sold [*MC, p 20 et seq, para 101 et seq*].

112. The fact that the parties define themselves as "*Licensor*" and "*Licensee*" clearly reinforces that the Agreement is a licensing contract [*Exh C3, p 11*]. These terms are used over the course of the entire Agreement [*Exh C3, p 11 et seqq*]. In fact, there is no trace of the words "*Buyer*" and "*Seller*", which would be the case if this was a sales contract.

113. To conclude, the parties agreed to a license of the GorAdCam viral vector under the Agreement.

### 2. The conditional purchase obligation of HEK-294 cells is not effective

114. CLAIMANT submits that the Agreement is a sales contract due to the purchase obligation of HEK-294 cells [*MC, p 21 et seq, para 108 et seqq*]. HEK-294 cells are a special form of cell-line used in the biotechnology industry to propagate viral vectors [*NoA, p 5, para 5*]. CLAIMANT, however, fails to see that this purchase obligation is merely conditional and not effective [*Exh C3, p 17, Sec 16.1*]. Pursuant to Sec 16 of the Agreement, CLAIMANT shall acquire its need of HEK-294 cells and cell growth medium from RESPONDENT 1 in case it successfully develops and commercialises a vaccine [*Exh C3, p 17*]. As CLAIMANT has not yet developed a vaccine, the purchase obligation has not become effective [*PO2, p 55, para 16*].

115. Pursuant to Art 5.3.2 UNIDROIT Principles, a conditional contractual obligation only takes effect upon fulfilment of the condition, unless the parties agree otherwise. In the present case, the parties have not agreed otherwise. The logical timeline of the Agreement (research → development → production) hints to the intention of both RESPONDENT 1 and CLAIMANT to conclude a purchase obligation that would only become effective upon the fulfilment of its condition. It would be pointless for CLAIMANT to be obliged to purchase HEK-294 cells before achieving successful research results for the production of the vaccine.

116. CLAIMANT is basing its entire case on a clause that might in fact never become effective, as it depends on an event that is uncertain to occur. As already seen during this pandemic, vaccine research that may appear to be promising in the beginning can turn out unsuccessful after all [*VFA*]. Relying on the conditional and uncertain purchase obligation in Sec 16 of the Agreement in order to assert the applicability of the CISG is therefore incorrect, as it clearly conflicts with Danubian law.

117. Besides, CLAIMANT itself is trying to sneak out of this exact purchase obligation by initiating the present proceedings. In light of its acquisition by Khorana, CLAIMANT has no interest in obtaining the HEK-294 cells from RESPONDENT 1 anymore **(Background Information, para 21**) [*Exh R1, p 29*]. Ironically, CLAIMANT is thus basing its case on a conditional purchase which it is trying to get out of.

118. In conclusion, the purchase obligation of HEK-294 cells is not effective. Therefore, CLAIMANT's incorrect submission that the Agreement is a contract of sale shall be dismissed.

### 3. There was no need to exclude the CISG

119. As demonstrated above, the Agreement does not fall under the scope of the CISG. Nonetheless, CLAIMANT contends that RESPONDENT 1 and CLAIMANT should have explicitly excluded the application of the CISG to the Agreement or could have derogated from Art 42 CISG if they wished for it not to apply [*MC, p 19 et seq, para 92 et seqq*]. CLAIMANT concludes that the CISG is automatically applicable [*MC, p 20, para 96*]. However, this line of argumentation must fail. In the following, RESPONDENTS will prove CLAIMANT's conclusion illogical.

120. CLAIMANT's argument would only make sense if the parties were actually concluding a sales agreement. This did not happen in the case at hand. As already elaborated above (**A.1, para 109-113**), the Agreement is a license agreement, and therefore it was clear that the CISG would not apply. Moreover, the parties defined themselves in the Agreement as "*Licensor*" and "*Licensee*" and not as "*Buyer*" and "*Seller*" [*Exh C3, p 11*]. Further, the template for the Agreement had always been used by RESPONDENTS to conclude license agreements [*Exh R2, p 31, para 8; NoA, p 6, para 11*]. This once more underlines that the parties' intention was to conclude a license agreement. In light of the above, there was no need to exclude the CISG.

