University of Maribor

Faculty of Law

MEMORANDUM FOR CLAIMANT

On Behalf of:	Against:	
RespiVac plc	**CamVir Ltd**	**& VectorVir Ltd**
Rue Whittle 9	112 Rue L. Pasteu	67 Wallace Rowe Drive
Capital City, Mediterraneo	Oceanside, Equatoriana	Oceanside, Equatoriana
-CLAIMANT-	-RESPONDENT NO. 1-	-RESPONDENT NO. 2-

Counsel for CLAIMANT

Jan Dolenc • Jasmina Mitev • Nuša Šaloven • Ema Turnšek

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TABLE OF ABBREVIATIONS

%	Per cent
§/§§	Paragraph/paragraphs
A. Agreement	Arbitration Agreement
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
ECHR	European Convention on Human Rights
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 rights	Intellectual Property rights
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
NYC	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
SCAI	Swiss Chambers' Arbitration Institution
supra	Above
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
VIAC	Vienna International Arbitral Centre
v. / vs.	Versus

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CISG	United Nations Convention on Contracts for the International Sale of Goods, Vienna, 11 April 1980
ECHR	European Convention on Human Rights
NYC	Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York 10 June 1958
Procedural code of Danubia	Prodecural code of Danubia, with amendments as adopted in 2010
Swiss Rules	Swiss Rules of International Arbitration of the Swiss Chambers' Arbitration Institution 2012
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006, Vienna, 21 June 1985
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts, Rome, 2010

SUMMARY OF FACTS

RespiVac plc (**"CLAIMANT"**), is a start-up biopharmaceutical company engaged in the development of vaccines for respiratory diseases caused by viruses. CamVir Ltd (**"RESPONDENT NO. 1"**) and VectorVir Ltd (**"RESPONDENT NO. 2"**) are both 100 % subsidiaries of Roctis AG ("Roctis"), the holding company of the Roctis Group which is one of the biggest pharmaceutical companies in the world.

RESPONDENT NO. 2 is the owner of a patent for the GorAdCam viral vector. On **15 June 2014**, RESPONDENT NO. 2 entered into a Collaboration and License Agreement with Ross Pharmaceuticals (**"Ross Agreement"**), the biggest life-science company in Danubia. Under the Ross Agreement RESPONDENT NO. 2 granted Ross Pharmaceuticals an exclusive license for the use of the GorAdCam vector for the development and production of malaria vaccines. The exclusive license was apparently given for "malaria and infectious diseases".

In August 2018, Roctis acquired RESPONDENT NO. 2 and its patents, while RESPONDENT NO. 1 was acquired **in 2009**. Immediately after the acquisition, RESPONDENT NO. 2 entered into an exclusive license agreement with RESPONDENT NO. 1. The exclusive license granted the latter the permission for the production, sale and sublicensing of the GorAdCam viral vector for all applications with the exceptions of malaria.

On **1 January 2019**, CLAIMANT entered into a Purchase, Collaboration and Licensing Agreement (**"PCL Agreement"**) with RESPONDENT NO. 1. According to the PCL Agreement, RESPONDENT NO. 1 was obliged to deliver to CLAIMANT a first batch of the GorAdCam viral vectors for research into vaccines against infectious respiratory diseases. In addition, the PCL Agreement obliged CLAIMANT, in case of the commercialization of the product developed under the PCL Agreement, to purchase the HEK 294-cells as well as the culture medium which are needed for the amplification of the GorAdCam vectors required for the production of the vaccine from RESPONDENT NO. 1.

On **1 May 2020**, CLAIMANT'S COO, Mr. Paul Metschnikow, was given an older article in the Biopharma Science, that there was apparently a dispute between Ross Pharmaceuticals and RESPONDENT NO. 2 as to the reach of the license granted in 2014 to Ross Pharmaceuticals under the Ross Agreement. Mr. Paul Metschnikow immediately contacted Ms. Alexandra Flemming, the CEO of RESPONDENT NO. 1 to clarify the situation. She replied by e-mail on **4 May 2020**, playing down the problem.

It was confirmed that in **June 2020** there were still ongoing discussions between Roctis and Ross Pharmaceuticals. The discussions dealt with the scope of the exclusive license granted under the Ross Agreement and the right to use GorAdCam vectors in connections with the research for a vaccine against COVID-19. Already the mere claim of a third party which is not completely baseless is sufficient to render the goods non-conforming in the sense of Article 42(1) CISG.

On **15 July 2020**, CLAIMANT submitted the Notice for Arbitration against RESPONDENTS, requesting the Arbitral Tribunal to declare that RESPONDENT NO. 1 breached the PCL Agreement by delivering GorAdCam viral vectors which were not free from third party rights or claims. On **14 August 2020** RESPONDENTS submitted joint Answer to the Notice of Arbitration.

SUMMARY OF ARGUMENTS

Ross Pharmaceuticals should not be joined to these arbitration proceedings pursuant to Art. 4(2) of the Swiss Rules. First, according to the privity of the contract, CLAIMANT has no direct contractual relationship with Ross Pharmaceuticals nor is the latter granted any direct right from the PCL Agreement. Therefore, Ross Pharmaceuticals is not in a position to become a party of the procedure. Second, Ross Pharmaceuticals as a third person is not willing to join these proceedings, considering not only its explicit objection to join, but the lack of its implicit consent as well. Furthermore, piercing the corporate veil doctrine as non-consensual theory for binding a non-signatory cannot apply. Third, permitted joinder would raise issues of confidentiality, as it cannot be ensured that Ross Pharmaceuticals would not obtain and use certain confidential information. Finally, in case of a permitted joinder, the final award rendered by this Tribunal would give rise to grounds for refusal and enforcement of Art. V(1)(c) of the New York Convention (**ISSUE I**).

The examination of witnesses and experts should be conducted remotely. First, RESPONDENTS gave their subsequent consent regarding the venue of proceedings, giving this Tribunal a wide discretion as how to conduct the proceedings. Second, and contrary to RESPONDENTS statements, the Swiss Rules are not rooted in the assumption that a hearing in person will be held and the Procedural code of Danubia allows remote hearings as an exception for health reasons. Third, remotely held examination does not violate the right to be heard or the duty of equal treatment of the Parties and the principle of immediacy is not jeopardized in the case of virtual hearings. Finally, as the present case involves primarily legal

questions, the dispute can be settled on the basis of the Parties' written submissions, without the need to hear any witnesses or experts remotely (**ISSUE II**).

The PCL Agreement, concluded between CLAIMANT and RESPONDENT NO. 1, should be considered sales contract, therefore CISG is applicable. Firstly, territorial prerequisites that determine international nature of the agreement pursuant to Art. 1(1) CISG are fulfilled. When a contractual object is a subject of IP rights, regardless being held by third party or being sold along object, their recognition as 'goods' is not influenced by it, therefore GorAdCam viral vectors can be considered goods. Secondly, Parties intention was to conclude a sales agreement that is governed by CISG. That can be concluded from Parties negotiation prior contracting, RESPONDENT NO. 1'S insisting on inclusion of the purchase clause and on fact that RESPONDENT NO. 1 contributed to CLAIMANTS research only with delivery of GorAdCam viral vectors, without transferring the know-how. Thirdly, even if PCL Agreement is considered a mixed contract CISG is applicable, based on prevailing economic value criterion and on weighing individual obligations and interests in time of contracting (**ISSUE III**).

RESPONDENT NO. 1 delivered non-conforming goods to CLAIMANT, hence it breached Art. 42 CISG. Firstly, RESPONDENT NO. 1 has breached its contractual obligations under Arts. 11.1.3 and 11.1.4 of PCL Agreement, by failing to perform as stipulated in Art. 42 CISG. Delivered GorAdCam viral vectors were not free from third party's right or claim, since exclusive license for its research, develop and manufacture products was previously granted Ross Pharmaceuticals. Secondly, pursuant to Art. 25 CISG, RESPONDENT NO. 1 has fundamentally breached its contractual obligations. RESPONDENT NO. 1 drastically disregarded its duties breaching articles in PCL Agreement were of utmost importance to CLAIMANT and did not foresee the detrimental consequences. Thirdly, pursuant to Art. 42(2)(a) CISG, RESPONDENT NO. 1'S liability cannot be exempt, since CLAIMANT was not aware nor could not have been unaware of Ross Pharmaceuticals IP right or claim. Fourthly, the PCL Agreement should be assessed under UNIDROIT Principles, if the Tribunal concludes that CISG cannot be applied. Therefore, RESPONDENT NO. 1 has breached its obligation under Art. 9.1.15 UNIDROIT Principles by assigning exclusive license, that was previously assigned to Ross Pharmaceutical, to CLAIMANT (**ISSUE IV**).

ISSUE I: ROSS PHARMACEUTICALS SHOULD NOT BE JOINED TO THE ARBITRATION PROCEEDINGS

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

2 Both RESPONDENTS insist on the joinder of Ross Pharmaceuticals to these arbitration proceedings to determine conclusively the scope of the exclusive license granted. CLAIMANT strongly objects to joinder and will subsequently establish that the request for joinder is unsubstantiated. Pursuant to Art. 4(2) of the Swiss Rules of International Arbitration of the Swiss Chambers' Arbitration Institution (hereinafter: Swiss Rules), Ross Pharmaceuticals is not a party of the PCL Agreement and does not derive any direct right from it, nor is in a position to become a party of the procedure **(1.)**. Furthermore, joinder should not be permitted as there is no consent to join from Ross Pharmaceuticals **(2.)** and piercing the corporate veil doctrine cannot apply **(3.)**. Additionally, in case of a permitted joinder, it cannot be ensured that Ross Pharmaceuticals would not obtain and use certain confidential information **(4.)**. Lastly, permitted joinder would bring into question the recognition and enforcement of the final award **(5.)**

1. Ross Pharmaceuticals is not in a Position to become a Party of the Procedure

3 As the arbitration agreement is an agreement on procedural issues [*Rubino-Sammartano, p. 196*], persons that are not parties to the arbitration agreement are excluded from the arbitration proceedings, according to the principle of privity of contract/agreement [*Rajoo, p. 134*]. The latter provides only the parties to an international arbitration agreement are either binding or benefitting by that agreement [*Born, p. 1407*]. Only the party named in the underlying contract which contains the arbitration agreement can be a party to the arbitration and the arbitration award is only binding on the parties [*Rajoo, p. 134*]. Said principle is

uniformly reflected in international arbitration conventions, national arbitration legislation, judicial decisions and arbitral awards [*New York Convention, Art. II(1), II(3); UNCITRAL Model Law, Art. 7(1); Tweddle v Atkinson; ICC Case No. 5721*]. Subjecting a non-signatory to an arbitration agreement is considered an exceptional act [*Born, p. 1415*], holding it accountable only through an examination, under very restrictive conditions [*Simamora/Sujayadi/Yuniarti*]. Joinder of Ross Pharmaceuticals is not in line with the doctrine of privity since CLAIMANT has no direct contractual relationship with Ross Pharmaceuticals **(a)** nor is the latter granted any direct right from the PCL Agreement **(b)**.

