TWENTY EIGHTH ANNUAL

WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT

27 MARCH – 1 APRIL 2021

VIENNA, AUSTRIA

MEMORANDUM FOR RESPONDENTS

University of Maribor

Faculty of Law

ON BEHALF OF:

CamVir Ltd
112 Rue L. Pasteur
Oceanside
Equatoriana

(**RESPONDENT NO. 1**)

VectorVir Ltd
67 Wallace Rowe Drive
Oceanside
Equatoriana

(**RESPONDENT NO. 2**)

AGAINST:

RespiVac plc
Rue Whittle 9
Capital City
Mediterraneo

(**CLAIMANT**)

Counsel for RESPONDENTS

Jan Dolenc • Jasmina Mitev • Ema Turnšek

TABLE OF CONTENTS

TABLE OF ABBREVIATIONS

%	Per cent
§/§§	Paragraph/paragraphs
ANA	Answer to the Notice of Arbitration
Art. /Arts.	Article/Articles
CEO	Chief Executive Officer
CISG	United Nations Convention on Contracts for the International Sale of Goods
COO	Chief Operating Officer
COVID-19	Co-corona; vi-virus; d-disease
e.g.	Exempli gratia (for example)
EUR	The single European currency
Ex. C	CLAIMANT's Exhibit
Ex. R	RESPONDENT's Exhibit
ICC	International Chamber of Commerce
i.e.	Id est (in other words)
inter alia	Among other things
IP right(s)	Intellectual Property right(s)
LCIA	The London Court of International Arbitration
MC	Memorandum for CLAIMANT
mio	Million
Mr.	A title used before a surname or full name to address or refer to a man without a higher or honorific or professional title

Mrs.	A title used before a surname or full name to address or refer to a married woman without a higher or honorific or professional title
Ms.	A title used before the surname or full name of any woman regardless of her marital status
NA	Notice of Arbitration
no.	Number
New York Convention	New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards
p. /pp.	Page/pages
PCL Agreement	Purchase, Collaboration and Licensing Agreement
PO1	Procedural order No. 1
PO2	Procedural order No. 2
Ross Agreement	Collaboration and License Agreement with Ross Pharmaceuticals
R&D	Research and Development
SCAI	Swiss Chambers' Arbitration Institution
supra	Above
Swiss Rules	Swiss Rules of International Arbitration of the Swiss Chambers' Arbitration Institution 2012
Tribunal	Arbitral Tribunal
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration with amendments as adopted in 2006
UNIDROIT	International Institute for the Unification of Private Law
UNIDROIT PICC/Principles	UNIDROIT Principles of International Commercial Contracts 2010
UTC	Universal Time Coordinated

VIAC	Vienna International Arbitral Centre
v. / vs.	Versus
WIPO	World Intellectual Property Organization
ZPO	Zivilprozessordnung (German Code of Civil Procedure)

INDEX OF AUTHORITIES

CITED AS		CITED IN
Achilles	Wilhelm-Albrecht Achilles ***Kommentar zum UN-Kaufrechtsübereinkommen (CISG)*** Hermann Luchterhand Verlag, 2000	§§84, 92
Audit	Bernard Audit ***La Vente Internationale de Marchandises*** In Convention des Nations-Unies du 11 Avril 1980, Paris (1990)	§84
Austmann	Andreas Austmann ***Commercial Multi-Party Arbitration: A Case-by-Case Approach*** In the American Review of International Arbitration, no. 3 (1990)	§16
Babiak	Andrew Babiak ***Defining "Fundamental Breach" Under the United Nations Convention on Contracts for the International Sale of Goods*** Temple International and Comparative Law Journal, 1992 Available at: https://www.cisg.law.pace.edu/cisg/biblio/babiak.html?fbclid=IwAR1ewUShvqJNnl6rjqCnBfrorNksUs_XsjA4khi03bdIN18qWMpipKapBHU#v (20. 1. 2021)	§94
Beline	Thomas M. Beline ***Legal Defect Protected by Article 42 of the CISG: A Wolf in Sheep's Clothing*** University of Pittsburgh Journal of Technology Law & Policy (2007)	§83

Bonell/Ligouri	Michael Joachim Bonell, Fabio Liguori ***The U.N. Convention on the International Sale of Goods: A Critical Analysis of Current International Case Law - 1997 (Part 1)*** In Revue de droit uniforme/Uniform Law Review (1997)	§71
Born	Gary B. Born ***International commercial arbitration*** *Volume I: International arbitral procedures, 2nd edition* *Volume II: International arbitral procedures, 2nd edition* *Volume III: International arbitral procedures, 2nd edition* In Wolters Kluwer (2014)	§§14, 16, 18, 24, 27, 29, 37, 40, 46, 49
Brunner/Gottlieb	Christoph Brunner, Benjamin Gottlieb ***Commentary on the UN Sales Law (CISG)*** In Kluwer Law International B.V., 2019	§§58, 60, 61, 69, 71, 73, 82, 89
Bygum	Mette Bygum ***Extension and Limitation of the Buyer's Right To Avoid the Contract Under the CISG*** Available at: https://law.au.dk/fileadmin/Jura/dokumenter/forskning/rettid/2010/afh21-2010.pdf?fbclid=IwAR1YvNRdeuFOZSy-rZj8WvK-iSgJQmvY4B3yUsAPhGARJs6Sst647tpBr3s (20. 1. 2021)	§92
Bärtsch/Petti	Philipp Bärtsch, Angelina Petti ***Consolidation and Joinder*** In Zuberbühler, Müller & Habegger (2014)	§§14, 18, 24, 25, 29
Cheng	Bin Cheng ***General Principles of Law as Applied by International Courts and Tribunals*** In London: Stevens (1953)	§40

Chiu	Julie C. Chiu ***Consolidation of Arbitral Proceedings and International Commercial Arbitration*** In Journal of International Arbitration (1990)	§§16, 29
CISG ACO No. 4	CISG Advisory Council Opinion No. 4 ***Contracts for the Sale of Goods to Be Manufactured or Produced and Mixed Contracts (Article 3 CISG)***	§§71, 73
CISG Opinion No. 5	CISG Advisory Council ***Opinion No. 05 - The buyer's right to avoid the contract in case of non-conforming goods or documents*** Available at: https://journals.aau.dk/index.php/NJCL/article/view/3051/2577 (21. 1. 2021)	§92
CISG Opinion No. 19	CISG Advisory Council ***Opinion No. 19 - Standards and Conformity of the Goods under Article 35 CISG*** Available at: https://www.cisgac.com/file/repository/CISG_Advisory_Council_Opinion_No_19b.pdf (21. 1. 2021)	§67
Collins	L. Collins ***Dicey, Morris and Collins on The Conflict of Laws*** In Sweet & Maxwell (2012), 15th ed.	§46
Diedrich	Frank Diedrich ***Maintaining Uniformity in International Uniform Law Via Autonomous Interpretation: Software Contracts and the CISG*** In Pace International L. Rev. (1996)	§62
Enderlein	Fritz Enderlein	§§82, 87

	Rights and Obligations of the Seller under the UN Convention on Contracts for the International Sale of Goods In International Sale of Goods: Dubrovnik Lectures, Oceana Publications (1996)	
Enderlein/Maskow/Strohbach	Enderlein, F., Maskow, D., Strohbach, H ***Kaufrechtskonvention der UNO (mit Verjährungskonvention) – Kommentar*** Staatsverlag DDR, Berlin, 1985	§66
Eörsi	Gyula Eörsi ***International Sales: The United Nations Convention on Contracts for the International Sale of Goods*** Published in Galston & Smit ed., 1984, Ch. 2, pp. 2-36 Available at: https://cisgw3.law.pace.edu/cisg/biblio/eorsi1.html#205 (20. 1. 2021)	§66
Farnsworth	E. Allan Farnsworth ***Commentary on the International Sales Law - Article 8*** Published in Bianca-Bonell Commentary on the International Sales Law, Giuffrè: Milan, 1987, pp. 95-102 Available at: https://cisgw3.law.pace.edu/cisg/biblio/farnsworth-bb8.html (20. 1. 2021)	§65
Ferrari	Franco Ferrari ***Fundamental Breach of Contract Under the UN Sales Convention - 25 Years of Article 25 CISG***	§§91, 92

	Published in Journal of Law and Commerce, 2006, pp. 489-508 Available at: https://www.cisg.law.pace.edu/cisg/biblio/ferrari14.html (20. 1. 2021)	
Flechtner	Harry M. Flechtner ***Buyers' remedies in general and buyers' performance-oriented remedies*** Published in Journal of Law and Commerce, Vol. 06, 2005, pp. 339-347 Available at: https://www.uncitral.org/pdf/english/CISG25/Flechtner.pdf (20. 1. 2021)	§66
Gaillard/Savage	Emmanuel Gaillard, John Savage ***Fouchard Gaillard Goldman on International Commercial Arbitration*** In Kluwer Law International B.V. (1999)	§§40, 49
Geisinger/Voser	Elliott Geisinger, Nathalie Voser ***International Arbitration in Switzerland: A Handbook for Practitioners*** In Kluwer Law International, 2nd edition (2013)	§24
Gilliéron/Pittet	Philippe Gilliéron, Didier Pittet ***Swiss Rules* of International Arbitration - *Commentary*** In Anwaltsrevue/Revue de l'avocat, 2nd edition (2005)	§18
Graffi	Leonardo Graffi ***Case Law on the Concept of "Fundamental Breach" in the Vienna Sales Convention*** Published in International Business Law Journal, No. 3, 2003, pp. 338-349 Available at:	§§91, 92

	https://cisgw3.law.pace.edu/cisg/biblio/graffi.html (21. 1. 2021)	
Hanotiau	Bernard Hanotiau ***Complex Arbitrations–Multiparty, Multicontract, Multi-Issue and Class Actions*** In Kluwer Law International (2005)	§24
Honnold	John O. Honnold ***Uniform Law for International Sales under the 1980*** United Nations Convention, 3rd edition In Kluwer Law International, 1998	§§65, 66, 67
Huber/Mullis	Peter Huber, Alastair Mullis ***The CISG: A new textbook for students and practitioners*** In Sellier European Law publ., 2007	§§56, 90, 92
Janal	Ruth M. Janal ***The Seller's Responsibility for Third Party Intellectual Property Rights under the Vienna Sales Convention*** Camilla B. Andersen & Ulrich G. Schroeter eds. In Simmonds & Hill Publishing (2008)	§84
Jenny	Reto M. Jenny ***Commentary on the Swiss Rules, Article 44 [confidentiality]*** In Arbitrations in Switzerland: The Practicioner's Guide /Kluwer Law International (2020)	§35
Jolles/Stark-Traber/Canals de Cediel	Alexander Jolles, Sonja Stark-Traber, Maria Canals de Cediel ***International Arbitration in Switzerland, Chapter 7, Confidentiality*** In Wolters Kluwer (2004)	§35

Khoo	Warren Khoo ***Commentary on the International Sales Law*** In Bianca-Bonell Commentary on the International Sales Law, Giuffrè	§69
Kiraz	Serife Esra Kiraz ***Third Party's Intellectual Property Rights And The Seller's Liability Under The United Nations Convention On International Sale Of Goods (CISG) And The Sale Of Goods Act (SGA)*** In degree of Doctor of Philosophy, University of Leicester	§§60, 61
Koch	Robert Koch ***The Concept of Fundamental Breach of Contract under the United Nations Convention on Contracts for the International Sale of Goods (CISG)*** Published in Review of the Convention on Contracts for the International Sale of Goods (CISG) 1998, Kluwer Law International, 1999, pp. 177 – 354	§§90, 91, 92
La Spada/Rohner	Fabrizio La Spada, Thomas Rohner ***Commentary of Article 44 of the Swiss Rules of International Arbitration*** In Zuberbühler T., Müller C., Habegger P. (Eds.) Swiss Rules of International Arbitration, commentary, 2nd ed., Zurich (2013)	§35
Lautenschlager	Felix Lautenschlager ***Current Problems Regarding the Interpretation of Statements and Party Conduct under the CISG - The Reasonable Third Person, Language Problems and Standard Terms and Conditions*** Published in Vindobona Journal of International Commercial Law & Arbitration, 2007, pp. 259-290	§65
Leboulanger	Philippe Leboulanger	§16

	Multi-Contract Arbitration In Journal of International Arbitration (1996)	
Level	Level ***Joinder of Proceedings, Intervention of Third Parties, and Additional Claims and Counterclaims*** In ICC Ct. Bull (1996)	§37
Liu	Cheng Liu ***The concept of fundamental breach: Perspectives from the CISG, UNIDROIT Principles and PECL and case law*** Available at: http://www.sisudoc.org/cisg/en/pdf/remedies_for_non_performance_perspectives_from_cisg_upicc_and_pecl.chengwei_liu.landscape.a4.pdf (23. 1. 2021)	§§90, 91, 92
Lookofsky	Joseph Lookofsky ***Article 35: Conformity of the Goods*** Published: J. Herbots/R. Blanpain: International Encyclopaedia of Laws - Contracts, Suppl. 29 In Kluwer Law International, 2000	§§65, 66, 80, 89
Lookofsky II	Joseph Lookofsky ***Article 25: Avoidance and Fundamental Breach*** Published: J. Herbots/R. Blanpain: International Encyclopaedia of Laws - Contracts, Suppl. 29 In Kluwer Law International, 2000	§§87, 91, 92
Magnus	Ulrich Magnus ***The Remedy of Avoidance of Contract Under CISG - General Remarks and Special Cases*** Published: Journal of Law and Commerce, Vol. 06, 2005, pp. 423-436	§§82, 87
McCullough	Justin McCullough	§19

	What is privity of contract? In Jotform blog (2020)	
McMahon	Anthony J. McMahon ***Differentiating between Internal and External Gaps in the U. N. Convention on Contracts for the International Sale of Goods: A Proposed Method for Determining "Governed by" in the Context of Article 7(2)*** In Volume 44 of Columbia Journal of Transnational Law	§64
McIlwrath/Savage	Michael McIlwrath, John Savage ***International Arbitration and Mediation: A Practical Guide*** In Kluwer Law International (2010)	§40
McKenzie/Wood	Lucy McKenzie, Myfanwy Wood ***Arbitration and COVID-19: Cybersecurity and data protection*** In: https://www.ashurst.com/en/news-and-insights/legal-updates/arbitration-and-covid-19---cybersecurity-and-data-protection/ (23. 1. 2021)	§48
Perović	Jelena Perović ***Selected Critical Issues Regarding the Sphere of Application of the CISG*** The University of Belgrade (2011) In Belgrade Law Review No. 3	§71
Pietrowski	Robert Pietrowski ***Evidence in International Arbitration*** In Arbitration International, Volume 22, Issue 3 (2006)	§40