## B. In case the Tribunal assumes a mixed contract, the service and licensing part of the Agreement outweighs the sales part

121. As CLAIMANT points out, the CISG can apply not only to pure sale contracts, but also to mixed contracts [*MC, p 21, para 105*]. Mixed contracts typically include the supply of labour or other services alongside the sale [*Construction Materials Case; Hotel Materials Case; Schlechtriem/Schwenzer, p 66*]. However, as established above, the parties concluded a license contract which is not governed by the CISG (**A.1, para 109-113**). Should the Tribunal nonetheless consider the Agreement a mixed contract, the Agreement remains excluded from the CISG.

122. Pursuant to Art 3 (2) CISG, the CISG "*does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services.*" Therefore, such mixed contracts are only governed by the CISG when the sale constitutes the preponderant part of the contractual obligations [*Air Cleaning Installation Case; Automatic Storage Systems Case; Floating Center Case; Schlechtriem/Schwenzer, p 66*].

123. CLAIMANT relies on Art 3 (2) CISG to assert that the Agreement is governed by the CISG [*MC, p 21, para 104*]. This is misconceived. In the following, RESPONDENTS will present the facts that CLAIMANT seems to ignore. First, (**1**) CLAIMANT bases its calculations regarding the preponderance of the sales part on incorrect assumptions. Second, (**2**) the "*other services*" provided by RESPONDENT 1 constitute the preponderant part of the Agreement. Therefore, the Agreement does not fall within the scope of the CISG.

### 1. CLAIMANT bases its calculations regarding the preponderance of the sales part on incorrect assumptions

124. One can visualise the evaluation of preponderance by picturing a scale upon which the different obligations under the Agreement are weighed against each other [*cf Hotel Materials Case; cf Spinning Plant Case*]. Under the Agreement, RESPONDENT 1 has the following obligations: to grant a license for the use of the GorAdCam viral vectors, to deliver the HEK-294 cells and cell growth medium, as well as later on to produce the vaccines [*Exh C3, p 11 et seqq*].

125. In its submission, CLAIMANT mistakenly regards the production of the vaccines by RESPONDENT 1 as a sale [*MC, p 22 et seq, para 111 et seq*]. However, the production of the vaccines is clearly a manufacturing service provided by RESPONDENT 1 and is an "*other service*" in the sense of Art 3 (2) CISG [*cf Caemmerer/Schlechtriem, p 69; cf Ferrari, p 552;*

*cf Staudinger/Magnus, p 71*]. By misinterpreting the vaccine production as a sale, CLAIMANT has weighed this part of the Agreement on the wrong side of the scale. Thus, CLAIMANT arrives at the incorrect conclusion that the sales part represents the preponderant part of the Agreement.

### 2. The "*other services*" provided by RESPONDENT 1 constitute the preponderant part of the Agreement

126. The Agreement consists of two parts. On the one hand, there is a conditional sales part with regard to the HEK-294 cells. On the other hand, it includes a services part made up by the license of the GorAdCam viral vectors and the production of the vaccines. In order to establish preponderance, the sales part and the services part have to be weighed against each other.

127. RESPONDENTS will prove that the services part of the Agreement constitutes the preponderant part for the following reasons: First, (**a**) the economic value is not the decisive criterion for preponderance. Instead, the intention of the parties is decisive. Second, (**b**) the parties intended to conclude a license agreement.

#### a. *The decisive criterion for preponderance is not the economic value, but the intention of the parties*

128. CLAIMANT argues that the economic value of the conditional sales part of the Agreement outweighs the service and licensing part and therefore the CISG is applicable to the Agreement [*MC, p 22 et seq, para 108 et seqq*]. However, CLAIMANT's calculations are based on the incorrect assumption that the production of the vaccines by RESPONDENT 1 represents a sale (**B.1, para 125**). Furthermore, CLAIMANT's narrow approach of strictly focusing on the economic value does not correspond with the objective of the CISG [*Czerwenka, p 144; Opinion, para 3.4*].