a. CLAIMANT has no Direct Contractual Relationship with Ross Pharmaceuticals

4 The essence of the contract is demonstrated in the fact that when a party signs it, it is legally bound by those terms – resulting from the fact that the contract is the law of the parties [*Wehberg*; *Dasser*, *o.c.. 109-110*; *M. Mustill, p. 86*]. On the other hand, someone who is not privy to a contract cannot legally enforce it [*Grigson v. Creative Artists Agency*]. Privity does not only refer to the substantive, but more importantly to the procedural part of the contract, where Arbitration Agreement (hereinafter: A. Agreement) in this specific case applies. Not only does the doctrine of privity of contract specify that only parties, who are directly involved can enforce the terms of the contract, but more importantly, it protects the parties from third-party interference regarding the procedure [*McCullough*]. According to the circumstances of the case, CLAIMANT has never had any connection with Ross Pharmaceuticals. On the other hand, it indisputably has connection with RESPONDENT NO. 2. The latter and RESPONDENT NO. 1 are now 100 % subsidiary of Roctis AG (hereinafter: Roctis). Immediately after the acquisition, RESPONDENT NO. 2 entered into an exclusive license agreement with RESPONDENT NO. 1. As RESPONDENT NO. 1 was granted an exclusive license for the production, sale and sublicensing of the Vectors on said grounds, involving RESPONDENT NO. 2 in the arbitration proceedings consists of a justifiable and valid reason, while no connection whatsoever exists between CLAIMANT and Ross Pharmaceuticals.

5 Firstly, in a similar case, the court ruled that a third party could not sue over an agreement because it was not in contract with the signatories. It was pointed out once more that privity rule means only those who are party to a contract (including an arbitration agreement) can be involved in the process [*Dunlop v Selfridge*]. In the present case, not only is CLAIMANT in no contractual relationship with Ross Pharmaceuticals, the same is true for RESPONDENT NO. 1. Ross Pharmaceuticals has entered into relationship only with RESPONDENT NO. 2, signing an agreement which bears no connection or relationship with CLAIMANT, nor with

RESPONDENT NO. 1 at the time of the conclusion of the contract. In this regard, Ross Pharmaceuticals can only be considered as a stranger not only to the PCL Agreement, but more importantly, to the therein enshrined A. Agreement, lacking its involvement in the process. Swiss Federal Tribunal in one of its decisions dealt with two claimant co-owners (B and C) of a joint venture (A) and the respondent (D) as an independent entity organised under Libyan state. As claimants filed a request for the arbitration against it and its country, the tribunal confirmed the decision of the Arbitral Tribunal and found that it lacked jurisdiction over the Libyan state. The latter could not be considered as a party of the contract and thereby bound by arbitration agreement. Its decision refers to the doctrine of privity of the contract, stating: "*An agreement is binding and has legal effect only to its parties, thus the third party cannot make a profit nor loss"* [*4A_636/2018*]. As there is no interference to arbitral proceedings in the present case, the arbitration agreement cannot be extended to Ross Pharmaceuticals as a third person that has not signed it.

6 Secondly, a party, even when agreeing to the Swiss Rules, can still expect the arbitration to remain between the parties, unless it was positively aware of Art. 4(2) when agreeing to those rules [*Meier, p. 106*]. Joinder of a third person against the other party's will is possible only under two specific criteria. First, when the other party could have foreseen at the time of contracting that its contract partner would potentially have an interest in including the third person in the resolution of the subject-matter of the dispute. Second, when the balance of interests is clearly in favour of the joinder rules [*Schramm, p. 7*]. CLAIMANT could not have foreseen the joinder of Ross Pharmaceuticals, as it was not aware at the time of contracting of any discussions or dispute between Ross Pharmaceuticals and RESPONDENTS [*PO2, p. 54*]. CLAIMANT has relied on the PCL Agreement and statements of RESPONDENT NO. 1 in good faith, especially in its Art. 11, where Representations, Warranties and Covenants are stated [*Ex. C3, p. 15*]. Permitted joinder would not only exceed the A. Agreement, contrary to the doctrine of privity of contract, but would as well, among other detriments, force Ross Pharmaceuticals as a third person to participate in a process in which it refuses to participate. Therefore, balance of interests of the parties and the third person to be joined are clearly against joinder.

7 To conclude, CLAIMANT has never had any connection with Ross Pharmaceuticals. PCL Agreement was concluded solely between CLAIMANT and RESPONDENT NO. 1, meaning only those are privy to that agreement. According to the privity rule, Ross Pharmaceuticals can only be considered as a stranger not only to the PCL Agreement, but to therein enshrined A. Agreement, as it is not involved in the process. CLAIMANT urges the Tribunal for this arbitration to remain between the signatories of the A. Agreement and RESPONDENT

NO. 2 as it gave its explicit consent to be bound, without the extension to Ross Pharmaceuticals as a third person that has not signed it.

b. Ross Pharmaceuticals is not granted any direct Right from the PCL Agreement

8 When deciding on the question of joinder, the arbitral tribunal should adopt a case-by-case approach [*Born, p. 1414*], considering a range of factors, including how the joinder would affect the proceedings and more importantly, the rights of all involved [*Segesser/Jolles/George, p. 238*]. Some courts have required that the third party be entitled to, and assert, contractual rights under a contract in order to be subject to its arbitration agreement [*Fortress Value v. Blue Skye*; *4A_627/2011*]. Consequently, the relevant intentions of the signatories will focus on the underlying contractual rights (as distinguished from the arbitration agreement) [*Born, p. 1458*]. On that point, it should be noted that Ross Pharmaceuticals derives no direct right from the PCL Agreement.

9 Firstly, a third person may be bound by an arbitration agreement if it asserts rights that it enjoys by virtue of its status as a third-party beneficiary to a contract containing an arbitration agreement [*Fink v. Carlson*; *Black & Veatch Int'l Co. v. Wartsila NSD N. Am.; Bevere v. Oppenheimer & Co.*]. The tribunal must therefore look to the intentions of the parties at the time of contracting [*Brantley v. Repub. Mortg. Ins. Co.*]. Swiss Federal Tribunal dealt with that question and stated: "*Whether the third party has an independent immediate right to claim performance is decided in principle on the basis of the statements made by the parties to the contract, alternatively through a corresponding exercise /…/ A pure contract in favor of a third party cannot be assumed.*" After resorting an objective interpretation, it was decided that the third party involved was not granted any direct right and could not avail itself of the arbitration clause [*4A_627/2011*]. In the present case it can be observed especially on the grounds of transmitted e-mails in 2020 [*Ex. R4, R5*], that the negotiations among the representatives of Ross Pharmaceuticals and RESPONDENT NO. 2 were based solely on the Collaboration and License Agreement (hereinafter: Ross Agreement), concluded only between those parties, and not on the grounds of the PCL Agreement. On that point, Ross Pharmaceuticals is a party only to the Ross Agreement and its direct and indirect rights can be based only upon that agreement.

10 Secondly, it must also be determined whether the signatory parties to the agreement accepted a third-party beneficiary [*Craig/Park/Paulsson*]. The principles of interpretation that apply to the arbitration agreement are the same as the general principles frequently adopted with respect to all contracts [*Fouchard, p. 256*]. Such an issue of jurisdiction ratione personae, which relates to the merits, must be in the present case resolved on the basis of Art. 8 of United

Nations Convention on Contracts for the International Sale of Goods (hereinafter: CISG). That provision provides interpretation according the intent of a party, where the other party knew or could not have been unaware what that intent was [*CISG, Art. 8*]. If the parties of the contract intended to have a third-party beneficiary, *such intent could have been easily expressed in the arbitration agreement* [*Tamayo v. Brainstorm USA*]. No provision of the PCL Agreement uses the concept of a contract in favour of a third party. It rather speaks against it in Art. 11, stating: "*Licensor is not a party to or otherwise bound by any oral or written contract or agreement that will result in any person or entity obtaining any interest in, or that would give to any entity or person any right to assert any claim in or with respect to, any of Licensee's rights granted under this Agreement.*" [*Ex. C3, p. 15*]. As the PCL Agreement is explicit that it does not create direct and forcible rights in favour of a third person, Ross Pharmaceuticals cannot avail itself of the arbitration agreement.

11 To conclude, Ross Pharmaceuticals does not derive status of a third-party beneficiary to the PCL Agreement, containing an A. Agreement. Not only does Ross Pharmaceuticals fail to assert that status, but it can be concluded from intention of the parties that the PCL Agreement speaks against it. As the latter is explicit in not creating direct and forcible rights in favour of a third person, Ross Pharmaceuticals cannot avail itself of the A. Agreement.

2. There is no Consent to Join from Ross Pharmaceuticals

12 The foundation of any arbitration is in its consensual process that requires the agreement of the parties [*Moses, p. 35; The Rice Company (Suisse), S.A. v. Precious Flowers Ltd.*]. Likewise, national courts uniformly hold that *arbitration is a creature that owes its existence to the will of the parties alone* [*Born, p. 251*]. The parties' consent not only limits an arbitrator's power on deciding only issues within the scope of the parties' agreement [*Moses, p. 2*], but further prevents arbitral proceedings being used by third parties who are not a party to the arbitration agreement [*Mauro Rubino-Sammartano, p. 295*]. Thus, the main concern regarding joinder stems from the consensual nature of arbitration [*Poudret/Besson, p. 239; Geisinger/Voser, p. 350*]. The consent of the parties to hear cases within the single set of proceedings can be either expressed, implicit or by reference to the arbitration rules in the arbitration agreement [*Hanotiau, p. 107; Bartsch/Petti, p. 57; Born, p. 1427*]. On that point, CLAIMANT maintains that there is no consent to join from Ross Pharmaceuticals. On the contrary, RESPONDENT NO. 2 was involved in the procedure by its own will from the beginning, not objecting to the jurisdiction of the Tribunal. There can be no doubt that the latter is in the procedure by its own will, while dragging Ross Pharmaceuticals into proceedings would be contrary to the fundamental rules of arbitration.