Poudret/Besson	Jean-Francois Poudret, Sebastian Besson ***Comparative Law of International Arbitration*** In licensed edition, London: Sweet&Mawell (2007)	§§16, 24
Rajoo	Sundra Rajoo ***Law, Practice and Procedure of Arbitration - Second Edition*** In Lexis Nexis, 2nd edition (2011)	§§15, 19, 22, 33, 40
Rauda/Etier	Christian Rauda, Guillaume Etier ***Warranty for Intellectual Property Rights in the International Sale of Goods*** In International Encyclopaedia of Laws - Contracts (2000), Kluwer Law International	§83
Rubino-Sammartano	Mauro Rubino-Sammartano ***International Arbitration Law*** In Kluwer Law International, 2nd edition (2001)	§§15, 22, 42, 44
Salger	Salger, H. C., Wolfgang, W., Lorenz, M. ***Internationales Einheitskaufrecht, Schriftenreihe Recht der internationalen Wirtschaft*** Heidelberg: Verlag Recht und Wirtschaft, 2000	§92
Sanchez	Sanchez, C. ***Commentary on CISG Articles 25-29 and 53-60*** La compraventa internacional de mercaderías, Díez-Picazo y Ponce de León ed., Madrid: Civitas, 1998	§92
Sandifer	Durward V. Sandifer ***Evidence Before International Tribunals*** In British Yearbook of International Law, Volume 48, Issue 1 (1976) University Press of Virginia	§40
Scherer	Maxi Scherer	§§44, 47, 49, 50, 51

	Remote Hearings in International Arbitration: An Analytical Framework In Kluwer Law International, Volume 37, Issue 4 (2020)	
Scherer/Schwarz	Maxi Scherer, Franz Schwarz ***In a 'First' Worldwide, Austrian Supreme Court Confirms Arbitral Tribunal's Power to Hold Remote Hearings Over One Party's Objection and Rejects Due Process Concerns*** In: http://arbitrationblog.kluwerarbitration.com/2020/10/24/in-a-first-worldwide-austrian-supreme-court-confirms-arbitral-tribunals-power-to-hold-remote-hearings-over-one-partys-objection-and-rejects-due-process-concerns/ (23. 1. 2021)	§51
Schlechtriem	Peter Schlechtriem ***Schuldrecht. Besonderer Teil.*** In Mohr Lehrbuch, 2003	§§64, 80
Schlechtriem II	Peter Schlechtriem ***Uniform Sales Law - The UN-Convention on Contracts for the International Sale of Goods (Art. 46 and 47)*** Available at: http://www.cisg.law.pace.edu/cisg/biblio/schlechtriem-46.html (23. 1. 2021)	§71
Schlechtriem/Schwenzer	Peter Schlechtriem, Ingeborg Schwenzer ***Commentary on the UN Convention on the International Sale of Goods (CISG)*** In Oxford University Press, 3rd ed., 2010	§§56, 58, 60, 61, 66, 69, 83, 87, 91, 92
Schramm	Dorothee Schramm ***Consolidation and Joinder: Commentary on the Swiss Rules, Article 4***	§29

	In Arbitration in Switzerland: The Practitioner's Guide (2012)	
Schroeter	Ulrich G. Schroeter ***Applicability to "Mixed Contracts" and Interaction with the 1968 Brussels Convention*** In Vindobona Journal of International Commercial Law and Arbitration (2001), Vienna Sales Convention	§§69, 71
Simamora/Sujayadi/Yuniarti	Y Sogar Simamora, Sujayadi Sujayadi, Yuniarti Yuniarti ***Binding effect of arbitration clause to third parties: privity of contract doctrine vs. piercing the corporate veil*** In Yuridika, Vol 33, No 1 (2018)	§19
Strong	S. I. Strong ***Intervention and Joinder As of Right in International Arbitration: An Infringement of Individual Contract Rights or A Proper Equitable Measure?*** In 31 Vand. J. Transnat'l L. 915	§37
Trakman	Leon E. Trakman ***Confidentiality in International Commercial Arbitration*** In Arb. Intl'l (2002)	§35
UNCITRAL Digest 2012	United Nations Commission on International Trade Law ***UNCITRAL Digest of Case law on the Model Law on International Commercial Arbitration, United Nations (2012)*** United Nations Publication Sales No. E.12.V.9	§88

UNIDROIT Commentary	International Institute for the Unification of Private Law ***Article 9.1.15 (Undertakings Of The Assignor)*** Available at: https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2010/408-chapter-9-assignment-of-rights-transfer-of-obligations-assignment-of-contracts-section-1-assignment-of-rights/1005-article-9-1-15-undertakings-of-the-assignor (20. 01. 2021)	§§65, 95
Vogenauer	Stefan Vogenauer ***Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*** In Oxford University Press (2015), 2nd ed.	§95
Voser	Nathalie Voser ***Multy-party Disputes and Joinder of Third Parties*** In ICCA Congress Series No. 14 (2009)	§§15, 29
Voser/Meier	Nathalie Voser, Andrea Meier ***Joinder of Parties or the Need to (Sometimes) be Inefficient*** In Austrian Arbitration Yearbook, 2008	§29
Wolff	Katharina Wolff ***Die Rechtsmängelhaftung nach dem Uniform Commercial Code und dem UN-Kaufrecht*** In Thesis Bonn, 1989	§60
Yang	Yang, F. ***CISG, CIETAC Arbitration and the Rule of Law in the P. R. of China: A Global Jurisconsultorium Perspective*** Available at:	§65

	http://www.cisg.law.pace.edu/cisg/biblio/yang3.html (23. 1. 2021)	
Zamir	Eyal Zamir ***Interpretation of the Law of Contracts*** In The Sale Law The Harry Sacher Institute for Research on Legislation and Comparative Law, G. Tedeschi, ed., (1987)	§61
Zeller	Bruno Zeller ***Determining the Contractual Intent of Parties under the CISG and Common Law – A Comparative Analysis*** In European Journal of Law Reform, Volume 4, no. 4, 2002, pp. 629-643 Available at: http://www.cisg.law.pace.edu/cisg/biblio/zeller8.html (23. 1. 2021)	§§64, 65
Zeller II	Bruno Zeller ***The Remedy of Fundamental Breach and the United Nations Convention on the International Sale of Goods (CISG) - A Principle Lacking Certainty?*** Available at: https://cisgw3.law.pace.edu/cisg/biblio/zeller15.html?fbclid=IwAR0KQepe_NqpgAMHemSXiOBJHu7eyMODzUHC4s9rYA5WG8uoCRT6jHTdNFE (23. 1. 2021)	§§90, 91, 92

Ziegel	Jacob Ziegel ***The Scope Of The Convention: Reaching Out To Article One And Beyond*** In the Scope of the Convention, Volume 25, Issue 1, (2005)	§58
Ziegel/Samson	Jacob Ziegel, Claude Samson ***Report to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods*** In Bianca-Bonell Commentary on the International Sales Law University of Toronto and Université Laval (1981)	§65

TABLE OF ARBITRAL AWARDS

CITED AS		CITED IN
	China International Economic and Trade Arbitration Commission	
Color concrete block production line case	Building materials Co. Ltd v. Aktiengesellschaft AG 30 June 2007 Case No. CISG/2007/04 Available at: http://cisgw3.law.pace.edu/cases/070630c1.html (23. 1. 2021)	§91
	Court of Arbitration of the International Chamber of Commerce	
Chemical fertilizer case	*Unknown parties* 1995 Case no. 8128 of 1995 Available at: http://cisgw3.law.pace.edu/cases/958128i1.html (23. 1. 2021)	§67

AD HOC AWARDS

Fashion products case	Unknown parties 2003 Case no. 11849 of 2003 Available at: https://cisgw3.law.pace.edu/cases/031849i1.html (23. 1. 2021)	§66

Sapphire v. Nat'l Iranian Oil	Sapphire International Petroleums Ltd. v. National Iranian Oil Company Ad Hoc Tribunal 15 March 1963 Award No. 35, I.L.R. 136, 169 (1967)	§46

TABLE OF COURT DECISIONS

CITED AS		CITED IN
	AUSTRALIA	
BHPB Freight v. Cosco Oceania	BHPB Freight Pty Ltd. v. Cosco Oceania Chartering Pty Ltd. Federal Court of Australia 23 April 2008 FCA 1087 [2009]	§21
Campaign Master v. Forty Two International	Campaign Master (UK) Ltd. v. Forty Two International Pty Ltd. (No. 3) Federal Court of Australia 13 November 2009 Case No. [2009] FCA 1306; 181 FCR 152	§51
Dorajay v. Aristocrat Leisure	Dorajay Pty Ltd. v. Aristocrat Leisure Ltd. Federal Court of Australia 13 May 2005 Case No. [2005] FCA 588	§51
Hanson-Young v. Leyonhjelm	Hanson-Young v. Leyonhjelm (No. 3) Federal Court of Australia 2019 Case No. [2019] F.C.A. 645	§51
Roder case	Roder Zelt- und Hallenkonstruktionen GmbH v. Rosedown Park Pty Ltd et al Federal Court, South Australian District, Adelaide 28 April 1995 Case No. SG 3076 of 1993; FED No. 275/95 Available at: http://cisgw3.law.pace.edu/cases/950428a2.html (28. 01. 2021)	§69

AUSTRIA

Case 18 ONc 3/20s	Unknown parties Austrian Supreme Court (Oberster Gerichtshof "OGH") 23 July 2020 Case No. 18 ONc 3/20s	§51
Chinchilla furs case	Unknown parties Oberster Gerichtshof (Supreme Court) 10 November 1994 Case No. 2 Ob 547/93	§67
Cooling system case	Unknown parties Oberster Gerichtshof (Supreme Court) 14 January 2002 Case No. 7 Ob 301/01t Available at: https://cisgw3.law.pace.edu/cases/020114a3.html (28. 01. 2021)	§69
Propane case	Unknown parties Oberster Gerichtshof 6 February 1996 Case No. 10 Ob 518/95 Available at: http://cisgw3.law.pace.edu/cases/960206a3.html (28. 01. 2021)	§67
Software case	Unknown parties Oberster Gerichtshof 21 June 2005 Case No. 5 Ob 45/05m Available at: http://cisgw3.law.pace.edu/cases/050621a3.html	§58

	(28. 01. 2021)	
Tantalum case	Unknown parties Oberster Gerichtshof 31 August 2005 Case No. 7 Ob 175/05v Available at: http://cisgw3.law.pace.edu/cases/050831a3.html (28. 01. 2021)	§68
	BRAZIL	
Chaval v. Liebherr	Chaval Navegação Ltda v. Liebherr Brasil Brazilian Superior Court of Justice (Brazilian Superior Tribunal de Justiça) 3 August 2006 Case No. 653.733-RJ 2004/0102276-0	§25
	CHINA	
Astel-Peiniger Joint Venture v. Argos	Astel-Peiniger Joint Venture v. Argos Engineering & Heavy Industries Company Ltd. Hong Kong, High Court, In the Supreme Court of Hong Kong 18 August 1994 Case No. HCCT 14/1994	§25
	FRANCE	
Siemens v. Dutco	Siemens AG and BKMI Industrienlagen GmbH v. Dutco Consortium Construction Company Ltd. French Cour de Cassation 7 January 1992 Cited in: XV Yearbook Com. Arb. (1992) 124 et seq.	§22
	GERMANY	
Cafe inventory case	Unknown parties	§87

	Oberlandesgericht Hamburg 25 January 2008 Case No. 12 U 39/00 Available at: https://cisgw3.law.pace.edu/cases/080125g1.html (28. 01. 2021)	
Cylinder case	Unknown parties Landgericht Mainz 26 November 1998 Case No. 12 HKO 70/97 Available at: https://cisgw3.law.pace.edu/cases//981126g1.html (28. 01. 2021)	§75
Machinery case	Unknown parties Bundesgerichtshof 31 October 2001 Case No. VIII ZR 60/01 Available at: http://cisgw3.law.pace.edu/cases/011031g1.html (28. 01. 2021)	§68
Marzipan case	Unknown parties Bundesgerichtshof (Supreme Court) 11 December 1996 Case No. VIII ZR 145/95 Available at: https://cisgw3.law.pace.edu/cases/961211g1.html (28. 01. 2021)	§66
Hygenic tissues case	Unknown parties Bundesgerichtshof 3 November 1999 Case No. VIII ZR 287/98	§87

	Available at: http://cisgw3.law.pace.edu/cases/991103g1.html (28. 01. 2021)	
Stolen automobile case	Unknown parties Appellate Court Dresden 21 March 2007 Available at: http://cisgw3.law.pace.edu/cases/070321g1.html (28. 01. 2021)	§87
	INDIA	
BGS v. NHPC	BGS SGS Soma JV v. NHPC Ltd. Supreme Court of India 10 December 2019 Case No. Civil Appeals No. 9307 of 2019, No. 9308 of 2019 and No. 9309 of 2019	§42
	NEW ZEALAND	
Smallmon case	RJ & AM Smallmon v. Transport Sales Limited and Grant Alan Miller Court of Appeal of New Zealand 22 July 2011 Case No. C A545/2010 [2011] NZ C A 340 Available at: http://cisgw3.law.pace.edu/cases/110722n6.html (28. 01. 2021)	§65
	SINGAPORE	
Bachmeer Capital v. Ong Chih Ching	Bachmeer Capital Ltd. v. Ong Chih Ching and others Singapore International Commercial Court 13 February 2018 Case No. [2018] SGHC(I) 01	§§49, 51

Int'l Research v. Lufthansa	International Research Corporation PLC v. Lufthansa Systems Asia Pacific Pte Ltd. and another Singapore High Court 12 November 2012 Case No. [2012] SGHC 226	§25
PT First Media v. Astro Nusantara	PT First Media TBK v. Astro Nusantara International BV The Court of Appeal of the Republic of Singapore 31 October 2013 Case No. [2013] SGCA 57	§14
	SLOVAKIA	
Health care products case	Unknown parties Supreme Court of the Slovak Republic 19 June 2008 Case No. 6 Obo 15/2008 Available at: http://cisgw3.law.pace.edu/cases/080619k1.html (28. 01. 2021)	§67
	SWITZERLAND	
4A_360/2012	Unknown parties Federal Supreme Court of Switzerland (Swiss Federal Tribunal) 3 December 2012 Case No. DFT 4A_360/2012	§49
4A_376/2008	Unknown parties Federal Supreme Court of Switzerland (Swiss Federal Tribunal) 5 December 2008 Case No. DFT 4A_376/2008 Published: 27 ASA Bull 745 (2009)	§25

4A_600/2010	Unknown parties Federal Supreme Court of Switzerland (Swiss Federal Tribunal) 17 March 2011 Case No. 4A_600/2010 Published: 30 ASA Bull 119 (2012)	§49
Blood infusion devices case	Unknown parties Appellate Court Luzern 8 January 1997 Available at: https://cisgw3.law.pace.edu/cases/970108s1.html (28. 01. 2021)	§69
Case Roland Schmidt GmbH	Roland Schmidt GmbH v. Textil-Werke Blumenegg AG Federal Supreme Court 22 December 2000 Available at: http://cisgw3.law.pace.edu/cases/001222s1.html (28. 01. 2021)	§67
Model locomotives case	Unknown parties Cantonal Court of Schaffhausen 27 January 2004 Case No. 11/1999/99 Available at: http://cisgw3.law.pace.edu/cases/040127s1.html (28. 01. 2021)	§87
	UNITED KINGDOM	
Abu Dhabi Gas Liquefaction v. Eastern Bechtel	Abu Dhabi Gas Liquefaction Company Ltd. v. Eastern Bechtel Corporation and Chiyoda Chemical Engineering & Construction Company Ltd. House of Lords	§37