129. First, a historical interpretation of Art 3 (2) CISG shows that the economic value is not the only criterion when analysing the contract. When negotiating the text of the CISG, the British proposal to use "*the major part in value*" instead of "*preponderant part*" in Art 3 (2) CISG was not accepted [*Official Records, p 84*]. This clearly shows that the UN-Conference opposed a mere consideration of the value of the different parts of the contract [*Caemmerer/Schlechtriem, p 70; Czerwenka, p 144; Enderlein/Maskow, Art 3, para 5*].

130. Second, the economic value of the different parts of a contract can only be considered if it can be calculated accurately [*Tissue-Paper Case; Caemmerer/Schlechtriem, p 70; Czerwenka, p 144 et seq*]. Besides, the economic value should only be used as a starting point and shall be revised by the weight the parties themselves attribute to each obligation

[*Herber/Czerwenka, p 29 et seqq; Schlechtriem/Schwenzer, p 69 et seq; cf Kahn, p 954 et seq; cf Karollus, p 24; cf Richards, p 234 et seq*]. The intent of the parties shall nonetheless be regarded as the decisive factor [*Kröll, p 58; Opinion, para 3.4*].

131. A German court stated that if the respective values of the different parts of a contract cannot be determined precisely, the intention of the parties must be used for the evaluation [*Tissue-Paper Case*]. Further, several other courts ruled on the basis of the intent of the parties, although a mere look at the economic value could have led to a different decision [*Grinding Machine Case; Orintix v. Fabelta Ninove; Steel bars case V*].

132. Based on the above, a simple consideration of the economic value is not sufficient. This is especially true in the present case, as the economic value of the different parts of the Agreement cannot be calculated accurately due to several reasons: First, the numbers CLAIMANT uses for its calculations are completely outdated and therefore no longer reliable [*PO2, p 59*]. These profit and loss calculations were verified on 10 February 2020 [*PO2, p 59*]. This was before the outbreak of COVID-19 and the subsequent classification as a pandemic by the WHO on 11 March 2020 [*WHO I*]. The classification by the WHO considerably changed the relevant circumstances regarding the value of a COVID-19 vaccine. Second, the profit and loss calculations lack a clear value for the production of vaccines by RESPONDENT 1 [*PO2, p 59*]. A clear value for this part is necessary since CLAIMANT plans to exercise this production option and have the vaccines produced by RESPONDENT 1 [*MC, p 22, para 111*]. Therefore, the production option represents a crucial part of the Agreement and must be taken into account when establishing the economic value. As a result, the outdated and incomplete calculation cannot serve as a reliable basis for the evaluation of the economic value.

133. On top of that, CLAIMANT's calculations of the economic value are inaccurate: the values only add up to a total of 97 % and are therefore obviously incorrect [*MC, p 23, para 112*]. Thus, the numbers provided by CLAIMANT cannot be used for the assessment of the economic value. Further, CLAIMANT manipulated its calculations by leaving out the royalties, which would represent a significant component of the licensing part [*MC, p 22 et seq, para 110 et seqq*].

134. In conclusion, due to the fact that the respective values of the different parts of the contract cannot be determined precisely and CLAIMANT's calculations are obviously incorrect, the main focus shall lie on the intent of the parties.

**b. *The parties intended to conclude a license agreement***

135. Supreme courts from various jurisdictions have confirmed that it is necessary to analyse several factors when determining preponderance based on the intention of the parties. Such factors are the circumstances surrounding the conclusion of the contract, the purpose of the contract, as well as the interest of the parties in the various performances [*Dunhill v. Tivoli; Glass Recycling Machine Case*].