13 Firstly, pursuant to Art. 4(2) of the Swiss Rules, the arbitral tribunal shall decide on request of joinder after consulting with all of the parties, including the person to be joined. That article, however, cannot be a substitute for the consent of the third person [*Bärtsch/Petti, p. 64; Voser, p. 396*]. As RESPONDENTS in the present case have submitted a request for joinder of Ross Pharmaceuticals into arbitration proceedings, the latter was asked to declare its willingness to join. In its declaration it was indicated that Ross Pharmaceuticals is not willing to participate in this arbitration [*Letter by Fasttrack, p. 24*]. The latter was confirmed by the Swiss Chambers' Arbitration Institution [*Letter by SCAI, p. 37*]. This leaves no doubt that Ross Pharmaceuticals explicitly objected to join into these arbitration proceedings. Although the issue of *forced joinder* has not yet been addressed by Swiss courts or arbitral tribunals, general consent to Swiss Rules is insufficient to constitute consent to joinder in accordance with rules generally applicable [*Born, p. 2600-2601*]. Allowing joinder of a 'true' non-consenting party (rather than a mere non-signatory) would be described as '*anathema to the internal logic of consensual arbitration,*' as stated in a case [*PT First Media TBK* v. *Astro Nusantara International BV*]. In reflection of this idea, Ross Pharmaceuticals as a true non-consenting party cannot be dragged into these arbitration proceedings.

14 Secondly, an entity may become a party to a contract, including an arbitration agreement, impliedly – typically, either by conduct or nonexplicit declarations, as well as by express agreement or formal execution of an agreement [*ICC Case No. 5721; E. Holding v. Z Ltd.*]. Even if the Tribunal would consider explicit objection of Ross Pharmaceuticals as insufficient, no implied consent was given either. The latter focuses on the parties' true intentions, which can be seen especially through three specific elements. The first one covers non-signatory participation in contract formation or negotiations, sometimes linked to confusion created by mention of the non-signatory in contract documents [*Park, p. 8*]. It is widely recognised that a party's formal execution of the underlying contract carries consent to the arbitration agreement [*Born, p. 1430; Moses, p. 38; Judgment of 28 November 1989*]. Courts have on numerous occasions denied an extension of the arbitration agreement to a non-signatory because of the absence of involvement at the time of the contract formation or at the time negotiations took place [*ICC Case No. 7155; Ad Hoc Final Award of 24 August 2011; ICC Case No. 6519; ICC Case No. 4504; Award in Geneva Chamber of Commerce of 24 March 2000*]. The PCL Agreement was based on a template of a Collaboration and License Agreement which had been used by RESPONDENT NO. 2 on other occasions. That, however, does not include Ross Pharmaceuticals in participation of its formation, nor on further negotiations, as those yet again took place only between the parties of the PCL Agreement. The Tribunal should deny

extension of the A. Agreement to Ross Pharmaceuticals because of the absence of its involvement at the time the PCL Agreement, as well as the A. Agreement, was concluded.

15 Same approach was taken regarding the extension of the arbitration agreement in the conclusion, performance and termination of the contract in dispute [*ICC Case No. 9771; ICC Case No. 6000; Air Line Pilots Ass'n Int'l v. US Airways Group Inc.*]. When a third party does not involve itself deeply enough in the contractual relationship, an arbitration clause cannot be assigned, taken over, transferred or simply become binding for that third party [*4A_128/2008*]. Swiss commentators and tribunals conclude that a third party is bound by the arbitration agreement particularly, if it has accepted substantial benefits under and intervened in performance of the relevant agreement [*Poudret/Besson, p. 289; Schwab/Walter, p. 7-36; 4P.48/2005*]. The Swiss Federal Tribunal stated: "*The legal basis of extension of the arbitration clause to a non-signatory third party is found in the international trade usages, pursuant to which the non-signatory's participation in the conclusion or performance of the contract is the decisive element*" [*4P.115/2003*]. Involving deeply or intervening in performance would in the present case mean that the assumption of an obligation from Ross Pharmaceuticals carries the transfer of accessory rights from the obligor to the party assuming the obligation. Ross Pharmaceuticals does not derive any rights from the PCL Agreement nor is actively involved in its performance or conclusion. On said grounds, exception of privity to a contract does not justify an extension of the A. Agreement to Ross Pharmaceuticals as an individual, who had not signed it.

16 The second element, on which implied consent could be seen, covers a single contract scheme constituted by multiple documents [*Park, p. 8*]. That would be the case if two (or more) documents taken together would constitute the original writing [*Alfred McAlpine Construction Ltd v. R.M.G. Electrical*]. The court has for example extended an arbitration clause based on consent, manifested by inconsistent designation of the party contracting on behalf of the non-signatory in a series of contracts [*ICC Case No. 1434; 4A_376/2008*]. Similarly, in one case, multiple contracts were found to constitute a single contractual relationship, which justified the extension of the arbitration agreement [*ICC Case No. 8910*]. Without a doubt, the PCL Agreement is a complete and uniform contract, which can be deduced from its wording in Art. 15 [*Ex. C3, p. 16*]. It does not form a part of the Ross Agreement, nor is the latter considered as a contract scheme that would, together with the PCL Agreement, represent a single contractual relationship. The Tribunal, therefore, has no other option but to deny the extension of the A. Agreement.

17 Arbitral awards in general have also held that merely incidental involvement in contractual performance is insufficient to constitute consent to the underlying contract [*Born, p. 1428*]. Therefore, third specific element covers implied or express acceptance of the arbitration agreement by the non-signatory, whether in the particular arbitration itself or in another forum [*Park, p. 8*]. Contrary to the [*ICC Cases No. 7604 & 7610*], where a non-signatory admitted its acceptance of the arbitration agreement, the Tribunal in the present case, in accordance with all the above, has no reason to rule in a similar manner. Ross Pharmaceuticals gave an explicit refusal to participate in this particular arbitration, and following the circumstances of the case, no acceptance in another forum was given either.

18 To conclude, the tribunal should in practice exercise its broad discretion under Art. 4(2) of the Swiss Rules in a restrictive way [*Moses, p. 35*]. It is widely accepted that in arbitration, the joinder of any form of participation of a third person which is not a party to the arbitration, requires the consent of all the parties concerned, especially of the person to be joined [*Bärtsch/Petti, p. 67*]. Some commentators consider Art. 4(2) of the Swiss Rules as far-reaching as to the extent, that none of the parties can object if a third person is willing to join the proceedings [*Gilliéron/Pittet, p. 11-12*]. Even if the Tribunal would in the present case share as far-reaching view as stated above, Ross Pharmaceuticals as a third person is not willing to join these proceedings. Carefully considering not only its explicit objection to join, but the lack of its implicit consent as well, the Tribunal has no other option but to deny joinder.

2. Piercing the Corporate Veil doctrine cannot apply

19 A party who has not assented to a contract containing an arbitration agreement may nonetheless be bound by it if that party is an *alter ego* of an entity that did execute, or was otherwise a party to, the agreement [*Pimm*]. The alter ego doctrine as non-consensual theory for binding a non-signatory is in many English language contexts referred to as *piercing* or *lifting* the *corporate veil* [*Born, p. 1432*]. As a general matter, a parent-subsidiary relationship is not sufficient to bind a non-signatory to an arbitration agreement [*Moses, p. 39*]. Such assumption requires that a party exerts complete and exhaustive control over another party with respect to the transaction at issue and has misused such control to such extent that it may be appropriate to disregard the separate legal forms of the two parties and treat them as one entity [*Eisele/Livschitz/Vogt*]. Demonstrating an *alter ego* relationship therefore requires convincing evidence that one entity dominated the day-to-day actions of another and/or that it exercised this power to work injustice or inequity on a third party or to evade

statutory or other legal obligations [*Born, p. 1432-1433*]. CLAIMANT maintains that Roctis does not comply with conditions to pierce the veil of RESPONDENT NO. 1.

20 Although 100 % subsidiary of Roctis, RESPONDENT NO. 1 is legally independent and takes all decisions relating to its day-to-day business without any involvement of its parent company. RESPONDENT NO. 1 was neither involved in the discussions concerning the scope of Ross Agreement nor positively knew about them as these were conducted first by RESPONDENT NO. 2 and then taken over by Roctis [*PO2, p. 53*]. It should be emphasized that Swiss courts and tribunals applying Swiss law are resolutely committed to the legal independence of the subsidiary in relation to the parent company [*Swiss Federal Tribunal Judgement of 16 October 2003; Swiss Federal Tribunal Judgement of 29 January 1996; Swiss Federal Tribunal Judgement of 1 September 1993; Ad Hoc Award in Geneva of 1991*]. Corporate personality will therefore only be disregarded, where the fact of resorting to such a subsidiary to escape one's obligations would amount to fraud or to a patent abuse of right [*Born, p. 1434; Poudret; Ad Hoc Interim Award of 9 September 1983; Swiss Federal Tribunal Judgment of 24 November 2006*]. Same approach was adopted by other courts [*Acatos & Hutcheson plc. v. Watson; Dadourian Group Int'l Inc. v. Simms; German Bundesgerichtshof Judgement of 25 September 2003; German Bundesgerichtshof Judgement of 10 December 2008; Orri v. Société des Lubrifiants Elf Aquitaine; InterGen NV v. Grina*]. There is no evidence in the present matter regarding fraudulent or wrongful behaviour of RESPONDENTS that would lead to misuse of the privileges of legal personality.

21 In conclusion, RESPONDENT NO. 1 is legally independent, taking all decisions relating to its day-to-day business without any involvement of Roctis. Furthermore, there is no evidence that the latter has misused its control as a parent company with respect to the transaction at issue. Therefore, no protection of a third person such as creditor or purchaser needs to be resorted to. Neither RESPONDENT NO. 2 as a party to the Ross Agreement nor Roctis can be considered as an *alter ego* of RESPONDENT NO. 1. The Tribunal should resolutely commit to its legal independence. As such, this arbitration procedure lacks a legal base for bounding Ross Pharmaceuticals to the A. Agreement.

4. In case of a permitted Joinder it cannot be ensured that Ross Pharmaceuticals would not obtain and use certain Confidential Information

22 Confidentiality is widely lauded as one of the major benefits of arbitration that prevents uninvolved third parties from intruding into the parties' confidential (sensitive) information [*Rajoo, p. 56*], reducing the risks of damaging disclosure to competitors [*Born, p. 2781*]. It assists in the effective, efficient resolution of international disputes, and which must be given

legal effect [*Hanotiau, International Arbitration; Knahr/Reinisch; La Spada/Zuberbühler/Müller/Habegger*]. The arbitral tribunal must therefore examine, whether the other party, in the present case CLAIMANT, has any legitimate interests in limiting the arbitration only to the contract partners [*Schramm, p. 5*].