	1982 Cited in: [1982] 2 Lloyd's Rep. 425	
Bandwidth Shipping v. Intaari	Bandwidth Shipping Corporation v. Intaari (the "Magdalena Oldendorf") England and Wales Court of Appeal 17 October 2007 Case No. [2007] ArbLR 7	§27
Bulk Oil v. Trans-Asiatic Oil	Bulk Oil (Zug) AG v. Trans-Asiatic Oil Ltd. SA Queen's Bench Division, High Court of Justice 1973 Cited in: [1973] 1 Lloyd's Rep. 129	§37
B v. A	Unknown parties England and Wales High Court 1 July 2010 Cited in: [2010] EWHC 1626	§27
Collins v. Cromie	Taunton-Collins v. Cromie and Others English Court of Appeal 1964 Cited in: [1964] 1 WLR 633	§37
Halifax v. Rasno	Halifax Overseas Freighters v. Rasno Export Technopromonport and Polskie Linie Oceaniczne PPW, The Pine Hill Queen's Bench Division, High Court of Justice 1958 Cited in: [1958] 2 Lloyd's Rep. 129	§37
Hanno v. Fairlight Shipping	Hanno (Heinrich) & Company BV v. Fairlight Shipping Company Ltd., The Kostas K Queen's Bench Division, High Court of Justice 1985 Cited in: [1985] 1 Lloyd's Rep. 231	§37

Lovell Partnership v. AW Construction	Lovell Partnership (Northern) Ltd. v. AW Construction Plc. English Court of Appeal 1996 Cited in: (1996) 81 BLR 83	§40
Mannai v. Eagle Star	Mannai Investment Company Ltd. v. Eagle Star Life Assurance Company Ltd. House of Lords 21 May 1997 Case No. UKHL 19 Cited in: AC 749, 771	§25
UNITED STATES OF AMERICA		
Allstate Settlement v. Rapid Settlement	Allstate Settlement Corporation v. Rapid Settlements Ltd. United States Court of Appeals, Third Circuit. 3 March 2009 Case No. 07-3224 Cited in: 559 F.3d 164, 170	§25
Amerix v. Jones	Amerix Corporation v. Laverne Jones United States District Court, District of Maryland, Fourth Circuit. 17 January 2012 Case No. JFM-11-2844 Cited in: 457 F.Appx. 287, 291	§27
Cedar Petrochemicals Inc. case	Cedar Petrochemicals inc vs. Dongbu Hannong Chemical Ltd. U.S. District Court, Southern District of New York 28 September 2011 Case No. 06 Civ. 3972 (LTS) (JCF). Available at: http://cisgw3.law.pace.edu/cases/110928u1.html	§65

	(28. 01. 2021)	
Century Indem v. Certain Underwriters	Century Indemnity Company v. Certain Underwriters at Lloyd's United States District Court, E.D. Pennsylvania 18 May 2006 Civil Action No. 05-CV-6004 Cited in: 584 F.3d 513, 534	§25
CSS case	CSS Antenna, Inc. v. Amphenol-Tuchel Electronics, GMBH U.S District Court, District of Maryland 8 February 2011 Case No. CCB-09-2008 Available at: http://cisgw3.law.pace.edu/cases/110208u1.html (28. 01. 2021)	§66
DiRussa v. Dean	DiRussa v. Dean Witter Reynolds, Inc. United States District Court, S.D. New York 29 July 1996 Case No. 95 Civ. 4469 (CSH)	§27
McBro Planning v. Triangle	McBro Planning and Development Company and McCarthy Brothers Company v. Triangle Electrical Construction Company Inc. United States Court of Appeals, Eleventh Circuit 6 September 1984 Cited in: 741 F.2d 342, 344	§25
MCC-Marble Case	CC-Marble Ceramic Center v. Ceramica Nuova D'Agostino Federal Appellate Court, 11th Circuit 29 June 1998 Available at: http://cisgw3.law.pace.edu/cases/980629u1.html	§66

	(28. 01. 2021)	
Oxford v. Sutter	Oxford Health Plans LLC v. Sutter United States Supreme Court 10 June 2013 Case No. 133 S. Ct. 2064, 2071 Cited in: 675 F. 3d 215	§27
Winship case	United States Supreme Court 31 March 1970 Case No. 778 397 U.S. 358	§56

TABLE OF LEGAL SOURCES

Belgian Judicial Code	Judicial Code of law in the country of Belgium as adopted on 10 October 1967
CISG	United Nations Convention on Contracts for the International Sale of Goods, Vienna, 11 April 1980
Danubian Arbitration Law	Arbitration Law in the country of Danubia
German ZPO	Code of Civil Procedure (ZPO) of Germany, as adopted on 30 January 1877
ICC Rules	International Chamber of Commerce Arbitration Rules, 1998, as adopted on 1 January 2021
LCIA Rules	LCIA Arbitration Rules, London, 1 October 2014
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York 10 June 1958
Procedural Code of Danubia	Procedural code of Danubia, with amendments as adopted in 2010
Swiss Rules	Swiss Rules of International Arbitration of the Swiss Chambers' Arbitration Institution 2012
UNCITRAL Arbitration Rules	Arbitration Rules of United Nations Commission on International Trade Law as revised in 2010
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted on 2006, Vienna, 21 June 1985
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts, Rome, 2010

STATEMENT OF FACTS

1 RespiVac plc (**"CLAIMANT"**) is a company engaged in the development of vaccines for respiratory diseases caused by viruses. While CLAIMANT may still be a start-up biopharmaceutical company, it now has a parent company, Khorana Lifescience, which is one of the leading life science companies in Danubia. CamVir Ltd (**"RESPONDENT NO. 1"**) and VectorVir Ltd (**"RESPONDENT NO. 2"**) are now both 100 % subsidiaries of Roctis AG.

2 RESPONDENT NO. 2 is the owner of a patent for the GorAdCam viral vector. In 2014, Ross Pharmaceuticals wanted to acquire RESPONDENT NO. 2 and its patents. At the time, the major shareholders of RESPONDENT NO. 2 were, however, not interested in selling the company as they were concerned that Ross Pharmaceuticals was only interested in the patents and would not seriously continue the research on respiratory diseases. Though not explicitly stated, it was obvious that Ross Pharmaceuticals was interested primarily in the use of the GorAdCam viral vector for a possible malaria vaccine. In consequence, on **15 June 2014**, a Collaboration and License Agreement with Ross Pharmaceuticals was concluded (**"Ross Agreement"**).

3 After a successful Phase III trial, Ross Pharmaceuticals abandoned the work on the malaria vaccine for economic reasons in summer 2018. Around the same time Ross Pharmaceuticals approached RESPONDENT NO. 2 again and made another purchase offer as the relevant researchers had apparently realized the potential of the GorAdCam as a viral vector for vaccines against respiratory diseases. At the time, RESPONDENT NO. 2 was, however, already in exclusive negotiations with Roctis AG which then led to the acquisition by Roctis AG on **25 August 2018**. On **10 September 2018**, RESPONDENT NO. 2 granted RESPONDENT NO. 1 an exclusive license for the use of the GorAdCam viral vector for all applications related to respiratory diseases.

4 In parallel, RESPONDENT NO. 1 started negotiations with CLAIMANT shortly after **1 December 2018**. On behalf of RESPONDENT NO. 1, negotiations were conducted primarily by Mr. Doherty who was at the time still working as Director Legal for RESPONDENT NO. 2 but was about to move to RESPONDENT NO. 1 as the Head of Contracting. Mr. Doherty decided to use the old template of RESPONDENT NO. 2 as the basis for further discussion, adding only the conditional purchase obligation in clause 16. On said grounds, on **1 January 2019**, RESPONDENT NO. 1 entered into a Purchase, Collaboration and Licensing Agreement (**"PCL Agreement"**) with CLAIMANT.

5 On **6 December 2019**, Mr. Doherty was contacted via email by Ms. Bordet, the Head of Contract and IP of Ross Pharmaceuticals. Ms. Bordet expressed her deep regret that RESPONDENT NO. 2 had not accepted the acquisition offer of Ross Pharmaceuticals and then came back to the alleged uncertainty concerning the scope of the exclusive license for malaria research granted to Ross Pharmaceuticals in 2014. The offer to settle the issue against the grant of a non-exclusive, not-fee-bearing license showed the real intention of Ross Pharmaceuticals, which was to use a minor ambiguity in the Ross Agreement for malaria diseases to bargain for a free license for respiratory application. In light of that, RESPONDENT NO. 1 saw no reason to stop the production of the GorAdCam virus nor its negotiations with potential licensees for the use of the GorAdCam vector in the context of respiratory diseases.

6 During the last days of 2019 RESPONDENTS have discovered that Ross Pharmaceuticals had started research into vaccines against several infectious respiratory diseases, including the ones, caused by the MERS-corona virus, using the GorAdCam vector. Mr. César Milstein, the Chief Operating Officer from the Roctis AG contacted Ms. Bordet via email on **13 January 2020**. The purpose of the email was to reiterate that RESPONDENT NO. 2 had a different understanding of the scope of the Ross Agreement and would also be willing to defend its position in courts.

7 On **15 July 2020**, CLAIMANT submitted the Notice for Arbitration against RESPONDENTS and the Swiss Chambers' Arbitration Institution acknowledged the receipt. On **14 August 2020** RESPONDENTS submitted joint Answer to the Notice of Arbitration.

SUMMARY OF ARGUMENTS

8 The Tribunal should determine that the request to join Ross Pharmaceuticals to these proceedings is substantiated pursuant to Art. 4(2) of the Swiss Rules. The question of joinder among the parties of the PCL Agreement is not a jurisdiction issue of the Tribunal and the concept of joinder cannot be equated with consolidation. Furthermore, joinder is justified based not only upon the strong contractual link between Ross Pharmaceuticals and the parties of the PCL Agreement, but also because Ross Pharmaceuticals impliedly consented to join these proceedings. Permitting joinder also promotes time and cost efficiency while not undermining confidentiality of the PCL Agreement, at the same time reducing the risk of inconsistent results in separate arbitrations (**ISSUE I**).

9 There is a need to hear both lay and expert witnesses as parties have not specifically waived that right. Further, the hearing scheduled for May has to be postponed to a date to be fixed later. This outcome is mandated not only by the fact the Arbitration Agreement provides for a hearing in person in one of the two specific hearing places but also by the fact the Procedural Code of Danubia is based on the assumption that a hearing in person will be held. Furthermore, holding hearings remotely does not withstand an overall balancing test as CLAIMANT incorrectly alleges. Lastly, holding remote hearings severely undermines the effectiveness of cross-examination and the difference in time zones strongly militates against it (**ISSUE II**).

10 In further notice, the PCL Agreement cannot be defined as a sales contract under Art. 1(1) and Art. 2 of the CISG. With that in mind, the Tribunal should also recognize the parties' intent was to conclude a license agreement, emphasizing that the PCL Agreement should not be considered as a sales contract. Even if the PCL Agreement was considered a mixed contract under Art. 3(2) of the CISG, the CISG would not apply, since both the economic value criterion and criterion based on weighing parties' individual interest and obligation show that the preponderant part of the PCL Agreement is the transfer of exclusive license and know-how (**ISSUE III**).

11 Even if the Tribunal would apply the CISG in the present case, there was no breach of obligations under Art. 42(1) of the CISG. Pursuant to Art. 42(2) of the CISG, RESPONDENT NO. 1'S obligation of liability should have been excluded. As CLAIMANT failed to notify correctly, Art. 43 of the CISG applies and therefore the latter does not own the right to rely on its breach. Furthermore, RESPONDENT NO. 1'S actions did not present a fundamental breach under Art. 25 of the CISG. RESPONDENT NO. 1 granted an exclusive license to CLAIMANT without breaching any of its obligations in line with the Art. 9.1.15 UNIDROIT Principles (**ISSUE IV**).

ISSUE I: Ross Pharmaceuticals should join the arbitration proceedings

12 The dispute between the Parties arises from the Purchase, Collaboration and Licensing Agreement (hereinafter: PCL Agreement), concluded between CLAIMANT and RESPONDENT NO. 1. The PCL Agreement contains the delivery and the use of GorAdCam viral vectors for the research, development and subsequent production of a vaccine against respiratory diseases, including the necessary licenses [*Ex. C3, p. 11*]. CLAIMANT primarily requests Arbitral Tribunal (hereinafter: Tribunal) to declare that RESPONDENT NO. 1 breached the PCL Agreement by delivering viral vectors, which were allegedly not free from third party rights or claims. The usage of the viral vectors may be in CLAIMANT'S opinion potentially restricted by an Intellectual Property right (hereinafter: IP right) of Ross Pharmaceuticals, to which RESPONDENT NO. 2 in the Collaboration and License Agreement (hereinafter: Ross Agreement) granted an exclusive license for all malaria related usages and "comparable infectious diseases".

13 RESPONDENTS insist on the joinder of Ross Pharmaceuticals to these arbitration proceedings to determine conclusively the scope of the exclusive license granted. They will consequently demonstrate that the request to join is substantiated pursuant to Art. 4(2) of the Swiss Rules of International Arbitration of the Swiss Chambers' Arbitration Institution (hereinafter: Swiss Rules). CLAIMANT incorrectly alleges that the question of joinder among the parties of the PCL Agreement is a jurisdiction issue of the Tribunal **(1.)**, at the same time incorrectly equating the concepts of joinder and consolidation **(2.)**. This is, in fact, a false equivalency. Furthermore, the strong contractual link that exists between Ross Pharmaceuticals and the parties of the PCL Agreement strongly militates in favour of joinder **(3.)**. RESPONDENTS will further demonstrate that Ross Pharmaceuticals not only gave its implied consent to join **(4.)**, but that permitting joinder also promotes time and cost efficiency **(5.)**. Allowing joinder does not undermine confidentiality of the PCL Agreement **(6.)** and reduces the risk of inconsistent results in separate arbitrations **(7.)**.

1. The question of joinder among the parties of the PCL Agreement is not a jurisdiction issue of the Tribunal

14 CLAIMANT incorrectly asserts that the Tribunal lacks jurisdiction because of CLAIMANT'S failure to expressly consent to the joinder of Ross Pharmaceuticals to these proceedings. National courts should respect the parties' decision to be bound by arbitral procedures such as joinder in situations where, as here, the parties have agreed to institutional rules providing

either an arbitral institution or tribunal with authority over joinder [*Born, p. 2594*]. Accordingly, pursuant to the principle of *competence-competence*, the arbitral tribunal is given the authority to decide both on a joinder request and on the issue whether it has jurisdiction over the third person to be joined into the proceedings [*Bärtsch/Petti, pp. 61-62, §38; PT First Media v Astro Nusantara*]. Under the system established by the Swiss Rules, either the claimant or the respondent can request the joinder of a third person [*Bärtsch/Petti, p. 62, §42*]. CLAIMANT opposes the jurisdiction of the Tribunal, stating: *"Claimant and the additional party Ross did not consent to the joinder hence the Tribunal has no jurisdiction"* [*MC, p. 23, §3*].

15 The tribunal is impowered to order joinder pursuant to Art. 4(2) of the Swiss Rules. Where parties arbitrate under rules allowing joinder without the unanimous consent of the original parties to the arbitration agreement, consent to joinder in compliance with those rules is assumed and should be uncontroversial [*Rajoo, p. 145*]. This exercise of power therefore cannot be confused with jurisdiction of the Tribunal over CLAIMANT who has previously agreed upon the Swiss Rules. Following CLAIMANT'S interpretation of the law would lead to an absurd situation, where joinder could never be permitted in situations where the original party does not expressly consent for the joinder. Consent for joinder from an original party is rarely provided in practice [*Rubino-Sammartano, p. 295*]. The drafters of Art. 4(2) intended to vest arbitral tribunals with broad discretion regarding joinder [*Voser, p. 396*].