136. RESPONDENT 1's intention when concluding the Agreement was to license the use of the GorAdCam viral vectors to a company that would develop a vaccine, so that it could eventually produce the developed vaccine [*Exh C2, p 10*]. This explains why RESPONDENT 1 made considerable investments to set up a large-scale production site that it was hoping to amortise with the royalty payments from CLAIMANT [*Exh C2, p 10*]. The business idea behind this was to find smaller companies, as CLAIMANT initially was, that had valuable research know-how, but did not have the means to produce the vaccines on their own. This way, RESPONDENT 1 as an established pharmaceutical manufacturer and CLAIMANT as a former research start-up would have created the perfect synergy and the Agreement would have been a true win-win situation.

137. This corresponds to CLAIMANT's intention at the time the Agreement was concluded. As CLAIMANT itself states in its submission, its main intent was "*to develop a vaccine and put it on the market for sale*" [*MC, p 23, para 115*]. This means that CLAIMANT only wanted to be in charge for the research of the vaccine and its commercialisation – not for its production. This makes perfect sense: as an at-the-time small start-up, CLAIMANT would have needed to make tremendous investments in order to produce the vaccine by itself. As can be seen from its profit and loss excerpts, it would have been more profitable for CLAIMANT to have RESPONDENT 1 produce the vaccine [*PO2, Appendix 1, p 59*].

138. CLAIMANT argues that it could not have developed a vaccine without buying the HEK-294 cells. It therefore concludes that the conditional sale of the HEK-294 cells is the preponderant part of the Agreement [*MC, p 23, para 116*]. However, this conclusion is incorrect and illogical. CLAIMANT could not have developed the vaccine without the license for the GorAdCam viral vectors, either. In fact, the GorAdCam viral vectors are the main material required for developing a vaccine [*NoA, p 4, para 3*]. The HEK-294 cells are merely needed for a large-scale production [*NoA, p 5, para 5*]. Contrary to CLAIMANT's assertion, the main purpose of the Agreement is not to own the GorAdCam viral vectors or the HEK-294 cells, but rather to use them for research under the license.

139. In addition, the license grant is the only obligation under the Agreement that the parties intended to be effective from the very beginning. This shows that the essential purpose of the Agreement was to grant a license. Only if the research conducted under this license turns out to be successful, then the later conditional sale might become effective (**A.2, para 116**).

140. The parties' intention to conclude a license agreement is further mirrored in the fact that they define themselves as "*Licensor*" and "*Licensee*" [*Exh C3, p 11*]. These terms are used consistently over the course of the entire Agreement [*Exh C3, p 11 et seqq*].

141. In conclusion, the license is the preponderant part of the Agreement. The parties' main intention was to grant a license, whereas the sale was merely ancillary.

**Conclusion to Issue III**

142. The CISG does not apply to the Agreement. The main prerequisite for the application of the CISG – a sale of goods – is not fulfilled. The parties to the Agreement never agreed on such a sale. In fact, they agreed on a license. The Agreement is thus a license agreement. The only potential sale it includes is merely conditional and not effective. Should the Tribunal however consider that the Agreement contains effective sale elements, these are merely ancillary. The preponderant part of the Agreement is a license and service. In any case, the Agreement is not governed by the CISG.

## IV. RESPONDENT 1 did not breach its contractual duty

143. In case the Tribunal decides to apply the CISG to the Agreement, RESPONDENTS will prove that RESPONDENT 1 fulfilled every contractual obligation under the Agreement.

144. CLAIMANT asserts that RESPONDENT 1 breached its contractual obligation by delivering goods that are burdened with an IP-claim by Ross [*MC, p 26 et seq, para 129 et seqq*]. CLAIMANT thereby relies on Art 42 (1) CISG: "*a seller must deliver goods which are free from any right or claim of a third party based on industrial property or other intellectual property*."

145. In an effort to finally solve the ongoing dispute, RESPONDENTS offered CLAIMANT to join Ross to the current arbitration in order to prove that Ross' alleged claim is insubstantial [*Answer to NoA, p 28, para 22*]. RESPONDENTS consider this offer a goodwill gesture meant to ease CLAIMANT's mind. Although CLAIMANT is basing its entire case on this alleged claim, it is hindering the clarification by "*strongly objecting*" to Ross' joinder [*Letter by Langweiler, p 48*]. This is not only contradictory behaviour, but also exposes CLAIMANT's plan to create a dispute to get out of the Agreement.