23 Parties in the present case included specially-drafted confidentiality provision in the underlying commercial PCL Agreement, providing disclosure of confidential information only under applicable law [*Ex. C3, p. 15*]. 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*]. Art. 44(1) of the Swiss Rules contains relatively broad confidentiality provision [*Born, p. 2802*]. The text clearly applies confidentiality obligation to persons, stated in the aforementioned article. However, persons not mentioned in the Art. 44(1), such as witnesses and party-appointed experts, are not bound by it [*Jenny, p. 2*]. Ross Pharmaceuticals could in case of a permitted joinder as CLAIMANTS competitor take advantage of confidential information especially through witnesses and experts and use it in further stages, considering its pre-clinical phase of vaccine, while CLAIMANT announced the start of a Phase-III-trial for mid-December 2020 [*PO2, p. 55*].

24 To conclude, Art. 44(1) of the Swiss Rules cannot sufficiently ensure that Ross Pharmaceuticals in case of a permitted joinder would not obtain and use confidential information as persons not mentioned in the aforementioned article are not bound by duty of confidentiality. The Tribunal would therefore not be able to ensure that certain sensitive information does not reach CLAIMANTS competitor or that Ross Pharmaceuticals does not use sensitive information in its advantage in further stages of a vaccine development.

5. Permitted joinder would bring into question the Recognition and Enforcement of the Final Award

25 Legal systems, permitting non-consensual joinder, including the Swiss Rules under Art. 4(2), are all considered as exceptions to the general recognition of the party autonomy. The approaches that these jurisdictions adopt are contrary to the New York Convention (hereinafter: NYC) [*Born, p. 2570*]. It cannot be implied that the parties have accepted the possibility of consolidation (or joinder) because they have selected the place of arbitration in a country where the law provides for that possibility [*Jarvin*]. If the tribunal would permit joinder without its jurisdiction or consent of the parties, especially the third person to be joined, the award would go outside the scope of the arbitration agreement, raising serious questions about its recognition and enforcement [*NYC, Art. II & V(1)(c)*]. Similar language

is found in the laws and rules of many states and arbitral institutions [*Strong, p. 988*; *Redfern/Hunter; UNCITRAL Model Law, Art. 36(1)(a)(iii)*].

26 Art. V(1)(c) of the NYC addresses that the basic requirement of arbitration is based on the parties' consent [*Born, p. 3542*]. The arbitral tribunal is therefore, outside its prescribed limits, as impotent as a morning mist [*Case of the French Company of Venezuelan Railroads*]. As cited in *Frères v. Roger*, "*the arbitrators can only arbitrate on what was asked to them*". Same opinion was held in *4A_440/2010*. RESPONDENTS insist on joinder of Ross Pharmaceuticals to these proceedings only to determine conclusively the scope of the exclusive license granted in the Ross Agreement [*ANA, p. 28*]. The aforementioned scope of the exclusive license in no way affects or solves the settlement of the dispute between CLAIMANT and RESPONDENT NO.1. Dragging Ross Pharmaceuticals to these proceedings to resolve the issue, arising from the Ross Agreement, would exceed the scope of the A. Agreement. Arbitration cannot be used as a toll to resolve all possible disputes that some parties may have with the third person. On said grounds, Art. V(1)(c) of the NYC would be applicable.

CONCLUSION ON ISSUE I

27 The Tribunal should determine that Ross Pharmaceuticals as a third person cannot join these proceedings pursuant to Art. 4(2) of the Swiss Rules. Any decision to the contrary would breach the principle of privity of a contract, as Ross Pharmaceuticals is not in a position to become a party of the procedure. Furthermore, these is no consent to join from a third person and the piercing of the corporate veil doctrine as non-consensual theory cannot apply. As confidentiality is of paramount importance for the Parties, it cannot be ensured, in case of a permitted joinder, that Ross Pharmaceuticals would not obtain and use certain confidential information. For the reasons stated above, permitted joinder would lead to the application of Art. V(1)(c) of the NYC for the final award.

ISSUE II: THE EXAMINATION OF WITNESSES AND EXPERTS SHOULD BE CONDUCTED REMOTELY

28 The RESPONDENTS strongly object to holding any hearings remotely, in particular, if they involve the taking of evidence. They allege, *inter alia*, that the A. Agreement provides for a hearing in person, that the Swiss Rules are rooted in the assumption that a hearing in person will be held, and that Danubian Procedural Law allows no exceptions from personal hearings. CLAIMANT, to the contrary, does not object a virtual hearing and will demonstrate that the Tribunal has the necessary discretion to order remote hearings. Not only have RESPONDENTS given their subsequent consent regarding the venue of proceedings **(1.)**, the

Swiss Rules are not rooted in the assumption that a hearing in person will be held **(2.)** and the Procedural code of Danubia allows remote hearings as an exception for health reasons **(3)**. Furthermore, remotely held examination does not violate the right to be heard or the duty of equal treatment of the Parties **(4.)** and the principle of immediacy is not jeopardized in the case of virtual hearings **(5.)**. Finally, the dispute can be settled on the basis of the Parties' written submissions **(6.)**.

1. RESPONDENTS gave their Subsequent Consent regarding the Venue of Proceedings

29 The venue is the place where the arbitral proceedings are to be held [*Rubino-Sammartano, p. 563*]. In some situations, it may become necessary to change the venue, expecting the parties and the arbitrators to agree on the need for a change [*Rubino-Sammartano, p. 569*]. The parties concluded in the A. 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*]. CLAIMANT maintains that although RESPONDENTS at first objected the possibility of a remote hearing, insisting the latter to be against the A. Agreement, subsequent consent was given after the telephone conference of 8 October 2020. The Tribunal took note that both Parties agreed: *"/…/ that, in case a hearing in person will not be possible, depending on the decision of the Arbitral Tribunal, the hearing will either take place remotely or will be postponed to a date to be fixed later/…/"* [*PO1, p. 51*]. In the absence of the parties' agreement, the arbitral tribunal has a wide discretion as how to conduct the proceedings, providing it a liberal framework to suit the great variety of needs and circumstances of cases [*Born, p. 2181*]. On that point, obtained consent of RESPONDENTS afterwards gives the Tribunal full discretion to allow examination or hearing of witnesses and experts in the 2nd Hearing of 3 to 7 May 2021, to be conducted remotely.

2. The Swiss Rules are not Rooted in the Assumption that a Hearing in Person will be held

30 CLAIMANT objects to RESPONDENTS' allegations, that the Swiss Rules are based on the assumption that a hearing in person will be held, which is in their opinion evidenced by Art. 25(4) of the Swiss Rules [*Letter by Fasttrack, p. 49*]. With regard to the method of examination, the aforementioned article provides that the arbitral tribunal is free to determine the manner in which witnesses or experts are to be examined [*Zuberbühler/Müller/Habegger, p. 282*], including by videoconference. This broad flexibility allows the arbitral tribunal to determine the appropriate procedure in each case [*Lévy/Reed, p. 633-644; Born, p. 1789-1792*]. Remote hearings are nothing new, but the COVID-19 crisis has forced international arbitration out of its comfort zone [*Scherer, p. 1*]. Therefore, COVID-19 gave a great push towards virtual hearings, but the discretion/authority of the arbitral tribunals to do so was always there.

3. The Procedural Code of Danubia Allows Remote Hearings as an Exception for Health Reasons

31 The procedural code of Danubia is based on the assumption that judges, parties and witnesses are personally present during the hearing [*PO2, p. 57*]. However, requirement of domestic law for a physical hearing is not applicable as such in international arbitration [*Scherer, p. 15*]. In light of the pandemic, the Danubian legislator stipulated 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. The only exceptions foreseen regarding public interest are that the witness is unable to participate in the hearing for health reasons. In such case, the examination may be conducted at any place convenient for the witness [*PO2, p. 57-58*].

32 In the course of the COVID-19 pandemic, many national courts had to innovate and move towards remote hearings. If national courts therefore consider remote hearings as sufficient guarantees for procedural rights in a national context, it will be difficult for the same courts to hold that remote hearings in international arbitration violate the parties' right to be heard [*Scherer, p. 15*]. Courts around the world have taken the approach that a justifiable reason needs to exist for excusing the physical presence during the hearing [*Islamic Republic of Pakistan v. Republic of India; Vivendi Universal v. Republic of Argentina*]. It is necessary to emphasize that in the present case some participants do not feel comfortable travelling if the situation does not change until the hearing and it cannot be excluded that there might be a travel ban at the time of the hearing [*PO2, p. 57*]. To conclude, virtual hearings are therefore required by public interest, as witnesses would be unable to participate for health reasons, connected with the COVID-19 pandemic.

4. Remotely held Examination does not Violate the Right to be Heard or the Duty of Equal Treatment of the Parties

33 Unless the parties agree otherwise, the arbitrators are free to organize the hearings as they see fit, subject only to compliance with the principles of due process and equal treatment of the parties [*Fouchard, p. 706; Born, p. 2163-2164*]. Equal treatment of the parties implies that the proceedings must be organized and conducted in such a way that each party has the same possibilities to present its case, treating them in the same way at all stages of the proceedings [*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*]. The latter includes the right

to express its views on the facts essential for the decision, to submit arguments, to propose evidence on pertinent facts, and to participate in the arbitral hearings [*4A_600/2010*]. If it is considered to be necessary for deciding the case, remote hearings, scheduled for 3 to 7 May 2021 do not violate the right to be heard or the duty of equal treatment of the parties.

34 Firstly, Art. V(1)(b) of the NYC provides grounds to challenge awards for a violation of a party's right to equal treatment or its right to be heard [*NYC, Art. V(1)(b); Chrome Resources S.A. v. Leopold Lazarus Ltd.*]. A decision in *Case No. 18 ONc 3/20s* rendered in the context of the COVID-19 pandemic, is the first national supreme court's decision worldwide addressing the issue of remote hearings [*Scherer I*]. In the latter, respondents challenged the arbitral tribunal over its decision to conduct an evidentiary hearing remotely by videoconference, claiming among others that the arbitrators failed to consider different time zones between the parties. The Austrian Supreme Court rejected respondents' challenge, stating that videoconferencing technology (both for the taking of evidence and the conduct of hearings) is widely used in judicial proceedings before state courts, that being also relevant for arbitral proceedings. It was expressly confirmed that remote arbitration hearings are not only permissible if both parties agree, but also over the objection of one of the parties, relying on Art. 6 of the European Convention on Human Rights, especially in circumstances like the COVID-19 pandemic. With regard to time zones, the court held that by concluding an arbitration agreement providing for VIAC arbitration, respondents had accepted the disadvantages resulting from the geographical distance to their place of business, including substantial travel and time differences [*Scherer I*].