16 Finally, the parties' agreement to arbitrate in a state whose law permits joinder, even absent the parties' consent, constitutes acceptance of such joinder for the purposes of Art. V(1)(d) of the New York Convention [*Austmann, p. 355; Chiu, pp. 72-73; Leboulanger, pp. 68-69; Poudret/Besson, p. 249*]. Where, as in the instant case, parties have agreed that the arbitrators have the competence to resolve disputes over the scope of the arbitration agreement, there should be no judicial review of the substance of the award's determination of this issue [*Born, p. 3550*]. On said grounds, Art. V(1)(d) of the New York Convention would not be applicable.

17 To conclude, CLAIMANT'S refusal of consent for joinder of Ross Pharmaceuticals does not present a problem under Art. V(1)(d) of the New York Convention, since jurisdiction over CLAIMANT is not contested. Rather, the only question is whether the Tribunal has jurisdiction over Ross Pharmaceuticals as a third person. As RESPONDENTS will demonstrate, it does.

2. CLAIMANT is incorrectly equating the concept of a joinder and consolidation

18 CLAIMANT maintains that the Tribunal, in allowing joinder, will look at similar factors to those examined when deciding on consolidation [*MC, p. 23, §5*]. Consolidation concerns the act or process of uniting several arbitrations, which are pending or initiated, into one proceeding before the same arbitral tribunal, pursuant to Art. 4(1) of the Swiss Rules. Joinder, on the other hand, refers to the distinctly different situation where a third person is either permitted to intervene in proceedings or is ordered to participate in the proceedings through the request of one of the parties to the pending arbitral proceedings, pursuant to Art. 4(2) of the Swiss Rules [*Bärtsch/Petti, p. 56, §15 §16*]. While the Swiss Chambers' Arbitration Institution has considerable discretion when deciding whether to consolidate proceedings, it is obliged to consider (a) the relationship between the two cases, and (b) the progress already made in the existing proceedings [*Gilliéron/Pittet, §7; Born, p. 2600*]. When deciding whether to join a third person to participate in pending arbitral proceedings, the arbitral tribunal should take into account *all relevant circumstances*, granting an expansive discretion without having to resort to any general rules or guidelines [*Bärtsch/Petti, p. 63, §44*]. Therefore, CLAIMANT'S effort to equate joinder with consolidation is a false equivalency and its reliance upon decisions and principles pertaining to consolidation have no bearing on joinder, as CLAIMANT incorrectly asserts [*MC, p. 23, §5*]. Nevertheless, even if the Tribunal does look at factors that inform the decision whether to grant consolidation, RESPONDENTS will demonstrate that they, too, compel the conclusion that joinder should be ordered in this case.

3. The strong contractual link between Ross Pharmaceuticals and the parties of the PCL Agreement compels the conclusion that joinder is appropriate in this case

19 CLAIMANT alleges that there is both an insufficient contractual or legal link between CLAIMANT and Ross Pharmaceuticals and that there is a lack of proximity between parties of the PCL Agreement and Ross Pharmaceuticals. CLAIMANT is wrong on both points. RESPONDENTS agree that an arbitration agreement binds only those parties that have entered into it [*MC, p. 24, §6*]. This is sometimes referred to as the doctrine of privity of the contract that refers both to the substantive and to the procedural aspects of the contract, where the arbitration agreement applies [*McCullough; Rajoo, p. 134*]. However, there are exceptions to the exclusive nature of privity [*Rajoo, p. 134*]. A third party, not signatory to the arbitration

agreement, can be held accountable through an examination of the arbitration case [*Simamora/Sujayadi/Yuniarti, pp. 171-187*], for example, when the arbitration involves multiple parties [*Rajoo, p. 141*]. Joinder of Ross Pharmaceuticals is in line with the exceptions of the doctrine of privity since there is a strong contractual link between Ross Pharmaceuticals and parties of the PCL Agreement.

20 CLAIMANT incorrectly asserts that the liability and rights of the Additional Party (Ross Pharmaceuticals) are not dependent upon the liability of the parties and the outcome of this proceeding [*MC, p. 24, §10*]. To the contrary, it is exactly the outcome of this proceeding that will determine conclusively the scope of the exclusive license granted to Ross Pharmaceuticals. Whether RESPONDENT NO. 1 breached its contractual obligations depends solely on the question whether the license of the Ross Agreement also covers the research into a vaccine against COVID-19 [*NA, p. 8, §27*]. This conclusion can also be reasonably inferred from Ross Pharmaceuticals' communication to the Tribunal, where it states that it wants to be informed about the progress of the proceedings [*Letter by Sinoussi, p. 46*].

21 In principle, RESPONDENTS agree with CLAIMANTS' statement that the closer the corporate links between a non-signatory and a signatory party, the more likely it will be for an arbitration tribunal to assume jurisdiction over the non-signatory claim [*MC, p. 24, §8*]. What CLAIMANT fails to mention, however, and where its argument goes off the rails, is the fact that the PCL Agreement was based on a template of a Collaboration and License Agreement which had been used by RESPONDENT NO. 2 while concluding the Ross Agreement with Ross Pharmaceuticals [*NA, p. 6, §11*]. The template had been provided by Mr. Peter Doherty after he assumed the negotiations in December 2018. At the time, he was officially still working for RESPONDENT NO. 2 before becoming the new head of the contract department of RESPONDENT NO. 1 from 1 January 2019 onwards. When Mr. Doherty assumed the negotiations, instead of trying to amend the original draft accordingly, he suggested to base further discussions on the template used by RESPONDENT NO. 2 for its Collaboration and License Agreements [*NA, p. 6, §12 §13*]. Thus, with the exception of Section 16 and the differences directly deductible from the cited excerpts, the agreements in Exhibits C 3 and R 3 are largely identical as to their legal terms [*PO2, p. 56, §25*]. Admittedly, a relationship of sufficient proximity between the signatory and the non-signatory must exist [*BHPB Freight v Cosco Oceania*]. In case of Ross Pharmaceuticals that link does indeed exist.

22 RESPONDENTS on that point question why CLAIMANT is willing to supposedly disregard the doctrine of privity when it concerns involving RESPONDENT NO. 2 into proceedings but

invokes the doctrine when it comes to Ross Pharmaceuticals. In its own understanding, "*the arbitration agreement in the PCL Agreement was signed between Claimant and Respondent No.1, Ross was not a party to the PCL Agreement and also its arbitration clause*" [*MC, p. 24, §6*]. The same is true for RESPONDENT NO. 2, whom is neither a party to the PCL Agreement nor its Arbitration Agreement. The participation of a third party is in practice sometimes essential in order that the arbitral proceedings may take place [*Rubino-Sammartano, p. 296*]. There are several situations where it would be appropriate that arbitration proceedings involve more than two parties [*Rajoo, p. 141; Siemens v Dutco*]. By including RESPONDENT NO. 2 into proceedings, CLAIMANT acknowledges that the present dispute involves issues impacting multiple parties' and can be resolved effectively only by also joining Ross Pharmaceuticals. That same line of reasoning explains why RESPONDENT NO. 2 did not object to the jurisdiction of the Tribunal [*PO2, p. 57, §33*].

23 To conclude, whether RESPONDENT NO. 1 breached its contractual obligations depends solely on the question whether the license of the Ross Agreement also covers the research into a vaccine against COVID-19. What is more, the PCL Agreement was based on a template of a Collaboration and License Agreement which had been used by RESPONDENT NO. 2 while concluding the Ross Agreement. By including RESPONDENT NO. 2 into proceedings, CLAIMANT tacitly acknowledged that the present dispute involves multiple parties' issues that can only be resolved effectively by also joining Ross Pharmaceuticals.

4. Ross Pharmaceuticals gave its implied consent to join

24 According to CLAIMANT'S allegations, the Tribunal lacks jurisdiction to allow joinder since Ross Pharmaceuticals did not expressly consent to it [*MC, p. 23, §3*]. Admittedly, the main concern regarding joinder stems from the consensual nature of arbitration [*Poudret/Besson, p. 239; Geisinger/Voser, p. 350*]. However, the consent of the parties to hear cases within a single set of proceedings need not only be express, but also implicit or by reference to the arbitration rules in the arbitration agreement [*Hanotiau, p. 107; Bärtsch/Petti, p. 57*]. Implied consent to be bound by the arbitration agreement in one contract can also be inferred from a party's conclusion of a related agreement, which is exactly the situation in the present case. This type of analysis has close parallels to the incorporation of an arbitration agreement by reference [*Born, pp. 1429-1430*]. RESPONDENTS will demonstrate that Ross Pharmaceuticals, regardless of its explicit objection to join [*Letter by Fasttrack, p. 24*], nevertheless gave its implied consent to be bound by Arbitration Agreement by concluding Ross Agreement as a related agreement.

25 When there are multiple related contracts containing the same arbitration agreements referring to the Swiss Rules, the tribunal should take into account the circumstances of the case to ascertain whether all parties (including the third person) consented, at least implicitly, to submit the entire dispute to one tribunal [*Bärtsch/Petti, p. 64, §47*]. Implied consent, given from a party's conclusion of a related agreement, has been on numerous occasions a basis for binding a non-signatory to an arbitration agreement [*Century Indem. v. Certain Underwriters; Allstate Settlement v. Rapid Settlement*]. Federal Supreme Court of Switzerland, for example, has upheld jurisdiction over non-signatories under circumstances where they were parties to related contracts and intended to be bound by an arbitration clause in an agreement they did not sign [*4A_376/2008*]. In another case, a non-signatory to a contract containing an arbitration clause was held required to arbitrate a dispute where claims were inextricably intertwined with duties created in underlying contract and non-signatory signed related contract which contained an arbitration clause [*McBro Planning v. Triangle*]. The same rationale has been confirmed by numerous courts and tribunals and should accordingly be upheld by the Tribunal as a matter of settled arbitral practice [*Mannai v. Eagle Star; Int'l Research v. Lufthansa; Astel-Peiniger Joint Venture v. Argos; Chaval v. Liebherr*].

26 In the present case, both the PCL Agreement and Ross Agreement contain not only similar, but identical arbitration agreements with reference to the Swiss Rules [*Ex. C3, p. 16; Ex. R3, pp. 33-34*]. As all the relevant parties have concluded arbitration agreements referring to the same rules, the Tribunal will further find, as already demonstrated by RESPONDENTS [*see supra §21*], that with the exception of Section 16 and the differences directly deductible from the cited excerpts, the PCL and Ross Agreement are largely identical as to their legal terms. In particular, the payment terms in Sections 9.2–9.5 are identical and the same quantity of viral vectors was delivered. The same applies to the confidentiality provisions in Section 10 [*PO2, p. 56, §25*]. Not only are concluded agreements between the parties largely identical, so also are the claims arising out of the PCL Agreement inextricably intertwined with possible future claims arising out of the Ross Agreement, as already emphasized above [*see supra §20*].

27 Finally, Art. V(1)(c) of the New York Convention addresses the basic requirement of arbitration being based on the parties' consent [*Born, p. 3542*]. RESPONDENTS have forcefully demonstrated that Ross Pharmaceuticals gave its implied consent to join by concluding a related agreement. Accordingly, Art. V(1)(c) does not apply, as it only governs cases where the arbitrators decide matters which have not been submitted to them [*Born, p. 3544*]. It is well-established that errors in legal or factual assessments do not constitute excesses of jurisdiction [*B v. A; Amerix v. Jones; Oxford v. Sutter; DiRussa v. Dean; Bandwidth Shipping v. Intaari*].

28 To conclude, the arbitration agreements in the two Collaboration and License Agreements are identical, with all parties concerned agreeing to the Swiss Rules, including their joinder provisions. The PCL and Ross Agreement are undisputedly related agreements and largely identical, with only minor, legally insignificant changes. Ross Pharmaceuticals is bound by Arbitration Agreement on the basis of intertwined claims, arising out of those agreements. The Tribunal should therefore hold that Ross Pharmaceuticals impliedly consented to be bound by Arbitration Agreement and, consequently, Art. V(1)(c) of the New York Convention is inapplicable.

5. Permitting joinder favours time and cost efficiency

29 CLAIMANT expressed the urgency of resolving the present dispute as soon as possible due to the race to develop a new vaccine for COVID-19. It alleged that a delay of permitted joinder would benefit RESPONDENTS at the expense of CLAIMANT [*MC, p. 26, §20*]. Although RESPONDENTS agree that it is sometimes more efficient and cost-effective to conduct arbitration proceedings solely with an opposing party [*MC, p. 25, §12*], that is not the case in the present dispute. To the contrary, a single arbitration can be more efficient than two or more separate arbitrations, as it permits savings of overall legal fees, witnesses' time, preparation efforts and other expenses [*Born, p. 2567*]. It is reasonable to conclude that a single arbitral proceeding of closely related disputes, where essentially the same evidence will be presented, will result in significant savings of both time and money [*Chiu*]. Addressing common legal and factual questions by the same arbitral tribunal in a common proceeding is both time and cost-effective and will yield consistent results [*Schramm, p. 364; Voser, p. 350; Voser/Meier, p. 116; Bärtsch/Petti, p. 64, §47*].

30 Firstly, CLAIMANT fails to explain why the delay of a permitted joinder benefits RESPONDENTS. The purchase obligation in Section 16 of the PCL Agreement clearly states that RESPONDENT NO. 1 as a contract manufacturer was interested not only in royalty payments but also in ensuring the use of its production of the cell growth medium and the HEK-294 cells [*PO2, p. 56, §26*]. The purchase obligation arises only if CLAIMANT successfully developed and produced a vaccine. In that case, CLAIMANT is obliged to buy the HEK 294-cells as well as the necessary cell growth medium from RESPONDENT NO. 1 [*NA, p. 6, §13*]. For these reasons, RESPONDENT NO. 1 has no reason to delay the procedure, since it will benefit economically from the development and production of a vaccine. CLAIMANT would, on the other hand, with the technical and financial help of Khorana Lifescience, now be able to produce the viral vectors and the HEK-294 cells itself at costs which could be considerably lower than the payments due under the PCL Agreement. CLAIMANT'S arguments are little more than thinly

concealed efforts to prepare for the termination or renegotiation of a contract which no longer appears to be favourable in light of the most recent developments [*Ex. R1, p. 29*].

31 Secondly, it was stated on numerous occasions that Ross Pharmaceuticals is aggressive in defending its IP rights [*Ex. C5, p. 19; Ex. C7, p. 21, §7*] and toward that end is presently involved in two IP litigations and one arbitration against third-parties allegedly infringing their rights [*PO2, p. 54, §15*]. In view of that posture, it can be reasonably expected that Ross Pharmaceuticals would raise a claim against CLAIMANT in the near future, as they both are still conducting research on a vaccine against COVID-19 [*PO2, p. 55, §16*]. In such case, CLAIMANT would be exposed to the increase of time and costs of another proceeding, while joinder among others adds to the possibility to obtain additional relevant documents that are under the control of Ross Pharmaceuticals.

32 To conclude, common legal or factual questions, addressed by the same arbitral tribunal in a common proceeding are both time and cost-effective, adding the possibility to obtain relevant documents under the control of Ross Pharmaceuticals. RESPONDENTS have no reason to delay the procedure with joinder as that would be to the detriment of RESPONDENT NO. 1. In case of a claim raised by Ross Pharmaceuticals in the near future, CLAIMANT would be exposed to the increase of time and costs of another proceeding, factors that strongly militate in favour of a single arbitration.