146. RESPONDENTS will show why CLAIMANT's submission shall be dismissed. First, (**A**) the GorAdCam viral vectors are not burdened with a third-party IP-right or claim. Second, (**B**) CLAIMANT must have known about the discussions concerning the Ross Agreement, thereby excluding RESPONDENTS' liability. Third, (**C**) a termination of the Agreement would be favourable for CLAIMANT.

## A. The GorAdCam viral vectors are not burdened with a third-party IP-right

147. CLAIMANT asserts that RESPONDENT 1 breached its contractual obligations by delivering goods that are burdened with Ross' IP-claim [*MC, p 26 et seq, para 129 et seqq*]. In the following, RESPONDENTS will disprove this allegation by establishing that: First, (**1**) CLAIMANT is not restricted in its use of the GorAdCam viral vectors for its research on a COVID-19 vaccine, as Ross never raised a claim against CLAIMANT. Second, (**2**) even if Ross raised a claim, it would be obviously unjustified and raised in bad faith, as Ross does not have the right to use the viral vectors for research on COVID-19. Third, (**3**) CLAIMANT bears the burden of proof regarding the existence of a third-party IP-claim.

### 1. Claimant is not restricted in its use of the GorAdCam viral vectors

148. CLAIMANT correctly points out that pursuant to Art 42 CISG, the seller guarantees the buyer that the delivered goods are free from any third-party IP-rights or claims [*MC, p 28, para 139*]. The logic behind Art 42 CISG is to provide the buyer with an unrestricted use of the purchased goods [*Web Solutions v. Vendorlink*]. In the case at hand, however, CLAIMANT is in no way restricted in its use of the viral vectors because Ross has not raised any claim against CLAIMANT.

149. Contrary to CLAIMANT's submission, a mere suspicion of a third-party claim is not enough to trigger a breach of contract under Art 42 CISG [*MC, p 28 et seq, para 138 et seq*]. Rather, Art 42 CISG requires that the third party Ross has already raised a specific claim against the buyer, *i.e.* CLAIMANT [*Achilles I, p 5; Gruber, p 1430 et seq; Prager, p 148 et seqq*]. In the case at hand, Ross never raised any claim concerning the use of the GorAdCam viral vectors against CLAIMANT. In fact, CLAIMANT was never contacted by Ross at all.

150. Ross solely approached RESPONDENTS concerning its uncertainty about the scope of the Ross Agreement [*Exh R4, p 35*]. This is particularly not sufficient to trigger a breach of contract under Art 42 CISG [*Achilles I, p 6 et seq; Huber, p 501*].

151. As a result, CLAIMANT is not at all restricted in their research on a COVID-19 vaccine. On the contrary, ever since initiating this arbitration, CLAIMANT continued its research and even announced the start of the final phase for its vaccine development [*PO2, p 55, para 16*]. This reveals CLAIMANT's two-faced approach in connection with the current arbitration: On the one hand, CLAIMANT argues that it is restricted in its research on a vaccine. On the other hand, it is publicly announcing a substantial progress in its vaccine trial.

152. As a consequence, RESPONDENT 1 fulfilled its contractual duty to provide CLAIMANT with the right to an unrestricted use of the GorAdCam viral vectors.

### 2. A claim by Ross would be obviously unjustified and raised in bad faith

153. Contrary to CLAIMANT's submission, a breach of contract pursuant to Art 42 CISG only exists when the delivered goods are actually burdened with an IP-right or claim of a third party [*Huber/Mullis, p 173*]. No such right or claim exists in the present case. Ross does not have a right to use the GorAdCam viral vectors for the research on a COVID-19 vaccine. Even if Ross raised a claim against CLAIMANT, it would be obviously unjustified and raised in bad faith.