35 Arbitral tribunals enjoy broad discretionary power in how to manage the arbitral proceedings and conduct hearings [*Berger, p. 415-435*]. Holding a hearing remotely falls within this prerogative of an arbitral tribunal and thus generally rests on safe ground [*Scherer II*]. If RESPONDENTS in the present case would oppose to remote hearings and challenge the award on said grounds, even though subsequent consent was already given, the approach, taken by Austrian Supreme Court, would be applicable by this Tribunal and courts as a useful guidance. Factual considerations in the present case favour remote hearings with even more urgency, as this is a dispute for the development of a vaccine against COVID-19, where time is of a crucial importance. Furthermore, the Tribunal already stated its awareness regarding time difference between the parties, which in case of a remote hearings would have to be addressed in the planning [*Letter by Sinoussi, p. 47*]. Even if the hearing could not take place during core business hours for all hearing participants, especially RESPONDENTS with Equatoriana being in UTC+8 time zone [*PO2, p. 57*], the latter agreed on such disadvantage.

Parties concluded an A. Agreement with the seat of arbitration in Vindobona, Danubia, accepting the disadvantages resulting from the geographical distance to their place of business, including substantial travel and time differences. Starting a remote hearing, including to acquire high quality technical equipment would therefore be less burdensome than having to travel for an in-person hearing. As for the cyber protection and data privacy, CLAIMANT is confident that the Tribunal will resolve RESPONDENTS concerns [*PO2, p. 58*] with efficient procedural orders, including using an online case management platform as a secure end-to-end platform for the entire arbitration. With sufficient lead-time and funds, the appropriate set-up can typically be organized, using professional help [*Scherer, p. 10*].

36 To conclude, in extraordinary circumstances like the COVID-19 pandemic, the Tribunal enjoys broad discretionary power to conduct remote hearings, notwithstanding the objection of one of the parties. Insisting on an in-person hearing would lead to a standstill of proceedings, while videoconferencing provides a useful tool to ensure both effective access to justice and the right to be heard. Furthermore, the Tribunal considered different time zones between the parties, while cyber protection and use of a quality technical equipment can be easily resolved, not violating the right to be heard or the duty of equal treatment of the parties.

5. The Principle of Immediacy is not Jeopardized in the case of Virtual Hearings

37 In the course of the current situation, the courts have already stated that, where achievable, *the wheels of justice should keep turning at their pre-crisis rate* [*Heineken Supply Chain BV v Anheuser-Busch Inbev SA*], which should *mutatis mutandis* apply to arbitration proceedings. The best possible way to do so is by using technological solutions that allow remote hearings. Provided the quality of transmission is good and the remote set-up appropriate, including large screens, the tribunal's ability to see and hear the testifying person is often better than in a physical hearing room [*Scherer, p. 9*]. Furthermore, courts around the world share the opinion that no disadvantage exists for the cross-examiner because of the virtual remoteness [*Commissioner of Taxation v. Grbich; Chandra v. CBC; Polanski v. Conde Nast Publications Ltd.*].

38 Even if some jurisdictions require that the judge should obtain an 'immediate' impression of evidence in an oral hearing, the principle of immediacy does not apply, as such, in international arbitration [*Schwarz/Ortner; Ivanc*]. It is of a crucial importance for CLAIMANT to resolve the present dispute as soon as possible, considering its start of a Phase-III-trial for mid-December 2020 in conducting research on a vaccine [*PO2, p. 55*]. The latter cannot be manufactured on the market unless this dispute has been previously resolved. Therefore, postponement of the hearings to a date to be fixed later would not only be to the detriment

of CLAIMANT but also to the detriment of the public interest, as the search for a COVID-19 vaccine and its subsequent manufacture is primarily for the benefit of public health.

6. The Dispute can be Settled on the basis of the Parties' Written Submissions

39 It is often remarked in arbitration that documentary evidence is 'preferred' or of superior weight to witness evidence [*Born, p. 2256*]. It may be said that evidence in written form is the rule and direct oral evidence the exception [*Sandifer*]. In Swiss Arbitration Law, the arbitrators can decide to dispense with hearings and reach their decision on the basis of the parties' written submissions without violating due process [*Fouchard, p. 706*]. Where the arbitrator has the discretion to have an oral hearing but chooses not to do so, the ultimate award cannot be attacked simply on the ground that the failure to demand oral evidence contravenes the rules of natural justice [*Rajoo, p. 423*]. In case *4A_65/2018* the Swiss Federal Tribunal declared that an arbitral tribunal may refuse to allow evidence without violating a party's right to be heard where the arbitral tribunal is satisfied that further evidence can no longer modify its view. On that point, CLAIMANT maintains that the present case involves primarily legal questions without the need to hear any witnesses or experts remotely on the largely uncontested facts. Considering Art. 15(7) of the Swiss Rules to "*avoid unnecessary costs and delays*," the Tribunal can reach a satisfying conclusion with the provided documents only.

CONCLUSION ON ISSUE II

40 The Tribunal should exercise its broad discretion and conduct the examination of witnesses and experts remotely, taking into consideration the subsequent consent of RESPONDENTS. The Swiss Rules are not rooted in the assumption that a hearing in person will be held and there is an exception on remote hearings for health reasons pursuant to the Procedural code of Danubia. No procedural right or principle of the Parties is violated with remote hearings. Lastly, the Tribunal can reach a satisfying conclusion on the basis of the Parties' written submissions, without the need to hear any witnesses or experts remotely.

ISSUE III: THE CISG IS APPLICABLE TO THE PCL AGREEMENT

41 RESPONDENT NO. 1 and RESPONDENT NO. 2 are both 100 % subsidiaries of Roctis, the holding company of the 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 - viral vectors, based on a gorilla (GorAdCam) and chimpanzee (ChAdCam) adenoviruses, who both have high potential for the development of vaccines against several infectous respiratory diseases (as it turns out, GorAdCam viral vector's potential is not only in the field of malaria). In 2018, immediately after the acquisition, RESPONDENT NO.

2 entered into an exclusive license agreement for the GorAdCam viral vector with RESPONDENT NO. 1 [*Ex. C3, p. 13, §5.2*]. In the following year, RESPONDENT NO. 1 sublicensed the vector to CLAIMANT. On 1 January 2019, RESPONDENT NO. 1 and CLAIMANT 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 of a Collaboration and License Agreement, which had been used by RESPONDENT NO. 2 on other occasions, however there were some peculiar and uncommon changes added - mostly purchase obligations of CLAIMANT. In case of the commercialization of the vaccine, the additional feature in the new Section 16 of the PCL Agreement obliges CLAIMANT to buy the HEK 294-cells and cell growth medium from RESPONDENT NO. 1 [*NA, pp. 5,6*]. Both HEK 294-cells and cell growth medium 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*].

42 The PCL Agreement contains, *inter alia,* a choice of law clause that should render CISG applicable to the present dispute. The Parties have agreed that the law governing the PCL Agreement shall be the substantive law of Danubia [*Ex. C3, p. 16, §15.2*], which encompasses general contract law of Danubia, being a verbatim adoption of the UNIDROIT PICC and CISG [*PO1, p. 52*]. However, RESPONDENT'S NO. 1 and NO. 2 deny the applicability of CISG, stating that the PCL Agreement, despite its name, is no contract of sales, but merely a license agreement, which is why it falls outside the scope of application of CISG as defined by Arts. 1-6 CISG [*ANA, p. 28, §19*]. It is of initial importance that the Tribunal first decides which law governs the concluded agreement.

43 Contrary to RESPONDENT'S allegations, CLAIMANT will demonstrate that CISG governs the PCL Agreement, since it corresponds a sales contract in sense of Arts. 1-6 CISG. CLAIMANT contends that the PCL Agreement is a contract for the sale of goods since all the prerequisites in Art. 1(1) CISG are met and it was the intent of the Parties to conclude a sales contract **(1)**. If the Tribunal finds that the PCL Agreement is not a contract for the sale of goods it should nevertheless apply CISG, considering the agreement as a mixed contract that includes the standard sale elements along with collaboration and license agreement all the while the purchase clause in Art. 16 of the PCL Agreement forms its preponderant part **(2)**.

1. The PCL Agreement is a Sales Contract

44 A sales contract is a reciprocal contract, directed at the exchange of goods against amount of money [*Schlechtriem/Schwenzer, p. 31, §8; Hubner/Mullis, p. 43; Winship case; Software case*]. CISG

does not expressly stipulate its own definition of a sales contract, yet such nature of an agreement is an essential precondition for the application of CISG. Seeing how CISG will only apply to a particular transaction if it is a contract for the sale of goods, CLAIMANT will show that the Parties to the PCL Agreement agreed to a sale of 'goods' pursuant to Art. 1(1) of CISG **(a)** and that it was always the intent of the Parties to conclude a sales contract **(b).**

a. The PCL Agreement is Considered a Contract of Sale of Goods pursuant to Art. 1(1) of CISG

45 While CISG does not expressly define a sales contract, it clearly stipulates territorial prerequisites for its use in Art. 1(1)(a) and (b) CISG. The territorial prerequisites that determine the international nature of an agreement are both looked into at the time of the conclusion of the contract. The first precondition under Art. 1(1) CISG is that a sales contract parties have places of business in different states and the second one that these states are both contracting states to CISG [*Brunner/Gottlieb, p. 184, §8*; *Schlechtriem/Schwenzer, p. 39, §28; Ziegel, p. 62*]. With RESPONDENT's NO. 1 place of business in Oceanside, Equatoriana, and CLAIMANT's in Capital city, Mediterraneo, both states being signatories to CISG, the preconditions stated are fulfilled. Therefore, the international nature of the PCL Agreement is determined.

46 The additional (and essential) precondition that stems from Art. 1(1) CISG is that the contract in question relates to a sale of 'goods'. Again, the wording of CISG offers no substantial help in defining the term 'goods', since CISG does not contain the definition of 'goods' nor is it possible to deduce the meaning of the term by analysing different language versions of its articles or by studying the *travaux préparatoires* produced at the time of its negotiation [*Mowbray, §2.1.2.*]. The term 'goods', used in Art. 1(1) CISG, should be interpreted autonomously and the decisive criterion whether the subject of an agreement represents 'goods' in sense of CISG should be the rules' suitability on non-conformity. The term 'goods' covers new or used moveable, tangible objects, forming the commercial sales contract's subject-matter [*Schlechtriem/Schwenzer, p. 34, §16; Diedrich, p. 327*]. The GorAdCam viral vectors, acquired by CLAIMANT, are by nature both movable and tangible objects and they represent 'goods' pursuant to Art. 1(1) CISG, having also the nature of intellectual property. That fact, though, does not affect the nature of the PCL Agreement as a contract for the sale of goods in the present case.