6. Allowing joinder does not undermine confidentiality of the PCL Agreement

33 CLAIMANT states that one of the main advantages of arbitration is its confidential nature. Therefore, in its view, the disclosure of some information in case of a permitted joinder to Ross Pharmaceuticals might be sensitive [*MC, p. 26, §22*]. Admittedly, confidentiality is widely lauded as one of the major benefits of arbitration that prevents uninvolved third parties from gaining access to the parties' confidential information [*Rajoo, p. 56*]. Confidentiality among the parties of the PCL Agreement is of paramount importance [*Ex. C3, p. 15, §10.1*]. RESPONDENTS will demonstrate that CLAIMANT has breached provisions of confidentiality under the PCL Agreement in its public statements, already allowing Ross Pharmaceuticals to gain important confidential information. Secondly, the Swiss Rules themselves sufficiently protect confidentiality obligations.

34 Firstly, "Confidential Information" means all information, data or know-how, whether technical or non-technical, that is disclosed, orally, electronically, visually or in writing, by Disclosing Party to the Receiving Party in relation to the Compound or the Licensed

Technology [*PO2, pp. 56-57, ∫30*]. Biopharma Science, a credible source of information [*PO2, p. 54, ∫9*] reported that CLAIMANT now has a parent company, Khorana Lifescience, which is one of the leading life science companies in Danubia. According to the article, CLAIMANT generated public interest with its announcement that it had at the time successfully completed a Phase I trial of a vaccine candidate against COVID-19. It further announced that the vaccine is based on the viral vector technology and does not rely on modified chimpanzee adenoviruses, but instead uses GorAdCam, a modified gorilla adenovirus, originally developed and patented by RESPONDENT NO. 2 [*Ex. R1, p. 29*]. Confidential information regarding vaccine technology, the HEK-cells and the growth medium necessary for the production is undisputedly of paramount importance for RESPONDENTS as they have economic interest for the production of the HEK-294 cells or cell culture media. Disclosure of such information to the public, among others to Ross Pharmaceuticals in a journal that is very popular with investors in the bioscience start-up market in Danubia, Equatoriana and Mediterraneo [*PO2, p. 54, ∫8*], presents a serious infringement of the PCL Agreement to the detriment of RESPONDENTS. Public statements of CLAIMANT have led to its acquisition by Khorana Lifescience with its new equipment that allows the production of the HEK-294 cells required for vaccine production at a cost well below the market price, without reliance on deliveries of HEK-294 cells or cell culture media by RESPONDENTS [*Ex. R1, p. 29*]. In that case, costs price would have been around 50 % lower than the price to be paid to RESPONDENT NO. 1 [*PO2, p. 53, ∫3*].

35 Secondly, if the parties agree on arbitration according to the Swiss Rules, the rules become part of the arbitration agreement and are thus contractually binding on the parties and the arbitrators [*Jolles/Stark-Traber/Canals de Cediel, p. 95*], including the principle of confidentiality as provided in Art. 44 of the Swiss Rules [*Jenny, p. 654*]. The text of Art. 44 clearly applies the confidentiality obligations only to persons stated therein, which importantly do not include witnesses and party-appointed experts, whom therefore are not bound by it. In cases where non-bound persons should also be obliged to confidentiality obligations, separate confidentiality agreements with them can be executed [*Trakman, p. 12; La Spada/Rohner; Jenny, p. 654*]. Ross Pharmaceuticals would, in case of a permitted joinder, not be able to take advantage of confidential information for its own purposes as it has concluded identical confidentiality provision in Section 10 as to that made by the parties in the PCL Agreement [*PO2, p. 56, ∫25*].

36 In conclusion, CLAIMANT has already breached provisions of confidentiality under the PCL Agreement by disclosing vaccine technology, the HEK-cells and the growth medium to the public, enabling Ross Pharmaceuticals to gain important confidential information. Furthermore, the Swiss Rules impose general confidentiality obligation, which provides

adequate protection and which also binds Ross Pharmaceuticals as it has concluded an identical confidentiality provision to the one, contained in the PCL Agreement. If considered necessary by the Tribunal, separate confidentiality agreements with witnesses and party-appointed experts can be executed.

7. Allowing joinder reduces the risk of inconsistent results in separate arbitrations

37 In multiple party disputes, the courts have highlighted the danger of inconsistent findings in different arbitrations on substantially the same facts which can produce practically significant consequences, if one arbitral tribunal orders a party to do something that another arbitral tribunal forbids [*Halifax v. Rasno; Collins v. Cromie; Bulk Oil v. Trans-Asiatic Oil; Abu Dhabi Gas Liquefaction v. Eastern Bechtel; Hanno v. Fairlight Shipping*]. One party to a tripartite dispute may be found liable to another party in one arbitration, while in a second arbitration the same party may be denied recovery from a different party on a theory inconsistent with the rationale of the first proceeding [*Born, p. 2567; Level*]. Permitting joinder would minimize the risk of injustice or inadvertently inconsistent results, while also resulting in savings of time and costs [*Strong, pp. 982-983*]. As the breach of the PCL Agreement depends solely on the question whether the license of the Ross Agreement also covers the research into a vaccine against COVID-19 [*see supra §20*], joinder of Ross Pharmaceuticals would reduce the risk of inconsistent results on substantially the same facts.

CONCLUSION ON ISSUE I

38 The Tribunal should determine that the request to join Ross Pharmaceuticals to these proceedings is substantiated pursuant to Art. 4(2) of the Swiss Rules. The question of joinder among the parties of the PCL Agreement is not a jurisdiction issue of the Tribunal and the concept of a joinder cannot be equated with consolidation. Joinder is justified based not only upon the strong contractual link between Ross Pharmaceuticals and the parties of the PCL Agreement, but also because Ross Pharmaceuticals impliedly consented to join these proceedings. Furthermore, permitting joinder favours time and cost efficiency and does not undermine confidentiality of the PCL Agreement, and will at the same time reduce the risk of inconsistent results in separate arbitrations.

ISSUE II: RESPONDENTS strongly object to the examination held remotely

39 CLAIMANT alleges that there is no need to hear any lay or expert witnesses, as this is in its opinion, a straight-forward case, involving primarily legal questions. RESPONDENTS will demonstrate that there is a need to hear both lay and expert witnesses as parties have not specifically waived that right **(1.)**. Second, RESPONDENTS strongly object to holding any hearings remotely, particularly if they involve the taking of evidence, as the Arbitration Agreement stipulates for hearings in person in one of the two specific hearing places **(2.)**. Furthermore, the Procedural Code of Danubia is based on the assumption that hearings will be held in person **(3.)**. Finally, holding hearings remotely does not withstand an overall balancing test **(4.)**.

1. There is a need to hear lay and expert witnesses as parties have not specifically waived that right

40 According to CLAIMANT'S allegations, the present dispute is a straight-forward case which involves primarily legal questions, such that there is no need to hear any lay or expert witnesses before the Tribunal [*MC, p. 27, §25*]. It is the overwhelming practice for tribunals to hold oral evidentiary hearings, at which the witnesses can be examined and the parties' counsel can make legal submissions [*Born, p. 2264*]. Although documentary evidence is usually the most effective way to prove or rebut allegations in arbitral proceedings, witness testimony also plays a vital role in such proceedings [*Cheng, pp. 318-319; Pietrowski, pp. 391-392; Sandifer*]. Admittedly, in Swiss Arbitration Law, the arbitrators can decide to dispense with hearings and reach their decision on the basis of the parties' written submissions, although that rarely occurs in practice [*Gaillard/Savage, p. 706, §1296*]. By contrast, arbitration statutes [*Art. 24 of the UNCITRAL Model Law; Art. 1047 of the German ZPO; Art. 1694 of the Belgian Judicial Code*] and most arbitration rules [*Art. 15(2) of the UNCITRAL Arbitration Rules; Art. 20(6) of the ICC Rules: Art. 19.1 of the LCIA Rules*] require the arbitrators to hear from the parties unless the parties have specifically waived that right. It is almost universally accepted that litigants must have the opportunity to present their case in person, and in the physical presence of the tribunal, as a basic, irreducible aspect of the adjudicative process which ought in virtually all cases be fully respected [*Born, p. 2266*]. As a result, the parties are entitled to present their arguments in a hearing, if one of them so requests [*Rajoo, p. 422; McIlwrath/Savage, p. 308; Gaillard/Savage, p. 706, §1296; Born, p. 2266; Lovell Partnership v. AW Construction*]. If the present dispute was so straight-forward as CLAIMANT alleged, there would be no dispute at all. As some of the documents provided by CLAIMANT are self-serving and unreliable, RESPONDENTS insist that the Tribunal must assess

witnesses' credibility and reliability. On said grounds, hearing is mandatory upon RESPONDENTS request for the proper resolution of some of the issues. Even CLAIMANT admits that in its statements: *"Based on the evidence, it can be implied that both parties are requesting for an oral hearing since both did not object to it /…/ Failure by the Tribunal to hold such hearings is a violation of the right to be heard"* [*MC, p. 28, §28*].

2. The Arbitration Agreement provides for hearings in person in one of the two specific hearing places

41 CLAIMANT states that since there is no express certainty from parties of the Arbitration Agreement as to whether they have intended for the oral hearings to be in person in its strict sense, the Tribunal accordingly has the discretion to determine the intention of the parties based on the reasonable man's test [*MC, p. 28, §30*], having in mind unnecessary cost and delays [*MC, p. 28, §32*]. CLAIMANT further states that choosing Danubia as the seat of arbitration does not mean that the hearings will be conducted as a physical hearing in person [*MC, p. 28, §31*]. RESPONDENTS will demonstrate that the parties of the Ross Agreement have designated two specific, alternative hearing places as venues to hold in-person proceedings, which also apply for the PCL Agreement and therein enshrined identical Arbitration Agreement.

42 Firstly, the seat of arbitration cannot be confused with the venue of arbitration [*BGS v. NHPC*]. The venue is the place where the arbitral proceedings are to be held and can differ from the seat of arbitration [*Rubino-Sammartano, p. 563*]. The parties concluded in the Arbitration Agreement that hearings shall be held, at the Tribunal's discretion, either in Vindobona or in the city where the "*Respondent*" has its place of business [*Ex. C3, p. 16*].

43 Secondly, the dispute resolution clause contained in Section 14 of the PCL Agreement is identical to that contained in the Ross Agreement [*Ex. C3, p. 16; Ex. R3, pp. 33-34*]. The drafting history of Ross Agreement establishes that there were discussions not only about the place of arbitration but also the need for an oral hearing. The relevant part concerning the 'Hearing' had been suggested by Ross Pharmaceuticals to accommodate Mr. Doherty's request that in cases brought by Ross Pharmaceuticals against RESPONDENT NO.2 the hearings should take place in Equatoriana [*PO2, p. 57, §32*]. As the choice of the venue was made directly by the parties of the Ross Agreement, the Tribunal's discretion is restricted to whether the hearings shall be held in Vindobona or in RESPONDENTS' place of business. Therefore, the Tribunal need not resort to an interpretation of the parties' intentions, as the parties conclusively resolved this issue through written agreement. During the negotiations between

CLAIMANT and RESPONDENT NO.1, Section 14 was not discussed any further but instead was accepted by CLAIMANT as fair, while the issue of virtual hearings was not discussed [*PO2, p. 57, §32*]. Parties of the PCL Agreement could have easily expressed in the Arbitration Agreement a different interpretation than the one used in the Ross Agreement but did not do so.

44 Thirdly, the principle that the tribunal should abide by the parties' agreement on procedural issues is set forth in many national laws and arbitral institutional rules [*Scherer, p. 13*]. The situation where the arbitral procedure was not in accordance with the agreement of the parties is among the grounds for refusal of recognition of the award [*New York Convention, Art. V(1)(d)*]. The choice of a venue different from the one agreed by the parties falls within that scope [*Rubino-Sammartano, pp. 568-569*]. Furthermore, if the possible delay of the proceedings is due to the parties' agreement to conduct the arbitration by way of a physical hearing, then upholding party autonomy is more important than insisting on expeditiousness [*Scherer, p. 13*]. RESPONDENTS are therefore convinced that the Tribunal will respect the agreement reached at arms-length by the parties regarding venue of the proceedings as an element of the greatest importance in arbitral proceedings. On said grounds, the hearing of lay and expert witnesses, scheduled for May, has to be postponed to a date to be fixed later.

45 To conclude, the dispute resolution clause in the PCL Agreement is identical to the one concluded in the Ross Agreement. In the latter, the parties have agreed upon two specific, alternative places where oral hearings should be held. While concluding the PCL Agreement, the resolution clause was not discussed any further but accepted by CLAIMANT as fair, thereby cementing the intention of the parties as contained in the Ross Agreement. Therefore, the hearing has to be postponed to a date to be fixed later. The choice of a venue agreed by the parties has to be respected; otherwise, Art. V(1)(d) of the New York Convention would be triggered and the results of the Tribunal would not be given recognition.

3. The Procedural Code of Danubia is based on the assumption that a hearing in person will be held

46 CLAIMANT alleges that the Tribunal has the discretion to decide the manner of hearing pursuant to Art. 24 of the Danubian Arbitration Law [*MC, p. 27, §27*]. However, this article only states that the tribunal shall hold hearings at an appropriate stage of the proceedings, if requested by a party [*Letter by Fasttrack, p. 49*]. What CLAIMANT fails to mention is that the Procedural Code of Danubia is in the present case *lex loci arbitri,* as the parties have chosen Danubia as the seat of arbitration [*Ex. C3, p. 16*]. The law of the arbitral seat (and procedural

law) will presumptively govern a substantial range of internal and external subjects in locally seated arbitrations, with the courts of the seat ordinarily being granted (exclusive) jurisdiction to apply such legislative provisions [*Born, p. 1576; Sapphire v. Nat'l Iranian Oil*]. It is the law of the seat which endows the arbitral award with its binding character upon which enforcement may be sought internationally under the provisions of the New York Convention [*Collins, p. 16; Born, pp. 1584-1585*]. It is clear from the provisions of the Danubian Procedural Code that they are based on the assumption that judges, parties and witnesses shall be personally present during the hearing, except in cases where the witness is unable to attend the hearing in person for health reasons [*PO2, p. 57, §37*]. In light of the pandemic, the legislator regulated in April 2020 that hearings could be held via videoconference if both parties agree or 'if required by public interest'. The highest court in Danubia decided on 18 July 2020 that in court proceedings no remote hearing could be conducted beyond those circumstances as an express empowerment was missing [*PO2, pp. 57-58, §37*]. In the present case, none of the participants have health issues which may prevent them from travelling to an in-person conference [*PO2, p. 57, §34*] and the public interest is not incompatible with an in-person hearing, which can be conducted with required safety measures. On said grounds, if the Tribunal were to hold hearings remotely, such award would not fit into the Convention's scope, raising problems with its recognition and enforcement.

4. Holding hearings remotely does not withstand an overall balancing test

47 According to CLAIMANT'S allegations, holding hearings remotely is appropriate following an overall balancing test [*MC, pp. 29-30*]. Admittedly, this balancing exercise must involve careful consideration of all circumstances of the case, weighing the potential benefits resulting from a remote hearing against the potential prejudice to any party resulting therefrom [*Scherer, pp. 7-8*]. There are a number of factors arbitral tribunals may typically consider in the context of this multi-factorial approach, including the content of the planned hearing, the envisaged technical framework for the remote hearing and the timing and costs differential between a remote hearing and a physical one [*Scherer, p. 8*]. RESPONDENTS will demonstrate that holding hearings remotely does not withstand an overall balancing test as the data of the content cannot be 100 % protected, since not only is the technical equipment better on CLAIMANT'S side but the costs of a remote hearing are even higher than those of an in-person hearing. Additionally, in case of a remote hearing, there are disadvantages regarding cross-examination and time zones.