154. Under the Ross Agreement, RESPONDENT 2 granted Ross an exclusive license to use the GorAdCam viral vectors in the "*field of malaria and related infectious diseases*" [*Exh R3, p 33 para 5.2*]. Ross wanted to use the GorAdCam viral vectors in its research for a vaccine against malaria, which was at the time considered the primary potential application for the viral vectors [*Answer to NoA, p 25, para 4; Exh C7, p 21, para 6*]. During the negotiations of the Ross Agreement, the notion "*related infectious diseases*" was only added because Ross thought it might be able to also use the viral vectors for its research on infectious diseases in developing countries, such as cholera [*PO2, p 55, para 20*].

155. Malaria is a parasitic disease transmitted by mosquitoes. Nearly all malaria cases are located in Africa and especially children under five years of age and pregnant women are at higher risks of an infection [*WHO*]. By contrast, COVID-19 is a viral disease transmitted from one human to another through aerosols [*ECDC*]. It spreads all over the world and especially people over 60 years of age are considered the high-risk group [*ECDC I*]. These facts show that COVID-19 is in no way related to malaria and therefore not covered by the scope of the Ross Agreement.

156. Further, Ross approached RESPONDENT 2 suggesting ending the discussions against the grant of a non-exclusive and no-royalty bearing license for the use of the GorAdCam viral vectors for respiratory diseases [*Exh R4, p 35*]. Ross would never offer to give up its alleged exclusive license on the GorAdCam viral vectors if it truly believed in the existence of such a right. An

exclusive license was specifically important to Ross when concluding the Ross Agreement, so there is little reason to believe that Ross would give up that right voluntarily, if it had one [*Exh C7, p 21, para 5*]. This is especially the case since Ross usually vigorously enforces all its IP-rights and even has a separate business unit solely to defend those rights [*Exh C7, p 21, para 7; PO2, p 54, para 15*]. Rather, Ross' approach reveals its real intention: to use an alleged ambiguity in the Ross Agreement to bargain for a free, non-exclusive license for the use of the GorAdCam viral vectors for respiratory diseases [*Answer to NoA, p 27, para 13*]. Therefore, should Ross ever decide to raise a claim regarding an exclusive right to use the viral vectors for respiratory diseases, this would be completely unjustified and an act of bad faith.

157. Such an obviously unjustified claim raised in bad faith would not trigger a breach of contract under Art 42 CISG [*Achilles, Art 41, para 3; Achilles I, p 8; Niggemann, p 93; Piltz, p 86; Prager, p 149 et seq; Schwerha, p 457; Secretariat Commentary Art 39, para 4; Soergel, p 84*]. Otherwise, a buyer could easily claim a breach of contract by convincing any third party to raise a claim on the goods even though such claim was meritless and completely unjustified [*Schwerha, p 457*]. Therefore, RESPONDENTS must not be held liable for any claim by Ross regarding an exclusive license for the viral vectors for respiratory diseases.

158. In conclusion, Ross does not have the right to use the viral vectors for its research on a COVID-19 vaccine, since COVID-19 and malaria are in no way related. Any claim by Ross concerning such a right is completely unjustified and raised in bad faith, thus not triggering a breach of the Agreement by RESPONDENT 1.

### 3. CLAIMANT bears the burden of proof regarding the existence of a third-party claim

159. In order to prove an alleged breach of contract by RESPONDENT 1, CLAIMANT must provide evidence that Ross raised an IP-claim against CLAIMANT. However, CLAIMANT has clearly failed to do so.

160. As a general principle, the CISG provides that the party asserting a fact bears the burden of proof for this submission [*Huber/Mullis, p 37; Reimers-Zocher, p 138 et seqq; Schlechtriem/Schwenzer, p 620;*]. This has been confirmed in numerous court decisions from several jurisdictions [*AGRI v. Marchfeldgemüse; Al Palazzo S.r.l. v. Bernardaud S.A; Antique Marble Sculpture Case; CD Media Case; Cables And Wires Case; FCF S.A. v. Adriafil*

*Commerciale; Glass Fibre Case II; Milk Powder Case; Rheinland Versicherungen v. Atlarex; Spinning Plant Case I; Used Textile Cleaning Machine Case*].