47 Admittedly, IP rights are not considered 'goods' pursuant to Art. 1(1) CISG and their acquisitions are not governed by CISG. Nevertheless, when an object/item is a subject of intellectual or property rights, their recognition as 'goods' in a contract is not influenced by it; regardless if the intellectual right is being held by third party or being sold along objects

[*Schlechtriem/Schwenzer, p. 36, §22, Brunner/Gottlieb, p. 29, §3; Kiraz, p. 16; Zamir, p. 374*]. A rising number of goods, possessing either intellectual property-protected component or being a subject of intellectual property rights as a whole, can become a subject to sales agreements as a result of interaction between IP rights and tangible goods [*Kiraz, p. 16*]. As an example, CISG governs sales of books and compact disks despite their intangible content being protected by an intangible property right [*Enderlein/Maskow, p. 76*]. Therefore, even though GorAdCam viral vectors are subjects of IP rights, they are also a commercial sales contract's subject matter and, when purchased alongside vectors pursuant to Section 9.2 of the PCL Agreement, must still be considered as 'goods' under Art. 1(1) CISG.

48 According to the stated above, the PCL Agreement is indeed a contract for the sale of goods since the agreement allows the sale of items (viral vectors) that can be considered as 'goods' under CISG for the purchase price of 2.500,000 EUR and determines an additional purchase obligation for CLAIMANT.

49 Additionally, CLAIMANT contends that the fact that CISG was not explicitly mentioned in the PCL Agreement does not mean that its application was excluded. Quite the opposite, the parties to an agreement need to affirmatively provide that CISG shall not govern their contract or exclude the applicability of certain articles of CISG [*Nielsen, p. 1; Roser Technologies case; Case BP oil international; Case American Mint LLC v. GOSoftware, Inc.*]. Therefore, if CLAIMANT'S and RESPONDENT NO. 1'S intent were to exclude CISG, the PCL Agreement would have to contain the explicit prohibition of applicability of CISG to the agreement. The Parties, however, can decide on the applicability of CISG by choice of law which should govern their agreement [*Battery machinery case*], as they did in the present case, choosing the Danubian law. The applicability of CISG to the PCL Agreement was therefore not implicitly excluded but rather indirectly included by the choice of governing law.

b. The Intention of the Parties was to conclude a Sales Agreement

50 When deciding on the nature of the PCL Agreement, the Tribunal should also analyse the wording of the PCL Agreement and all relevant circumstances of the situation in line with Art. 8 CISG to determine the true intent of the Parties when concluding the agreement. Therefore, it should analyse the scope of contractual obligations through the 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*]. The underlying principle of Art. 8 CISG is the identification of the "true intent" of the parties, determined through consideration of all the facts

and circumstances surrounding the case [*CISG Advisory Op. No. 3, §4.5; Ziegel/Samson; Farnsworth p. 97; Lookofsky; Zeller (2002); Chinchilla fur case*]. Interpretation of statements, conduct of parties, intent and circumstances before conclusion of the contract are all relevant under Art. 8 (1) CISG [*Honnold, p. 116; Propane case*]. If Art. 8(1) CISG is not applicable, Art. 8(2) CISG further determines that statements are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances [*Farnsworth, p. 97; Murray, p. 40; Egg case; Health care products case; Rubber sealing parts case; Roder case*]. A reasonable person would consider all the relevant circumstances of the case and would therefore be objective [*Honsell, Art. 18, §§ 28-29; Auto case*].

51 Pursuant to Art. 8(1) CISG it is sufficient to determine that a seller was aware of the buyer's intent, if a reasonable seller could discern the intended purpose of goods from all the relevant circumstances of the case [*Eörsi, pp. 2-19; Enderlein/Maskow/Strohbach, Art. 35, §11; CSS case; Machinery case; Tantalum case; MCC-Marble case; Flechtner*]. Statements along with other conducts of a party are to be interpreted subjectively per Art. 8(1) of CISG [*Textiles case; Egg case*], in line to its intent where the other party knew or could not have been unaware of other party's intent [*Roser Technologies, Inc. case; Propane case; Corporate Web Solutions Ltd. case*].

52 Pre-contractual negotiations are relevant especially when interpreting the parties' intent when concluding a contract [*CISG Advisory Op. No. 3, §1.2.3; Lookofsky p. 55; Marzipan case, Fashion products case; Schlechtriem/Schwenzer, p. 152, §13*]. In the present case, contractual negotiations started in December 2018 between representatives of the Parties. RESPONDENT NO. 1'S biological engineer Ms. Jones initially suggested a standard template contract that RESPONDENT NO. 1 had previously used for its costumers for contract manufacturing. However, after closer examination, the Parties came to a conclusion that this draft was not suitable. Therefore, RESPONDENT NO. 1 provided a new draft of the PCL Agreement that included a purchase clause for base production materials - HEK-294 cells and cell culture media [*PO2, pp. 55, 56, §24*]. That draft was adopted in the PCL Agreement.

53 CLAIMANT did not contest the inclusion of the purchase clause, which was drafted by RESPONDENT NO. 1, since it was aware of its importance for the latter [*Ex. R2, p. 31, §13*]. RESPONDENT NO. 1 was the one who insisted on the inclusion of the purchase clause and added production provisions in the draft. On that point, its actions indicate that its primary interest was not sublicensing, but rather an actual sale of HEK-294 cells and cell culture media to CLAIMANT. The motive behind such an inclusion of the purchase clause in the PCL Agreement is purely economic. Months before the conclusion of the PCL Agreement,

RESPONDENT NO. 1'S CEO Ms. Flemming has already publicly pointed out that the main goal of the company is to produce base materials or even vaccine itself for smaller vaccine producers that do not have the necessary know-how and technical equipment to 'breed' the GorAdCam vector [*Ex. C2, p. 10*]. When the vaccine for COVID-19 is developed, CLAIMANT will require a minimum of 100 batches of the growth medium and HEK-294 cells annually [*PO2, p. 53, §5*], meaning RESPONDENT NO. 1 would make at least 40.000,000 EUR per year [*PO2, p. 59; Ex. R2, p. 31, §12*] just by selling these essential materials for further production of the vaccine to CLAIMANT. That was certainly a sufficient incentive for RESPONDENT NO. 1 to insist that the PCL Agreement should include a purchase clause, *i.e.,* a sale element.

54 The importance of the clause is further shown by the fact that the inclusion of the purchase clause that obliges CLAIMANT to buy HEK-294 cells and cell culture media from RESPONDENT NO. 1 was a prerequisite for CLAIMANT to use and exploit the Licensed Technology. CLAIMANT's main agenda is to produce vaccine for COVID-19 and to attain this goal, CLAIMANT must first complete the research of the GorAdCam vector and then achieve the approval for the vaccine, which must be manufactured in the required quantities [*Ex. C2, p. 10*]. For CLAIMANT to accomplish the goal of producing the vaccine for COVID-19, it needs to acquire the most essential materials – HEK-294 cells and cell culture media, which are needed for the growth of the GorAdCam viral vectors. If CLAIMANT would not be able to acquire these base production materials from RESPONDENT NO. 1, it would be impossible for it to produce and manufacture products from GorAdCam vector, such as the vaccine for COVID-19, let alone sell the vaccine to consumers [*Ex. C2, p. 10*]. The negotiation process that is clearly reflected in the wording of the PCL Agreement therefore shows that the purchase clause was a preponderant part of the PCL Agreement.

55 Furthermore, RESPONDENT NO. 1 does indeed have the necessary know-how, needed for the production of greater quantities of adenovirus vectors under GMP-conditions, being one of the leading contract production companies [*Ex. C2, p. 10, §17*]. However, the only way RESPONDENT NO. 1 has contributed to CLAIMANTS research was with the delivery of GorAdCam viral vectors [*PO2, p. 55, §17*]. There was no other obligation for the transfer of know-how under the PCL Agreement for RESPONDENT NO. 1. On the contrary, under the Ross Agreement, RESPONDENT NO. 1 was also under obligation to have two leading researchers attend meetings to transfer know-how, needed in developing the GorAdCam viral vectors [*PO2, p. 55, §21*]. In this regard, RESPONDENT NO. 1 is erroneous in its claim that the transfer of know-how is the most important part of its obligation under the PCL Agreement.

56 CLAIMANT additionally points out that the Parties purposely decided to rename the concluded agreement, based on a template previously used by RESPONDENT NO. 2, named only a "Collaboration and License" Agreement". They added the word "Purchase" and they primarily used this word, while "License" is placed last, which gives it minor significance in the formulation of the title of the agreement itself. Words used in the contract are also determinative to discover the parties' intention [*Hideo Yoshimoto case*]. The use of word in the title of the PCL Agreement shows that the license part of the PCL Agreement is subsidiary to the purchase clause.

57 Pursuant to Art. 8(2) CISG, the description (or rather the naming) of the contract is not determinative for the nature of the contract, but rather the understanding that a reasonable person would have had with regard to the contract [*Honnold p. 118; Case Roland Schmidt GmbH; Cooling system case; Roder case; Health care products case*]. A reasonable person would observe the contract as whole, not just reading isolated terms of the contract, but rather integrating these terms into the whole concept of the contract [*Schlechtriem/Schwenzer, p. 159, §30*]. Should a tribunal find that the subjective intent of the parties is not clearly evident from the formulation of the agreement, it should determine the true intent of the parties by applying an objective test in accordance with Art. 8(2) CISG [*Magnesium case*].

58 In the present dispute, the described negotiation process and the reasons on RESPONDENT NO. 1'S side for insisting on the purchase clause inclusion would have led any reasonable person to believe that the purchase part of the PCL Agreement is of crucial importance to the opposing party. A reasonable person would also conclude that the sales provisions are not included just in the purchase clause but also in other parts of the PCL Agreement, namely in the chapter milestone payments. This conclusion would arise from the fact that CLAIMANT is obliged to pay RESPONDENT NO. 1 a one-time upfront payment of 2.500,000 EUR in return for the delivery of the first batch of GorAdCam vectors and the non-exclusive access to Licensor's Licensed Technology [*Ex. C3, p. 13, §9.2*]. Additionally, it has to pay four more payments for the "Compound", which is connected to certain development and regulatory milestones in overall amount of 3.000,000 EUR [*Ibid, §9.4*]. Both payments of 2.500,000 EUR for first batch of GorAdCam viral vectors and a total payment of 3.000,000 EUR for reached milestones represent a purchase price for GorAdCam viral vectors and Licensed Technology.