48 Firstly, one of the main advantages of arbitration is its confidential nature, as already demonstrated above [*see supra §33*]. In CLAIMANT'S words, the proceedings are capable of being

organized in a way ensuring that the underlying contract and any business secrets of the parties are not disclosed to third parties [*MC, p. 26, §21*]. Confidentiality among the parties of the PCL Agreement is of paramount importance [*Ex. C3, p. 15, §10.1*]. On said grounds, primary concerns of RESPONDENTS are that the data cannot be 100 % protected in case of remote hearings [*PO2, p. 58, §38*]. Cybersecurity breaches have the potential to affect the integrity of the arbitral process and expose confidential and commercially sensitive information [*McKenzie/Wood*]. Even utilizing all available required safety features will not exclude the possibility that third parties may interfere and gain access to the hearing [*PO2, p. 57, §35*].

49 Secondly, it is of crucial importance for the Tribunal to comply with the principles of due process and equal treatment of the parties. The latter implies that the proceedings must be organized and conducted in such a way that each party has the same possibilities to present its case orally, treating them in the same way at all stages of the proceedings [*Gaillard/Savage, p. 707, §1299; 4A_360/2012*]. Similarly, an opportunity of the right to be heard is frequently referred to as a party's right to present its case [*Born, p. 2175*; *4A_600/2010*]. CLAIMANT alleges that the RESPONDENTS' right to be heard will not be breached since the witnesses can still be examined in both circumstances [*MC, p. 29, §37*]. What it crucially fails to mention, however, is that the technical equipment is better on CLAIMANT'S side [*PO2, p. 58, §38*], which could potentially lead to the less effective presentation of evidence on RESPONDENTS' side. In case of doubt, an arbitral tribunal may consider conducting a testing phase before deciding on whether or not to conduct a hearing remotely [*Bachmeer Capital v. Ong Chih Ching; Scherer, p. 11*]. If the Tribunal will not be sufficiently satisfied with the quality of RESPONDENTS technical equipment, it cannot proceed with remote hearings. Otherwise, the principle of equal treatment of the parties could potentially be jeopardized, enabling better possibilities for CLAIMANT to present its case.

50 Thirdly, CLAIMANT states that holding hearings remotely avoids unnecessary delays and costs [*MC, p. 29, §35*]. While RESPONDENTS have already demonstrated that upholding party autonomy is more important than insisting on expeditiousness regarding delay [*see supra §44*], costs are another factor. One should not underestimate the costs involved in remote set-ups, in particular if they include top-end platforms and possibly hardware rentals [*Scherer, p. 11*]. In the present case, the costs of a remote hearing may be even higher, depending on the outside provider hired to organize and moderate the hearing and the required safety features [*PO2, p. 57, §35*]. Admittedly, according to Art. 15(7) of the Swiss Rules, all participants in the arbitral proceedings shall act in good faith, contribute to the efficient conduct of the proceedings and avoid unnecessary costs and delays [*MC, p. 29, §35*]. On said grounds, holding hearings remotely does not comply with the aforementioned article.

51 Finally, remote cross-examination is not as effective as one where the lay and expert witness is physically present, in particular because of the loss of non-verbal cues and the inability to scrutinize the person's demeanour [*Scherer, p. 8*]. On said grounds, some courts state that technical difficulties interfere with the giving of the evidence and, particularly, with cross-examination, where the witnesses are being assessed by video link [*Campaign Master v. Forty Two International; Dorajay v. Aristocrat Leisure; Hanson-Young v. Leyonhjelm; Bachmeer Capital v. Ong Chih Ching*]. This view should mutatis mutandis apply to arbitration proceedings. Regarding time zones, the Austrian Supreme Court stated that by concluding an arbitration agreement providing for VIAC arbitration, an institution based in Vienna, the respondents had accepted the disadvantages resulting from the geographical distance to their place of business, including substantial travel and time differences [*Case No. 18 ONc 3/20s*]. This view, however, is not convincing [*Scherer/Schwarz*], at least not in the present case, where the time zone for Danubia is UTC, while Mediterraneo is UTC-3 and Equatoriana is UTC+8 [*PO2, p. 57, §36*], meaning that the hearing cannot take place during core business hours for all hearing participants. The aforementioned view cannot apply here as parties have designated two specific hearing places to be held in person as the venue of proceedings [*see supra §41*].

52 To conclude, in case of remote hearings, the data of the content cannot be 100 % protected and the technical equipment is better on CLAIMANT'S side, which could potentially lead to the less effective presentation of evidence on RESPONDENTS' side. Furthermore, costs of a remote hearing are even higher than those of an in-person hearing and there are substantial and unpreventable disadvantages regarding cross-examination and time zones. On said grounds, holding hearings remotely does not withstand an overall balancing test.

CONCLUSION ON ISSUE II

53 Firstly, there is a need to hear both lay and expert witnesses as parties have not specifically waived that right. Secondly, the hearing of lay witnesses and experts, scheduled for May, has to be postponed to a date to be fixed later. This result is compelled not only by the fact the Arbitration Agreement provides for a hearing in person in one of the two specific hearing places but also by the fact the Procedural Code of Danubia as *lex loci arbitri* is based on the assumption that a hearing in person will be held. Furthermore, holding hearings remotely does not withstand an overall balancing test as the data of the content cannot be 100 % protected, since not only is the technical equipment better on CLAIMANT'S side but the costs of a remote hearing are even higher than those of an in-person hearing. Lastly, holding remote hearings severely undermines the effectiveness of cross-examination, one of the chief litigation methods

of ascertaining the truth. This factor alone strongly militates against a remote hearing, as does the difference in time zones, which will wreak havoc on the process.

ISSUE III: The CISG is not applicable to the PCL Agreement

54 RESPONDENT NO. 1 and RESPONDENT NO. 2 are 100 % subsidiaries of the holding company Roctis Group, which is one of the biggest pharmaceutical companies in the world [*NA, p. 4*]. RESPONDENT NO. 2 is the owner of a patent for the GorAdCam and ChAdCam viral vectors based on a gorilla (GorAdCam) and chimpanzee (ChAdCam) adenoviruses with high potential for the development of vaccines against several infectious respiratory diseases. RESPONDENT NO. 2 entered into an exclusive license agreement for the GorAdCam viral vector with RESPONDENT NO. 1 in 2018 [*Ex. C3, p. 13, §5.2*]. In the following year, the latter sublicensed the vector to CLAIMANT and on 1 January 2019 they concluded the PCL Agreement, under which RESPONDENT NO. 1 was obliged to deliver GorAdCam viral vectors for CLAIMANT to use, research, develop and to produce a vaccine against respiratory diseases [*Ex. C3, p. 13, §5.2*]. The PCL Agreement was based on a template, which had already been successfully used by the same party on other occasions with some negligible changes. Those occur in the Section 16 of the PCL Agreement as an additional purchase obligation, by obliging CLAIMANT to buy the HEK 294-cells and cell growth medium from RESPONDENT NO. 1 [*NA, pp. 5, 6*]. Both additional features are essential for production of the viruses in sufficient quantities and for amplification and growth of the GorAdCam viral vector [*Ex. C3, p. 17, §16.1; Ex. R2, p. 30, §8*].

55 The intention of RESPONDENT NO. 1 and RESPONDENT NO. 2, contrary to CLAIMANT'S arguments, was sublicensing, not the mere sale of HEK-294 cells and cell culture media. In the following text, RESPONDENT NO. 1 will firstly establish that contrary to CLAIMANT'S argument, it is wrong to define the PCL Agreement as a sales contract since it should be considered a license agreement **(1.)**. Secondly, even if the PCL Agreement were considered a mixed contract as CLAIMANT asserts, the CISG would still not apply as the transfer of exclusive license and know-how forms a preponderant part of the PCL Agreement **(2.)**.

1. PCL Agreement should not be considered a Sales Contract

56 Contrary to reciprocal sales contracts, directed at the exchange of goods against an amount of money [*Schlechtriem/Schwenzer, p. 31, §8; Huber/Mullis, p. 43; Winship case; Software case*], under license agreements one party permits the use of its property under specific set of parameters to another party. Opposite to CLAIMANT'S incorrect allegations, RESPONDENT NO. 1 will show that PCL Agreement cannot be defined as a contract for the sale of goods under Art. 1(1) of

the CISG and Art. 2 of the CISG **(a)**. Furthermore, it was clear from the parties intent before and during contracting that their true intention was to conclude a license agreement **(b)**.

a. PCL Agreement cannot be defined as a Sales Contract under Art. 1(1) and Art. 2 of the CISG

57 CLAIMANT wrongfully asserts that the PCL Agreement should be considered a sales contract in which its subject-matter is the exclusive license, attached to GorAdCam viral vectors and considered as 'goods' under the CISG [*MC, p. 34, §60*]. To the contrary, the subject-matter of the PCL Agreement is the transfer of exclusive license and know-how, both independent and not attached to any object. RESPONDENT NO. 1 will show that exclusive license and know-how as contracts subject-matter do not represent 'goods' under the CISG.

58 Admittedly, CLAIMANT'S assertions regarding territorial preconditions for applying the CISG are correct. When parties have their places of business in different states that are both contracting states to the CISG, pursuant to Art. 1(1) CISG, territorial precondition for applying the CISG is met [*Brunner/Gottlieb, p. 184, §8; Schlechtriem/Schwenzer, p. 39, §28; Ziegel, p. 62*]. However, the mere fulfilment of this condition does not lead to an automatic application CISG, since the CISG applies only to the contracts for the sale of goods. The PCL Agreement is not a contract of this kind, it is a license agreement as a contract in which a property owner permits another party to use that under terms they agreed upon.

59 The PCL Agreement cannot be defined as a sales contract, because opposite to CLAIMANT'S argumentation, IP rights and know-how can neither be considered as 'goods' neither as the elements of sales contract, which makes the PCL Agreement not of sales but rather of license nature. The transfer of exclusive license and know how should be understood as IP rights, which are, by the WIPO's broad definition, creations of the mind. Those creations cannot be considered as goods. The term 'goods' as merchandises is usually used for 'things' or 'objects' [*Lookofsky*] and is the key condition, when defining the nature of an agreement. In this regard, real property lies outside the concept of a moveable thing, just as 'know-how' and 'goodwill' have no connection with the commonly accepted term 'goods' [*Schlechtriem, p. 23*]. The subject-matter of the PCL Agreement is the exact contradiction of the one having to be fulfilled to determine it as a sales contract – instead of real property, there are IP rights and instead of goods, there is know-how. As operating with goods is one of the main conditions required for the CISG to be applicable, this condition is clearly not fulfilled.

60 Only movable, tangible objects that are physical at the time of delivery can be considered goods under the meaning of the CISG [*Schlechtriem/Schwenzer, p. 34, §16; Diedrich, p. 327;*

Brunner/Gottlieb, p. 29, §2]. Intangible property such as contractual claims or IP rights are governed by separate rules and regulations and should therefore fall within the general scope of applicability of property law [*Wolff, p. 37*]. IP rights as know-how and exclusive license are intangible property rights, therefore they are not recognized as goods since the precondition of tangibility is not met [*Brunner/Gottlieb, p. 29, §2; Kiraz, p. 16*]. Rights not incorporated in physical medium and without a link to the notion of goods, do not fall under the term 'goods' in the CISG [*Schlechtriem/Schwenzer, p. 36, §§20, 22*]. Therefore, CLAIMANT wrongfully claims that license is a tangible good under the CISG, being similar to the software embedded in printing system or software delivered on CD ROM [*MC, p. 33, §52*]. IP rights as subject-matter of the PCL Agreement are not considered 'goods' pursuant to the meaning of the CISG.

61 Indeed, if IP rights are embodied in objects that fall under the meaning of 'goods', the prerequisite of tangibility is meet and the objects are considered 'goods' under the CISG. [*Schlechtriem/Schwenzer, p. 36, §22, Brunner/Gottlieb, p. 29, §3; Kiraz, p. 16; Zamir, p. 374*]. However, contrary to CLAIMANT'S assertions [*MC, p. 33, §53, 54*], IP rights in the present dispute are not attached to such objects. CLAIMANT fails to recognize that transferred exclusive license and know-how in the present case are not embodied in GorAdCam viral vectors. In case IP rights were embodied in GorAdCam viral vectors, the PCL Agreement would indeed be considered a sales contract, as the prerequisite of tangibility would be met. However, they are not. That can be concluded from the fact that a license agreement could be concluded without the purchase clause, hence validity of the license agreement does not depend upon its inclusion. Under the Ross Agreement exclusive license was correctly granted for exactly the same purpose but on different field as in the PCL Agreement, despite the fact that purchase clause for GorAdCam viral vectors is not included. Therefore, IP rights, not being attached to GorAdCam viral vectors, are transferred independently and form the subject-matter of the PCL Agreement, which should consequently be recognized as a license agreement.

62 To conclude, IP rights as subject-matter of the PCL Agreement do not represent 'goods' pursuant to established definition under the CISG, hence the PCL Agreement cannot be identified as a sales contract but as a license agreement, which is not governed by the provisions of the CISG.

b. Parties intent was to conclude a License Agreement

63 RESPONDENT NO. 1 will demonstrate that the true intent of the parties was to conclude a license agreement and not a sales contract. The intent of the parties is an abstract term which can be determined through Art. 8 CISG and Art. 4.1 of the UNIDROIT Principles, which should be

applied to the present dispute. Using Art. 4.1 of the UNIDROIT Principles leads to the same conclusion as using the Art. 8 CISG. The fact that the parties intended to conclude a license agreement can be derived both from the wording of the PCL Agreement, which parties decided to include, and the actions of the parties prior to the conclusion of the PCL Agreement.

64 Before determining the intent of the parties, RESPONDENT NO. 1 will establish that the UNDROIT Principles should be applied to determine the present dispute, albeit CLAIMANT does not specifically address this issue. Since the PCL Agreement, as a license agreement, is not governed by the CISG, UNIDROIT Principles should apply due to the 'external gap'. External gap or *lacunae praeter legem* represents matter not within the purview of the CISG. Since prerequisites for qualifying as a sales contract are not met and license agreements fall outside the scope of the CISG, the gap must be settled directly via recourse to domestic law and not Art. 7(2) of the CISG gap-filling mechanism [*McMahon, p. 69; Zeller, p. 457; Schlechtriem, p. 13*]. Parties have agreed under section 15.2 of the PCL Agreement that it should "be construed in accordance with and governed exclusively by the laws of Danubia" [*Ex. C3, p. 11*]. Since UNIDROIT Principles are contained in the scope of Danubian general Contract Law [*PO1, p. 52, §5*], the ground for their applicability is therefore already laid down. Additionally, as it is set forth in the Preamble of the UNIDROIT Principles, they may be used when the parties agree their contract is governed by general principles of law, *lex mercatoria* or such, and to interpret international uniform law instruments. Moreover, the Preamble dictates that they determine general rules for international commercial contracts. In this regard, the UNIDROIT Principles can be considered relevant for the case, as the PCL Agreement is undoubtedly a commercial contract. The UNIDROIT Principles therefore apply to the present dispute, so the intent of the parties should be determined through its Art. 4.1.