161. Consequently, under Art 42 CISG it is the buyer who must prove that a third-party claim is raised [*cf Mobile Phone Cover Case; Antweiler, p 190; Ferrari, p 895; Honsell, p 458; Schlechtriem/Schwenzer, p 706*]. This approach is the only logical one, as the buyer has the closer proximity to proof than the seller. Factually, only the buyer can prove that a third-party IP-claim was raised against it [*Antweiler, p 190*].

162. In conclusion, if CLAIMANT tries to seek protection under Art 42 CISG, it must prove that Ross raised an IP-claim against CLAIMANT. CLAIMANT failed to provide any evidence about the existence of such a claim. As a result, RESPONDENT 1 did not breach its contractual obligations.

## B. CLAIMANT must have known about the discussions concerning the Ross Agreement

163. Even if the Tribunal finds the GorAdCam viral vectors to be burdened by Ross' alleged IP-claim, RESPONDENT 1 shall not be held liable. In the case at hand, CLAIMANT as the buyer must have known about the discussion concerning the Ross Agreement. This excludes RESPONDENT 1's liability.

164. Pursuant to Art 42 (1) CISG, the seller may only be held liable if it "*knew or could not have been unaware*" of a third party's right or claim at the time of the conclusion of the contract [*Honsell, p 456; Reinhart, p 102; Schlechtriem/Schwenzer, p 700*]. To fulfil its duties, the seller must investigate whether such rights exist [*Kröll, p 656; Schlechtriem/Schwenzer, p 701; Staudinger/Magnus, p 347 et seq*].

165. Art 42 (2) (a) CISG provides for an exemption of the seller's liability. This exemption applies if the buyer "*knew or could not have been unaware*" of a third party's right or claim at the time of the conclusion of the contract [*Ferrari, p 902 et seq*; *Staudinger/Magnus, p 348*].

166. Since the wording of the exemption of liability pursuant to Art 42 (2) (a) CISG is identical with the aforementioned part in Art 42 (1) CISG, the buyer faces the same obligations as the seller [*Prager, p 175; Shinn, p 125*]. Thus, also the buyer, *i.e.* CLAIMANT, has the duty to investigate whether the goods are burdened with third-party IP-rights or claims [*Decathlon v. Lidl; IP Infringing Shirts Case; cf Le Corbusier v. GrandOptical; cf Marshoes v. Tachon diffusion; cf Tachon Diffusion v. Marshoes*].

167. In the case at hand, CLAIMANT must have been aware of the ongoing discussions between Ross and RESPONDENT 2 concerning the scope of the Ross Agreement. This discussion was released in an article in Biopharma Science on 14 December 2018, *i.e.* before the Agreement was concluded [*Exh C4, p 18*]. Biopharma Science is a very popular journal in the bioscience start-up community [*Exh C4, p 18; PO2, p 54, para 8*]. Not only has CLAIMANT failed to carry out its duty to research in a very renowned journal in its field, but instead CLAIMANT's CEO even negligently terminated its subscription to save costs [*PO2, p 54, para 8*]. CLAIMANT should not be allowed to hide its neglected research simply by stating that it did not have a magazine subscription. Besides, CLAIMANT's previous subscription even proves that CLAIMANT is aware of the journal's relevance, reinforcing that CLAIMANT knowingly neglected its duty to investigate.

168. Contrary to CLAIMANT's submission, RESPONDENTS do not have the duty to notify CLAIMANT about discussions with RESPONDENTS' other contracting partners [*MC, p 29 et seq, para 144 et seqq*]. None of the sources provided by CLAIMANT actually support its argument [*MC, p 29, para 145*]. The legal scholars' articles merely state the general duties of the buyer and the seller under Art 42 CISG, making no mention of the notification duty that CLAIMANT alleges [*Rauda/Etier, p 38; Shinn, p 124; Zeller, p 292*]. Similarly, the *CD Media Case* does not mention such a notification duty either [*CD Media Case*]. In addition, neither the CISG nor Danubian contract law stipulate such an obligation. Further, a duty to notify CLAIMANT all the more did not exist, since any claim by Ross concerning the use of the viral vectors would be completely unjustified and baseless (**A.2, para 153-158**). Therefore, RESPONDENTS had no obligation to notify CLAIMANT, especially since the discussions between RESPONDENTS and Ross were simple contract negotiations [*cf Exh R4, p 35; Exh R5, p 36*]. CLAIMANT cannot blame its own negligence on RESPONDENTS.