59 To conclude, it is clear through objective consideration that the Parties' intention was to transfer ownership of the GorAdCam viral vector for a certain price. The Parties intent when concluding the PCL Agreement was therefore to conclude a sales contract.

2. CISG is applicable to the PCL Agreement even if it is considered a Mixed Contract

60 If the Tribunal finds that the PCL Agreement is not entirely a contract for the sale of goods, it should find it a mixed contract in the sense of Art. 3(2) CISG and conclude that CISG is nevertheless applicable. According to Art. 3(2) CISG, CISG applies to mixed contracts as well, *i.e.,* when the contract qualifies as a single contract and when the sale and purchase obligation is its preponderant part, governing all main and accessory contract elements [*Schlechtriem/Schwenzer, p. 70*].

61 Mixed contracts under Art. 3(2) CISG include sellers' obligation to supply goods and perform some kind of services on the one hand and buyer's obligation to pay for the goods to be manufactured along with supplying materials for their production on the other [*Schroeter, p. 75*]. In case legal elements of sale are being prevailed by other elements of the contract, the application of CISG must be denied [*Blood infusion devices case; Khoo, p. 42*]. To determine whether CISG applies to the PCL Agreement in case it is considered a mixed contract, the Tribunal needs to determine which part of it can be considered as the preponderant part.

62 In determining the preponderant part of the contract, the economic value criterion prevails [*CISG ACO No. 4, p. 12, §3.3; Schlechtriem II, p. 8; Perovi, p. 186*]. This criterion compares the value ratio of the delivered goods to the total of seller's obligations with the value ratio of non-sale elements [*Brunner/Gottlieb, p. 40, §8; Schroeter p. 77; Bonell/Liguori; Honnold (1999)*]. In the PCL Agreement, the delivery and sale of the GorAdCam viral vectors with an additional purchase obligation represent sale elements, while granting license and agreeing to collaboration form the non-sale elements of the agreement. The one-time upfront payment for first batch of vectors with the non-exclusive Licensed Technology access granted to CLAIMANT is 2.500,000 EUR and acquisition of at least 100 batches of the growth medium priced at 2.000,000 EUR per 2000 l batch from RESPONDENT NO. 1 are expected in case of commercialization of the vaccine for COVID-19 pursuant to Section 16.1 of the PCL Agreement [*PO2, p. 55, § 5*].

63 Collaboration under Research plan milestone payments is set for a total price of 3.000,000 EUR and royalties for annual net sales vary between 4-6%, depending on annual net sales [*PCL Agreement, p. 15*]. Considering up-front payment and predicted milestones according to which CLAIMANT will acquire more batches from RESPONDENT NO. 1, sales elements represent the majority by surpassing the 50 %. Since the value of sale elements formulates the preponderant part of the PCL Agreement by significantly exceeding 50 %, the economic criterion is fulfilled and the application of CISG to the PLC Agreement pursuant to Art. 3(2) CISG is justified.

64 Additionally, if the result of value ratios is not enough to establish the preponderant part of the contract, this can 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*]. Circumstances of the formation of the contract along with contractual documents must be taken into account when determining what contractual parties understood as the preponderant part of the contract - sellers' obligation to deliver goods or the services accompanying the delivery [*Cylinder case*]. In the PCL Agreement the Parties defined the sell and delivery of GorAdCam viral vectors as the main and most important subject of it [*Ex. R2, p. 31, §8*]. Stated above yet again shows that the sale elements form the preponderant part of the PCL Agreement.

65 In conclusion, since the economic value ratio of sales elements in the PCL Agreement exceeds 50 %, it can be governed under Art. 3(2) CISG. Further, by comparing and weighing individual obligations of the Parties under the PCL Agreement, CISG can apply, since the main contractual interest is transferring the ownership of first batch of GorAdCam viral vectors in exchange for price of 2.500,000 EUR. Therefore, the PCL Agreement, even if considered a mixed contract that includes sales elements, license agreement and an agreement on collaboration, is entirely governed by CISG.

CONCLUSION ON ISSUE III

66 Considering all formal prerequisites in Art. 1(1) CISG and the Parties intention when contracting the PCL Agreement, it can be concluded that the PCL Agreement is a contract for sale of goods and is entirely governed by CISG. Even if the PCL Agreement was considered a mixed contract, the purchase clause forms its preponderant part and CISG would still apply.

ISSUE IV: RESPONDENT NO. 1 BREACHED ITS CONTRACTUAL OBLIGATIONS BY DELIVERING NON-CONFORMING GOODS PURSUANT TO ART. 42 OF CISG

67 RESPONDENT NO. 1 and CLAIMANT concluded the PCL Agreement based on which CLAIMANT is granted the right to research, develop and subsequently produce vaccine against respiratory diseases including the necessary licenses [*Ex. C3, p. 13*]. During 2019, CLAIMANT recognized the potential of the GorAdCam virus as a vector for a future vaccine against the SARS-CoV-2, causing COVID-19. Thus, from early February 2020 onwards CLAIMANT concentrated its further research on a vaccine against COVID-19. The first results in April 2020 were very promising. However, on 1 May 2020, CLAIMANT's COO, Mr. Paul Metschnikow, read an article published in Biopharma Science that there was a dispute between Ross Pharmaceuticals and RESPONDENT NO. 2 as to the reach of the license granted to Ross Pharmaceuticals under the Ross Agreement in 2014 [*NA, p. 7, §19; Ex. C4, p. 19*].

68 Based on the published article CLAIMANT's COO became aware that RESPONDENT NO. 2 has 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*]. Due to this revelation, CLAIMANT'S use of the GorAdCam viral vectors to develop a vaccine against COVID-19, which is defined as a respiratory infectious disease, can be potentially restricted by an IP right of Ross Pharmaceuticals, to which RESPONDENT NO. 2 seems to have granted an exclusive license. 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 "*other infectious diseases"* against a 600.000,00 EUR payment made by Ross Pharmaceuticals [*PO2, p. 55, §20*]. Given the fact that the exclusive license on GorAdCam viral vector was granted to Ross Pharmaceuticals prior to the conclusion of the PCL Agreement, RESPONDENT NO. 1 has sold CLAIMANT non-conforming goods, which were not free from third party's right.

69 CLAIMANT is a small company with limited resources; hence it cannot afford legal proceedings, initiated by RESPONDENT NO. 2, which has a reputation of aggressive enforcement of its IP rights [*Ex. C5, p. 20*]. For these reasons, CLAIMANT had no other option but to file NA, where it demands that the Tribunal declares that RESPONDENT NO. 1 breached its contractual obligations. In the PCL Agreement RESPONDENT NO. 1 specifically assured CLAIMANT that no third party's intellectual property exists on the GorAdCam viral vector and that there are no claims, judgments or settlements pending regarding Licensed Technology. By failing to deliver goods, which would adhere to all the explicitly guaranteed specifications, RESPONDENT NO. 1 breached Arts. 11.1.3 and 11.1.4 of the PCL Agreement. CLAIMANT will demonstrate that RESPONDENT NO. 1 failed to deliver goods free from the claim of a third party, which constitutes a breach of contract pursuant to Art. 42(1)(a) CISG **(1)**. Alternatively, if the Tribunal concludes that the PCL Agreement should be governed by UNIDROIT Principles, RESPONDENT NO. 1 has failed to deliver conforming goods under Art. 9.1.15 UNIDROIT Principles **(2)**.

1. RESPONDENT NO. 1 committed a Breach of Arts. 11.1.3 and Art. 11.1.4 of the PCL Agreement and Art. 42(1)(a) CISG

70 Notwithstanding RESPONDENT NO. 1'S contrary allegations [*ANA, p. 29, §18-20*], CLAIMANT submits that RESPONDENT NO. 1 breached Arts. 11.1.3 and Art. 11.1.4 of the PCL Agreement by failing to perform its obligations as stipulated in Art. 42 CISG **(a)**. Moreover, CLAIMANT will establish that non-conformity of the delivered goods amounts to a fundamental breach

under Art. 25 CISG **(b)**. Additionally, RESPONDENT NO. 1 cannot exempt its liability under Art. 42(2)(a) CISG **(c)**.

a. RESPONDENT NO. 1 did not deliver Goods which were free from a Third-Party Claim

71 Art. 42(1) CISG provides the duty of the seller to deliver goods, which are free from any right or claim of a third party based on industrial property or other intellectual property [*Brunner/Gottlieb, p. 302, § 5; Enderlein*]. IP rights within the framework of the Art. 42 CISG are defined as "*all rights protecting an intellectual activity with a pecuniary value, which are attached to a good and which are able to infringe the use or the resale of the merchandise*" [*Shinn, p. 116; Rauda/Etier, p. 36*]. In the present dispute, CLAIMANT'S right to merchandise and resale the newly developed vaccine for COVID-19 is violated, since there are ongoing discussions between Roctis and Ross Pharmaceuticals about the scope of the exclusive license granted under the Ross Agreement and their right to use GorAdCam vectors in connection with the research for a vaccine against COVID-19 [*Ex. C7, p. 22*].

72 Under Article 42(1) CISG the buyer's rights are protected with respect to only those rights or claims of which the seller knew or could not have been unaware when the contract was concluded [*Honnold, p. 295*]. It is widely accepted that Art. 42 CISG does not require the claim of the third party to be founded. This follows from the aim of this provision, which is to protect the buyer against having to face a third party's claim, since such litigation would be costly and time-consuming [*Schwenzer/Tebel, p. 156; Lookofsky, §201; Smythe, p. 521; Schwenzer for Quintana Adriano, p. 340*]. Therefore, a start of litigation by the third party is not required to establish a breach of Art. 42 CISG [*Rauda/Etier, p. 36*]. As it can be derived from the article, published in Biopharma Science, there is an ongoing discussion between Roctis about the use of the GorAdCam vector for Ross Pharmaceuticals' research on vaccines for various infectious respiratory diseases. Allegedly, Ross Pharmaceuticals' exclusive license was not obtained only for malaria, but also for other comparable infectious diseases [*Ex. C4, p. 19; PO2, p. 54, §11*]. Such deliberations and claims represent a serious threat to CLAIMANT'S entire future work on the vaccine for COVID-19. An unrestricted access to the GorAdCam viral vector is absolutely essential for CLAIMANT for the further research, production and distribution of the vaccine [*Ex. C5, p. 20*].