65 Art. 4.1(1) of the UNIDROIT Principles discusses the subjective intent of the parties, relevant for determining the nature of the PCL Agreement, emphasizes the intention of the parties and states that contracts must be interpreted in consideration of common intention among the parties, also known as the subjective test. Pursuant to Art. 4.1 UNIDROIT Principles, all the circumstances shall be considered [*UNIDROIT Commentary, pp. 137-138*]. The stated article provides de facto the same provisions Art. 8 of the CISG. When examining the parties intent through Art. 8 of the CISG, contractual obligations scope should be analysed through subjective and objective interpretation of the intent of the parties [*CISG Opinion no. 19, p. 6, § 1.3; Honnold, p. 116; Lautenschlager, p. 260; Zeller, p. 638; Yang, p. 618; Smallmon case; Propane case; Cedar Petrochemicals Inc. case; Chinchilla furs case; Chemical fertilizer case*]. 'True intent' of the parties

represents the underlying principle of Art. 8 of the CISG that is determined through consideration of all the facts [*Ziegel/Samson; Farnsworth, p. 97; Lookofsky; Zeller; Chinchilla fur case*].

66 Parties conduct, intent and circumstances before conclusion of the contract and interpretation of statements are all considered relevant [*Honnold, p. 116; Propane case*], with pre-contractual negotiations being especially relevant [*Lookofsky p. 55; Marzipan case, Fashion products case; Schlechtriem/Schwenzer, p. 152, §13*]. Determining that the seller was aware of buyer's intent is sufficient, if discerning the intended purpose of goods from all the relevant circumstances of the case could be done by the reasonable seller [*Eörsi, pp. 2-19; Enderlein/Maskow/Strohbach, Art. 35, §11; CSS case; Machinery case; Tantalum case; MCC-Marble case; Flechtner*]. In the present case, CLAIMANT was firstly offered a standard model contract for contract manufacturing during negotiations. This model was objected by CLAIMANT who later stated that the involved IP element has not been sufficiently taken into account, indicating the importance of it and recognizing it as crucial for contracting with RESPONDENT NO. 1. After that, further negotiations were based on the new template that RESPONDENT NO. 2 has previously used for its Collaboration and License Agreement. CLAIMANT later accepted the template with some additional provisions regarding purchase obligation from RESPONDENT NO. 1 [*Ex. R2, p. 30, §7; NA, p. 6, §13*]. Intention behind this purchase obligation is to induce the licensees to request RESPONDENT NO. 1 to manufacture the vaccine for it, rather than producing the vaccine themselves from merely bought base materials [*Ex. R2, p. 31, §11*]. Therefore, the subjective intent of the parties as seen from the course of negotiations was to conclude a license agreement.

67 Arts. 8(2) and 8(3) of the CISG, as Art. 4.2 of the UNIDROIT Principles, address the objective intent of the parties [*UNIDROIT Principles Commentary, pp. 137-138*]. The latter provides that if intent cannot be seen, the conduct should be interpreted in the light of understanding as a reasonable person of the same kind as that party would have had in the same circumstances. The understanding that a reasonable person would have had with regard to the contract is crucial for determining the nature of the contract [*Honnold p. 118; Case Roland Schmidt GmbH; Cooling system case; Roder case; Health care products case*]. Even though the word 'purchase' is the first word in the name of the PCL Agreement, parties' intent could not be determined by that nor would the reasonable interpret PCL Agreement as a sales agreement merely because of it. Different nature of the PCL Agreement can be seen from its scope - it governs terms and conditions of the activities, which are not likely to be a subject of a sales agreement, such as exclusive license to the licensed technology, the ownership of intellectual property related to and generated in the course of the research and development activities, but rather as a subject of a so-called license agreement. Furthermore, Section 5 of the PCL Agreement provides only

the explanation of license materia – Background IP License, License Technology and in fact even Sublicensing [*Ex. C3, p. 12, 13*].

68 In conclusion, it can be derived from the stated that both the application of Art. 4.1(1) UNIDROIT Principles and Art. 8 of the CISG should lead the Tribunal to the same result, *i.e.* that the parties intent was to conclude a license agreement.

2. The CISG is not applicable to the PCL Agreement even if it were considered a mixed contract

69 In case the Tribunal does not find the PCL Agreement a license agreement, it should recognize it as a mixed contract under Art. 3(2) of the CISG. Pursuant to Art. 3(2) of the CISG, mixed contracts encompass buyers' obligation to pay for the goods to be manufactured along with supplying materials for their production and sellers' obligation to supply goods and perform some kind of services [*Schroeter, p. 75*]. Under Art. 3(2) of the CISG, the CISG also applies to mixed contracts in case when the whole contract qualifies as a single contract and when the contracts' preponderant part is purchase obligation [*Schlechtriem/Schwenzer, p. 70*]. In contracts where other elements prevail over legal elements of sale, application of the CISG must be denied [*Blood infusion devices case; Khoo, p. 42*]. Were the Tribunal to find that the PCL Agreement should be considered a mixed contract, it needs to determine which part of it can be considered the preponderant part in order to determine whether the CISG is applicable. Primarily, the Tribunal must consider the economic criterion, however, individual obligations according to parties' interests will also be weighed if the value ratio under economic criterion is difficult to establish [*Brunner/Gottlieb, p. 41, §8*]. CLAIMANT recognizes both relevant criteria in theory [*MC, p. 37, §69*], but fails to correctly apply it to present case.

70 CLAIMANT argues that the value of the goods sold by RESPONDENT NO. 1 is of higher value and confers more economic value [*MC, p. 35, §63*], which leads it to the erroneous conclusion that the preponderant part of the PCL Agreement is the sale of GorAdCam viral vectors. To determine the preponderant part of the PCL Agreement, the Tribunal should therefore firstly apply the specific criteria based on the economic value **(a.)**, and secondly weigh parties individual obligations and interests when contracting **(b.)**. Both methods lead to the same conclusion - that the preponderant part of the PCL Agreement is a license agreement.

a. PCL Agreement should be considered a License Agreement under the economic criterion

71 Economic criterion prevails when the preponderant part of the contract is to be determined [*CISG ACO No. 4, p. 12, §3.3; Schlechtriem II, p. 8; Perović, p. 186*] Under this criterion the value ratio of the delivered goods to the total of seller's obligations is compared to the non-sale elements value ratio [*Brunner/Gottlieb, p. 40, §8; Schroeter p. 77; Bonell/Liguori; Honnold, p. 59*]. CLAIMANT recognized economic value as an important element when determining the nature of the contract. Yet, it still wrongly argues that the value of the goods sold by RESPONDENT NO. 1 is of higher value and confers more economic value as "*all evidences have shown*" [*MC, p. 35, §63*]. CLAIMANT does not actually state or indicate any of these so called 'all evidences' and that is purely due to the fact that they do not exist.

72 Following CLAIMANT'S internal calculation in Appendix 1, price for one batch of GorAdCam viral vectors costs 2,50 mio EUR, potential costs for further milestones are calculated at 3,00 mio EUR and R&D costs, which depend on success, are valued from 5,00 to 400,00 mio EUR. [*Appendix 1, p. 59*]. Regarding the R&D costs, CLAIMANT is expected to sell at least 100 mio dosages of vaccine a year at a price between 20 and 40 EUR in each of the 10 years Royalty Term, which are established in section 9.4 of the PCL Agreement [*PO 2, p. 53, §6*]. Upfront payment of 2,5 mio EUR under Section 9.2 of PCL Agreement is actually a payment for the "*delivery of the first batch of GorAdCam viral vectors and the non-exclusive access to Licensor's Licensed Technology*" [*Ex. C3, p. 13*], hence it should not be considered as a payment for GorAdCam viral vectors only. Further, under Purchase obligation in section 16.2 of the PCL Agreement, the price for HEK-294 cells and growth medium is 2,0 mio EUR per batch and CLAIMANT will require at least 100 batches to develop vaccine [*PO 2, p. 53, §5*]. With R&D and milestones costs, which are expected to exceed 400,00 mio EUR it is clear that the sales part of the agreement, valued at maximum around 200,00 mio EUR and representing less than 50 % of the contract value, does not form the preponderant part. CLAIMANT'S allegations based on wrong economic value are therefore unfounded and false.

b. Determining the preponderant part by weighing parties individual obligations and interests

73 When the preponderant part of a contract cannot be established under the economic criterion, it can also be determined by weighing individual obligations and interests of the parties when concluding the contract [*Brunner/Gottlieb, p. 40, §8; CISG ACO No. 4, p. 18, §3.4*]. The purpose of the contract along with its formational circumstances should also be taken in consideration when determining the preponderant part of the mixed contract [*Cylinder case*]. Even when

considering this subsidiary criterion, the results show that the preponderant part of the PCL Agreement is the transfer of exclusive license and know-how. It was in the parties main contractual interest to transfer the exclusive license and know-how, not the purchase clause or additional purchase obligation. Although RESPONDENT NO. 1 did insist on inclusion of additional purchase obligation, the provision is not in party's main interest, since it is possible to grow GorAdCam in cells other than HEK-294 [*PO2, p. 55, §19*]. CLAIMANT also had serious objections regarding some provisions which did not sufficiently take the involved IP element into the account [*Ex. R2, p. 30, §7*], which additionally shows that the transfer of exclusive license and other provisions regarding this subject were of immense importance for CLAIMANT.

74 Given that under both relevant criteria, the transfer of exclusive license and know-how forms a preponderant part of the PCL Agreement as a mixed contract. Therefore, even if the Tribunal were to consider the PCL Agreement as a mixed contract under Art. 3(2) CISG, the non-sale elements would prevail and the CISG would not apply.

CONCLUSION ON ISSUE III

75 The CISG is not applicable to the PCL Agreement, since it is not a sales agreement but rather a license agreement. The subject-matter of the PCL Agreement is the transfer of exclusive license and know-how which cannot be considered 'goods' pursuant to the CISG. Even if the PCL Agreement was considered a mixed contract under Art. 3(2) of the CISG, the CISG would not apply, since both the economic value criterion and criterion based on weighing parties individual interest and obligation show that the preponderant part of the PCL Agreement is the transfer of exclusive license and know-how.

ISSUE IV: RESPONDENT NO. 1 has delivered conforming goods

76 During 2019, CLAIMANT recognized the potential of the GorAdCam virus as a vector for a future vaccine against COVID-19 and focused its research in this field. However, on 1 May 2020 there was an article published in Biopharma Science, stating, that there was apparently a dispute between Ross Pharmaceuticals and RESPONDENT NO. 2 as to the reach of the license granted under the Ross Agreement [*NA, p. 7 § 19; Ex. C4, p. 19*]. The Ross Agreement was concluded between RESPONDENT NO. 2 and Ross Pharmaceuticals in 2014. Under the Ross Agreement, RESPONDENT NO. 2 granted an exclusive license for the use of GorAdCam virus as a vector to Ross Pharmaceuticals to research and develop a vaccine for "*malaria and comparable infectious diseases*" [*Ex. C4, p. 19*]. Although the scope of that exclusive license granted in the Ross Agreement was initially limited to the field of malaria, this field was later extended to 'related

infectious diseases' against a 600,000.00 EUR payment made by Ross Pharmaceuticals [*Ex. R3, p. 33; PO2, p. 55, § 20*]. The PCL Agreement, in contrast, granted CLAIMANT the right to research, develop and subsequently produce vaccine against 'respiratory diseases' [*Ex. C3, p. 13*].

77 Despite the fact that Ross Pharmaceuticals willingly paid an additional amount of money for the extension of the exclusive license, it was clear to both parties, this expansion would not involve the use of the GorAdCam vector for research into infectious respiratory diseases such as COVID-19 [*Ex. R2, p. 31, § 5*]. The intention of RESPONDENT NO. 2 was to give Ross Pharmaceuticals an exclusive license for malaria related research and developed products [*Ex. R5, p. 37*]. CLAIMANT alleges that the RESPONDENT NO. 1 committed a breach of contract by delivering goods, which were not free from third party claims based on intellectual property, as required by Art. 42 of the CISG [*MC, p. 40, §85*].

78 RESPONDENTS submit that there was no breach of the PCL Agreement as RESPONDENT NO. 1 delivered conforming goods to CLAIMANT, free from any third party's right. It will be demonstrated why CLAIMANT cannot rely on the provisions of Art. 42 of the CISG **(1.)**, establish RESPONDENT NO. 1 did not breach its contractual obligations pursuant to Art. 25 of the CISG **(2.)** and prove there was no breach of Art. 9.1.15 of the UNIDROIT Principles **(3.)**.

1. CLAIMANT cannot rely on Art. 42 of the CISG

79 CLAIMANT falsely claims that RESPONDENT NO. 1 has failed to deliver goods free from IP rights under Art. 42 of the CISG [*MC, p. 40, § 87*]. RESPONDENT NO. 1 has previously already substantiated the CISG is not applicable to the PCL Agreement and cannot form the relevant legal ground on which the present dispute could be solved. However, since Art. 42 of the CISG could be an argument for the CLAIMANT'S position, RESPONDENT NO. 1 will nevertheless explain why its provisions are neither applicable nor relevant in the present dispute.

80 Hypothetically, if the PCL Agreement was governed by the CISG, which is not, Art. 42(1) of the CISG would not have been breached, because there was no sale of "goods" as already determined [*see supra §59*] and more importantly, RESPONDENT NO. 1 has delivered the GorAdCam vector free of any third party rights. A breach of contract under Art. 42 of the CISG exists when the seller delivers goods, which are encumbered by third party rights based on industrial or other intellectual property or when a third party claim that its right has been violated [*Schlechtriem, p. 74; Honnold, p. 296; Lookofsky, p. 111*]. The claim cannot represent a breach of contract pursuant to Art. 42 of the CISG if it is unfounded or non-existent. In the

present dispute, RESPONDENT NO. 1 delivered conforming goods to CLAIMANT since it never granted a license on GorAdCam vector for research and development of vaccine on respiratory diseases to Ross Pharmaceuticals. Additionally, there is no IP-right of Ross Pharmaceuticals nor has such a right ever formed the basis of a claim raised against CLAIMANT.

81 Consequently, RESPONDENT NO. 1 will demonstrate the exemption of liability under Art. 42 of the CISG **(a.)** and establish how CLAIMANT lost the right to rely on the breach in line with Art. 43 of the CISG **(b.)**.

a. The exemption of RESPONDENT'S liability under Art. 42 of the CISG

82 At first, it might seem as purpose of the Art. 42 of the CISG is to expose the seller's obligations, most of all – to deliver goods, which are free from any right or claim based upon intellectual property [*Brunner/Gottlieb, p. 302, §5*]. Nevertheless, a closer look reveals that the true function of the provision is to limit the seller's liability [*Magnus, p. 12; Enderlein, p. 178*]. Art. 42 of the CISG is dissected to two parts – the first one does set forth the seller's liability on delivering goods free from any third party right, but the second demonstrates certain conditions narrowing down his obligation of liability.