169. In conclusion, CLAIMANT violated its duty to investigate whether third-party IP-claims exist. Since the discussions concerning the scope of the Ross Agreement have been published in a renowned journal, CLAIMANT must have known about this dispute. As a result, even if there was a claim by Ross, RESPONDENTS' liability would be excluded.

## C. A termination of the Agreement would be favourable for CLAIMANT

170. CLAIMANT argues that it would have a clear financial advantage if it produced the vaccine in the agreed collaboration with RESPONDENT 1 [*MC, p 32, para 162*]. CLAIMANT alleges that a termination of the Agreement would therefore be unfavourable. To prove this allegation,

CLAIMANT relies on its internal profit and loss calculations displayed in the appendix [*MC, p 22 et seq, para 111 et seqq; MC, p 32, para 159 et seqq*]. However, these calculations were made before its acquisition by Khorana [*Exh R1, p 29; PO2, Appendix 1, p 59*]. In the following, RESPONDENTS will present why the Tribunal shall disregard CLAIMANT's argument.

171. These profit and loss calculations are dated January 2019 and were last verified in February 2020 [*PO2, Appendix 1, p 59*]. CLAIMANT was acquired by Khorana in April 2020 [*Answer to NoA, p 25, para 2*]. As a consequence, these calculations are outdated and useless. CLAIMANT merely tries to hide the fact that, with Khorana's help, it is now able to produce the vaccine at much lower costs. As shown above (**Background Information, para 21**), Khorana could provide CLAIMANT with the required base materials at costs which would be 50 % lower than the price due under the Agreement [*PO2, p 53, para 3*]. Additionally, Khorana can produce vaccines cost-efficiently in its own production facilities or provide financing to CLAIMANT for building its own facilities [*Exh R1, p 29; PO2, p 53, para 3*].

172. To conclude, contrary to CLAIMANT's argumentation [*MC, p 32 et seq, para 159 et seqq*], a termination of the Agreement would be indeed highly profitable for CLAIMANT.

## Conclusion to Issue IV

173. RESPONDENT 1 fulfilled its contractual duty to deliver GorAdCam viral vectors free from any third-party right or claim. First, CLAIMANT is not restricted in its use of the GorAdCam viral vectors since Ross never raised a claim against CLAIMANT. Second, any claim by Ross would be obviously unjustified and raised in bad faith, as Ross does not have the right to use the viral vectors for research on COVID-19. Such obviously unjustified claims raised in bad faith do not trigger Art 42 CISG. Third, CLAIMANT must have known about the discussions concerning the Ross Agreement, thus excluding RESPONDENT 1's liability under Art 42 CISG. Finally, with Khorana's help, CLAIMANT is now able to produce the GorAdCam viral vectors and the vaccine significantly cheaper than under the Agreement. Tempted by this financial benefit, CLAIMANT tries to twist its way out of the Agreement.

## Request for Relief

174. In light of the above, RESPONDENTS respectfully request the Tribunal:

1. to join Ross to the present arbitral proceedings;
2. to hold the examination of witnesses and experts scheduled May 2021 in person;
3. to declare the CISG inapplicable to the Agreement;
4. to declare that RESPONDENT 1 did not breach the Agreement pursuant to Art 42 CISG.

## Certificate

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

ALEXIA CRIVOI

TIM KIRCHMAYR

SUSANNIKA GLOETZL

BENEDIKT MAYER

MORITZ IBESICH

SARAH SCHWEBL

CAROLINE STROHMEIER