83 The liability of the seller is excluded under the Art. 42(2)(a) of the CISG if the buyer knew or could not have been unaware of the right or claim at the time of concluding the contract [*Schlechtriem/Schwenzer, p. 669, § 18; Beline; Enderlein (1996), p. 183; Rauda/Etier, p. 56*]. In 2014, RESPONDENT NO. 2 and Ross Pharmaceuticals concluded the so-called Ross Agreement for a transfer of IP rights on GorAdCam vector for research and development of vaccine in the field of malaria and other relatable infectious diseases [*Ex. R3, p. 33*]. However, the license granted under the Ross Agreement is completely different in comparison to the PCL Agreement, under which RESPONDENT NO. 1 granted an exclusive license on GorAdCam vector to CLAIMANT to conduct a research in the field of respiratory infectious diseases, more precisely to develop and merchandise the vaccine against COVID-19. Still, CLAIMANT strongly, but wrongly believes that the existence of Ross Pharmaceutical's IP rights on GorAdCam vector are a source of third-party rights on the delivered and purchased goods under the PCL Agreement [*MC, p. 40, §85*]. Considering Ross Agreement was concluded way before the PCL Agreement and its conclusion was somehow transparent, not mysteriously hidden, CLAIMANT should have at least heard about its existence. What is more, the project was published in Press Release [*Ex. C1, p. 9*], meaning anyone could inform himself about the collaboration between Ross Pharmaceutical and RESPONDENT NO. 2 and the subject-matter of the Ross Agreement. Not knowing about the Ross Agreement and the transfer of the

exclusive license on GorAdCam vector only exposes CLAIMANT'S negligence. If CLAIMANT did not inform and educate himself about the business before he entered into the collaboration with RESPONDENT NO. 1, that cannot be a matter of RESPONDENT NO. 1's liability, but rather a sign of CLAIMANT'S negligence and irresponsibility.

84 Even if the Tribunal concludes that under Art. 42 CISG the mere awareness of the foundations of the third party claim suffices, RESPONDENT NO. 1 submits that it did not know nor could it have been aware of the existence of Ross Pharmaceutical's alleged IP rights on GorAdCam vector, since it was not in any contractual or business relationship with RESPONDENT NO. 2 at the time of the conclusion of the Ross Agreement. Furthermore, CLAIMANT incorrectly alleges that the expression 'could not have been unaware' places an obligation to investigate on the situation regarding IP rights on the seller [*MC, p. 42, §101*]. This type of duty would constitute a disproportionate obligation [*Janal, p. 205*] for the seller, if it needed to warrant the worldwide absence of IP rights, which might limit the general use of the goods [*Achilles, Art. 42, §4*]. It is almost impossible and, in any case, very costly to identify IP rights existing in every country of the world. Moreover, it is rather unnecessary, since the buyer is usually only interested in selling or using the products in particular markets and will only be willing to pay a price, which reflects the licensing fees required for such use. [*Janal, p. 205*]. Because of these factors there is the uncertainty of immaterial rights, which leads to the seller's legitimate interest to limiting their warranty [*Audit, p. 113*]. The wording of the Art. 42 of the CISG does not suggest that it is the RESPONDENT NO. 1'S obligation to investigate, but rather that it cannot disregard the obvious indications of the existence of the claim. It follows from the case, that at the time of the conclusion of the PCL Agreement, RESPONDENT NO. 1 had no actual knowledge of the existence of the Ross Pharmaceutical's alleged IP rights on GorAdCam vector [*PO2, p. 53, §1*]. Even if the dispute between Roctis and Ross Pharmaceuticals already existed in December 2018, prior to the conclusion of the PCL Agreement [*Ex. C4, p. 18*], it cannot be expected for RESPONDENT NO. 1 to know about the dispute regarding the Ross Agreement concluded between two completely different parties – Ross Pharmaceuticals and RESPONDENT NO. 2. In addition, there were no obvious indications that RESPONDENT NO. 1 ignored, and consequently, failed to become aware of the existence of third-party IP rights.

85 Alternatively, if the Tribunal would hold that Art. 42 of the CISG requires the obligation of RESPONDENT NO. 1 to investigate, RESPONDENT NO. 1 submits that even if it made the required investigation, it still could not have concluded the claim of Ross Pharmaceutical would be raised. Through the investigation RESPONDENT NO. 1 would have learned that under the Ross Agreement, RESPONDENT NO. 2 granted Ross Pharmaceutical an exclusive licence for the use

of GorAdCam vector for the development and production of vaccines in the field of "*malaria and related infectious diseases (in particular cholera)*" [*PO2, p. 55, §21*]. This discovery would have led RESPONDENT NO. 1 to a conclusion, that it can enter into an exclusive licence agreement with CLAIMANT for the use of GorAdCam vectors in the field of respiratory diseases, since this agreement would not violate nor disrupt the license, which was granted to Ross Pharmaceutical. Further, RESPONDENT NO. 1 was entitled to assume that any claim, which eventually may be raised by Ross Pharmaceutical, would be manifestly unfounded and could have concluded that there were no obstacles that would prevent the fulfilment of RESPONDENT NO. 1'S obligations under the PCL Agreement. Therefore, there was no reason for RESPONDENT NO. 1 not to proceed with the conclusion of the PCL Agreement with CLAIMANT. Hence, the RESPONDENT NO. 1 did not know, nor was it supposed to be aware of the Ross Pharmaceutical's IP rights on GorAdCam vectors and did not commit a breach of the PCL Agreement pursuant to Art. 42 of the CISG.

b. CLAIMANT lost the right to rely on the breach in line with Art. 43 of the CISG

86 If the Tribunal would conclude that RESPONDENT NO. 1 was supposed to be aware of the ongoing dispute between RESPONDENT NO. 2 and Ross Pharmaceutical, RESPONDENT NO. 1 respectfully submits that CLAIMANT failed to notify it of the existence of the third party claim on GorAdCam vector within a reasonable time, as required by Art. 43 of the CISG, and thus lost the right to rely on the breach.

87 Art. 43 of the CISG provides that the notice of the existence of third party claim must be given within a reasonable time after the buyer became aware or ought to have become aware of the third party claim [*Schlechtriem/Schwenzer, p. 675, § 2; Lookofsky II, p. 113; Enderlein, p. 185*]. The notification should be made within the reasonable time after the moment of the discovery of the existing third-party claim on the delivered goods. Although the CISG does not require prompt notification, this does not mean that the notification can be unreasonably delayed. The length of the period for notification should be interpreted so as to include the minimum time reasonably needed to perform the notification, since the primary purpose of that requirement is the protection of the seller [*Magnus, p. 15*]. The general time limit for notification usually expands over at least one week up to a one-month time period, depending on the circumstances of a specific case [*Schlechtriem/Schwenzer, p. 677, §3; Hygenic tissues case; Cafe inventory case; Stolen automobile case; Model locomotives case*].

88 In the present case, CLAIMANT has sent an e-mail to RESPONDENT NO. 1 on 2 May 2020, a day after its COO Mr. Paul Metschnikow became aware of the alleged third-party intellectual

property claim on GorAdCam viral vectors [*Ex. C5, p. 19*]. In that email CLAIMANT demanded a meeting with RESPONDENT NO. 1 and further explanation regarding the Ross Pharmaceuticals allegedly exclusive license for the use of GorAdCam viral vectors to conduct a research in the field of infectious diseases. Admittedly, this e-mail was sent to RESPONDENT NO. 1 within one day, after CLAIMANT became aware of third party's right, however, this notification was formed as a mere request to provide CLAIMANT with further explanation regarding the alleged Ross Pharmaceutical's IP rights on GorAdCam viral vectors. CLAIMANT never expressed any threat of legal action, but merely asked for further information regarding the exclusive license granted under Ross Pharmaceutical. The notice of a third-party claim is supposed to allow the seller to contact that party and to defend the claim against the buyer [*UNCITRAL Digest 2012*], CLAIMANT'S email did not provide RESPONDENT NO. 1 with this option. In consideration of all the stated, CLAIMANT failed to select a proper legal approach and notify RESPONDENT NO. 1 in line with Art. 43 of the CISG.

89 Admittedly, a seller cannot 'knowingly close his eyes' to obvious facts. In this regard, Art. 43(2) of the CISG precludes seller from relying on Art. 43 (1) of the CISG if he knew or should have known for the third party right and its nature. Hence it is required that the seller has a detailed knowledge regarding materia he is selling [*Brunner/Gottlieb, p. 321*]. As previously established [*see supra §84*], RESPONDENT NO. 1 did not know nor could have been aware of the third party right, so it is not precluded from relying on Art. 43(1) of the CISG. Furthermore, RESPONDENT NO. 1, as a subsidiary of a holding company, which is one of the biggest pharmaceutical companies in the world, clearly has a deep and detailed knowledge in its field. The PCL Agreement inter alia contains a provision in its Art. 11.1.3 [*Ex. C3, p. 15*] which provides that "*pursuant to Licensor's best knowledge, the latter is not aware of any Third Party's Intellectual Property that might be infringed.*" Since RESPONDENT NO. 1 was the stronger party to the contract and was the one, who mainly created it, it is the only logical explanation that the provisions set forth are not breached. RESPONDENT NO. 1 is certainly to his best knowledge unaware of any third-party rights that CLAIMANT biasedly found.

2. RESPONDENT NO. 1 did not breach its contractual obligations pursuant to Art. 25 of the CISG

90 Even if CLAIMANT does not specifically address the breach of Art. 25 of the CISG, the latter will be established in parallel with why there was no breach of the PCL Agreement. The provisions of Art. 25 of the CISG govern the scope of the fundamental breach, which is fundamental if it substantially deprives the buyer of what it was entitled to expect under the contract and the

detriment is foreseeable [*CISG Opinion No. 5, p. 2, § 1.2; Zeller II, p. 224; Koch, p. 263*]. Two main criteria for the fundamental breach test are the substantial deprivation requirement and the foreseeability requirement [*CISG, Art. 25; Huber/Mullis, p. 782; Liu, p. 121; Zeller II, p. 224*].

91 For a breach to be considered fundamental by virtue of Art. 25 of the CISG, it must cause a detriment that substantially deprives the injured party of what it was entitled to expect under the contract [*Schlechtriem/Schwenzer, p. 409, § 21; Huber/ Mullis, p. 214; Liu, p. 121; Zeller II, p. 224; Koch, p. 263; Lookofsky II, p. 118; Pressure sensors case*]. Furthermore, the breach is argued to be fundamental in cases where the buyer's intended use of the goods becomes impossible or when the interest in receiving performance is lost [*Graffi, p. 339; Ferrari, p. 496; Koch, p. 264; Color concrete block production line case*]. However, CLAIMANT in the present case, was not deprived in any way. Not only did CLAIMANT not lose the main benefits from the PCL Agreement, he did not lose any benefits from it at all. On the contrary, on top of the rights and acquisitions (the transfer of exclusive license, IP rights…), it gained a business-relationship with a subsidiary of one of the biggest companies in the world, concluded a solid contract regarding the transfer of exclusive license and put its name on the world-market.

92 A breach of contract cannot be considered fundamental when the defaulting party did not foresee the detrimental consequences and when a reasonable person of the same kind and in the same circumstances, would not have foreseen these consequences [*Schlechtriem/Schwenzer, p. 398; Huber/Mullis, pp. 215-782; Liu, p. 121; Zeller II, p. 224; Graffi, pp. 339-340; Achilles, p. 69; Sanchez, p. 217; Salger, p. 210; Ferrari, pp. 495-499; Babiak, p. 142; Koch, p. 229*]. The main purpose of the foreseeability requirement under Art. 25 of the CISG is considering the breaching party's knowledge of the harsh consequences of the breach in determining whether or not it is fundamental. On the other hand it is also a burden of proof rule and it serves to exempt the breaching party from his liability for the breach of contract [*Achilles, p. 69; Sanchez, p. 217; Salger, p. 210; Babiak, p. 142; Koch, p. 263; Bygum, pp. 4-7; Lookofsky II, p. 118*]. In the present dispute, RESPONDENT NO. 1 could not have foreseen the potential raise of third party claim, since it was neither involved in the discussions concerning the scope of the Ross Agreement nor positively knew about them [*PO2, p. 53, §1*]. Therefore, RESPONDENT NO. 1 cannot be held accountable for the actions and conducted business of the subsidiary company, since it dutifully performed all its obligations under the PCL Agreement and conducted its business with CLAIMANT in good faith.

93 In light of all above, the alleged suffered and not proven detriment, was not foreseeable. Hence, the prerequisites for a fundamental breach under Art. 25 CISG are not fulfilled.

3. There was no breach of Art. 9.1.15 of the UNIDROIT Principles

94 Although CLAIMANT does not explicitly claim that Art. 9.1.15 UNIDROIT Principles was breached, RESPONDENT NO. 1 will show that granting an exclusive license to CLAIMANT was completely legitimate and that it did not breach its obligation under said article. In the present case, the PCL Agreement is to be considered a license agreement and is governed under the provisions of the UNIDROIT Principles [*see supra §63*].

95 Pursuant to Art. 9.1.15(b) UNIDROIT Principles assignor undertakes that it is entitled to assign the right, therefore no legal or contractual prohibition exists in order to prevent assigning assignors right to assignee. Demand established in the following section in Art. 9.1.15(c) UNIDROIT Principles explicitly requires the right not to be already assigned to another assignee, in order to establish assignor's commitment [*Vogenauer, p. 1128; UNIDROIT Commentary, pp. 318-319*].

96 Since RESPONDENT NO. 1 did not breach its obligations under Art. 42 of the CISG [*see supra §84*], it also did not breach obligations pursuant to Art. 9.1.15 UNIDROIT Principles. Pursuant to the meaning of both Art. 42 of the CISG and Art. 9.1.15 UNIDROIT Principles, RESPONDENT NO. 1'S obligations under mentioned articles are the same. As RESPONDENT NO. 1 was entitled to grant CLAIMANT an exclusive license for GorAdCam viral vectors, free from third party's right and not already assigned to another assignee, none of its obligations were breached.

CONCLUSION ON ISSUE IV

97 If the Tribunal would find the CISG applicable in the present case, RESPONDENT NO. 1 did not breach its obligations under Art. 42(1) of the CISG. Furthermore, pursuant to Art. 42(2) of the CISG, its obligation of liability is excluded. Additionally, Art. 43 of the CISG applies as CLAIMANT failed to notify correctly and therefore cannot rely on a breach. RESPONDENT NO. 1 actions also did not present a fundamental breach under Art. 25 of the CISG. RESPONDENT NO. 1 granted an exclusive license to CLAIMANT without breaching its obligations under the relevant Art. 9.1.15 UNIDROIT Principles.

* * *

REQUEST FOR RELIEF

In light of the submissions made above, Counsel for RESPONDENTS respectfully requests the Tribunal to:

1. join Ross Pharmaceuticals to these proceedings;

2. hold the 2nd Hearing of witnesses and experts of 3 to 7 May 2021 in person. Alternatively, if hearing in person is not possible, to postpone it to a date to be fixed later;

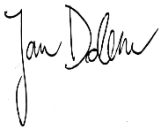
3. find that the CISG is not applicable to the Purchase, Collaboration and License Agreement;

4. declare that RESPONDENT NO. 1 has not breached the Purchase, Collaboration and License Agreement;

5. order CLAIMANT to bear the costs of these arbitration proceedings.

Respectfully signed and submitted by counsel on 28 January 2021.

Jan Dolenc



Jasmina Mitev

Ema Turnšek

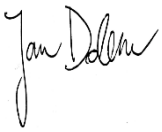
University of Maribor

CERTIFICATE

Maribor, 28 January 2021

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

Jan Dolenc



Jasmina Mitev

Ema Turnšek