73 If the seller is aware or could not have been unaware of a third party's right on intellectual property at the time of concluding a contract [*CD media case; Shinn, p. 120*], the seller is liable for delivering non-conforming goods pursuant to Art. 42 CISG [*Janal, p. 212; Shinn, p. 124; Smythe, p. 8; Brunner/Gottlieb, p. 302, § 5; Enderlein, p. 181*]. In the present case, RESPONDENT

NO. 1 was undoubtedly aware of Ross Pharmaceuticals' IP right on GorAdCam viral vector, since the dispute between Roctis and Ross Pharmaceuticals already existed in December 2018, two years prior to the conclusion of the PCL Agreement [*Ex. C4, p. 18*]. Furthermore, the template, which forms the basis of the PCL Agreement has been provided by Mr. Peter Doherty after he took over the negotiations between CLAIMANT and RESPONDENT NO. 1 in December 2018 [*PO2, p. 55, §24*]. At that time, he was officially still working for RESPONDENT NO. 2 on the position of Director Legal before becoming the new head of the contract department of RESPONDENT NO. 1 from 1 January 2019 onwards [*Ex. R2, p. 30*]. He was also the recipient of an e-mail sent by Mrs. Julia Bordet from Ross Pharmaceuticals on 6 December 2018, where it is explicitly stated that Ross Pharmaceuticals paid a considerable amount of money to extend the exclusive license beyond malaria-vaccination related applications to comparable infectious diseases [*Ex. R2, p. 34; Ex. R4, p. 35*]. Consequently, RESPONDENT NO. 1 was undeniably acquainted with the Ross Pharmaceuticals' extended exclusive license to use GorAdCam viral vectors for all malaria and other infectious diseases related usages.

74 CLAIMANT can rely on its right under Art. 42 CISG, since it gave notice to RESPONDENT NO. 1 within a reasonable time as stipulated in Art. 43(1) CISG. CLAIMANT'S notice was in compliance with the requirements laid down in Art. 43(1) CISG, which provides that the buyer loses the right to rely on Art. 42 CISG, if the notice was not given within a reasonable time after the buyer became aware or out to become aware of the right or claim [*Schlechtriem/Schwenzer, p. 675, §2; Lookofsky (1980), p. 113; Enderlein (1996), p. 185*]. The criterion of measurement of reasonable time has been established in the case law dealing with Art. 39 CISG. The general time limit for notification under the provision of Art. 39 CISG 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*]. In the present case, CLAIMANT has given notice to RESPONDENT NO. 1 on 2 May 2020, only a day after its COO, Mr. Paul Metschnikow, became aware of the third-party intellectual property claim on GorAdCam viral vectors [*Ex. C5, p. 19*]. In that e-mail 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. Due to the fact that the notice was given to RESPONDENT NO. 1 within one day after CLAIMANT became aware of third party's right, CLAIMANT can rely on its right under Art. 42 CISG.

75 In conclusion, by granting the exclusive license for the use of GorAdCam viral vector to Ross Pharmaceuticals under Ross Agreement prior to the conclusion of the PCL Agreement,

RESPONDENT NO. 1 was indisputably aware or could not have been unaware that CLAIMANT'S IP right on GorAdCam viral vector in connection with the research for a vaccine against COVID-19, will be restricted and violated.

b. RESPONDENT NO. 1 Fundamentally Breached its contractual Obligations pursuant to Art. 25 CISG

76 The definition of a fundamental breach is determined in Art. 25 CISG. It provides that a breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party substantially depriving it of what it is entitled to expect under the contract. When assessing whether a breach of contract is fundamental, it must be determined whether the circumstances of non-conformity affect the usability or value of the goods [*Schwenzer Commentary, p. 573, §9; Automobile case; Sunprojuice case*]. In that regard, non-conformity of the delivered products is fundamental in cases where the delivered goods are improper for the intended use by the buyer [*Leisinger, p. 130; Shoes case; CNC machine case; Elastic fitness clothing case; Water pump case; Mitias v. Solidea case*]. Two main criteria for the fundamental breach test are the substantial deprivation requirement and the foreseeability requirement [*Huber/Mullis, p. 782; Liu, p. 121; Zeller, p. 224*]. RESPONDENT NO. 1'S breach of Arts. 11.1.3 and Art. 11.1.4 of the PCL Agreement resulted in detriment that substantially deprived CLAIMANT of what it was entitled to expect under the agreement. It shall be further demonstrated that the breach was fundamental as detriment, suffered by CLAIMANT, was foreseeable.

77 First, it must be noted that parties can expressly or implicitly attach a particular weight to certain obligations they consider significant. The consequence of breaching such significant obligations will result in a fundamental breach [*Huber/Mullis, p. 215; Lorenz, §11-19; Zeller II, p. 226*]. The Parties incorporated the clause in Art. 11.1.3 of the PCL Agreement, determining that is crucial for RESPONDENT NO. 1 as licensor, when concluding the PCL Agreement, not being aware of any third party's IP rights on the GorAdCam vectors. Further, in Art. 11.1.4 of the PCL Agreement the Parties established that RESPONDENT NO. 1 is not aware of any claims, judgments or settlements pending with respect to the Licensed Technology and that licensor has not received notice that any such claims, judgments or settlements are threatened [*Ex. C3, pp. 15-16*]. These two articles strongly indicate that it was of utmost importance to CLAIMANT that the received Licensed Technology does not possess any third party's IP rights.

78 Second, it should be noted that it is not important how drastically the seller disregards its duties. The concept of fundamental breach rather depends on how important proper performance would have been for the buyer. The focus is therefore on the importance of interest for proper

performance [*Huber/Mullis, p. 215; Lorenz, §50; Zeller II, p. 226*]. When deciding whether the contract is frustrated by the breach, due regard must be given to general purpose of the contract [*Lorenz, §50*]. In the present case, the sole purpose of the PCL Agreement was to ensure that CLAIMANT as a licensee has unrestricted access to the GorAdCam viral vector for further research, development, production and distribution of the vaccine for COVID-19. RESPONDENT NO. 1 as subsidiary of Roctis, one of the biggest pharmaceutical companies in the world, should have been aware that License Technology on GorAdCam viral vector with pending third-party IP rights represents a threat to CLAIMANT'S distribution of the newly developed vaccine.

79 Third, it must be stressed, that the detriment in form of financial loss to the buyer is not necessarily a decisive factor in determining the fundamentality of the breach [*Huber/Mullis, p. 214; Bygum, p. 3*]. In particular, for small start-ups like CLAIMANT, which focus their whole work on one product, any uncertain or pending third-party IP rights that represent a threat of a lawsuit, irrespective of its final outcome, prevent unaffected use of the delivered goods. CLAIMANT, due to its limited funding, is not capable to enter a lengthy and costly IP rights dispute with Ross Pharmaceuticals.

80 Finally, 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 them [*Achilles, p. 69; Sanchez, p. 217; Salger, p. 210*]. Once it has been established that a reasonable person of the same kind as the seller would have understood the importance of a certain obligation, the breaching party cannot be excused because of their personal lack of knowledge [*Huber/Mullis, p. 216*; *Schwenzer Commentary, p. 417, §36; Saidov, pp. 101-105*]. RESPONDENT NO. 1, as an expert in its field [*NA, p. 4, §2*], just as any other expert in the same sector and under the same circumstances, should have understood the importance of delivering License Technology without restrictions, claims or existing third-party IP rights, especially when RESPONDENT NO. 1 was completely aware that CLAIMANT'S main goal was development of vaccines on the basis of viral vectors for respiratory diseases.

81 To conclude, all the stated facts demonstrate that RESPONDENT NO. 1 deprived CLAIMANT of what it was entitled to expect under the PCL Agreement by fundamentally breaching its obligations and delivering goods that were improper for the intended use by CLAIMANT.

c. RESPONDENT NO. 1 cannot exempt its Liability under Art. 42(2)(a) of CISG

82 Article 42(2)(a) CISG exempts the seller from its liability only when the buyer knew or could not have been unaware of the right or claim [*Schlechtriem/Schwenzer, p. 669, §18; Beline (2007); Enderlein (1996), p. 183; Raude/Etier, p. 56; Footware case*]. It provides an obligation for the seller to inquire the legal situation concerning existing rights, following that the buyer does not have the same duty. Moreover, the seller is in a better position to assess whether a potential infringement, claim, judgment or settlement could arise, as it has a more thorough knowledge of its own intellectual property than the buyer [*Shinn Jr. (1993), p. 125; Janal, p. 219*]. In the present case, RESPONDENT NO. 1'S liability cannot be excluded, since at the time of the conclusion of the PCL Agreement CLAIMANT was not aware nor did it obtain any information regarding third party's right or claim on GorAdCam viral vector. Therefore, CLAIMANT could not have been reasonably expected to know that there is a pending discussion regarding the Licensed Technology on GorAdCam viral vector between Ross Pharmaceuticals and Roctis.

83 Moreover, information obtained by the buyer after the conclusion of the contract is irrelevant for the exclusion of seller's liability under Art. 42(2)(a) CISG [*Brunner/Gottlieb, p. 311, §21*]. The Parties concluded the PCL Agreement on 1 January 2019. CLAIMANT'S COO Mr. Paul Metschnikow became aware of an ongoing dispute between Ross Pharmaceuticals and Roctis on 1 May 2020, when it read an article published in Biopharma Science. After the discovery, CLAIMANT'S COO immediately contacted RESPONDENT NO. 1 and demanded further explanation regarding the Ross Pharmaceuticals IP right on GorAdCam viral vector [*Ex. C5, p. 20*]. Admittedly, there were also some rumors regarding the said dispute published on 14 December 2018 in Biopharma Science, where it was stated that disagreement between Ross Pharmaceuticals and Roctis is regarding the scope of an exclusive license granted to Ross Pharmaceuticals in relation to malaria and comparable infectious diseases [*Ex. C4, p. 19*]. However, at that time CLAIMANT was not subscribed to Biopharma Science [*PO2, p. 54, §8*], which clearly indicates that it could not have been aware of the ongoing dispute when entering into the PCL Agreement. As information gathered after the conclusion of the contract is irrelevant, RESPONDENT'S NO. 1 liability cannot be excluded under Art. 42(2) CISG.

2. Alternatively, RESPONDENT NO. 1 breached Art. 9.1.15 of UNIDROIT Principles

84 Alternatively, if the Tribunal concludes that Art. 42 CISG cannot be applied by analogy for the breach of the PCL Agreement, the contract should be assessed by Art. 9.1.15 UNIDROIT Principles. The basis for such assessment is in Art. 7(2) CISG. Pursuant to this provision

matters that are governed by CISG, but not expressly settled, can be settled in conformity with the general principles of CISG [*Lookofsky, p. 51*].

85 When applying Art. 7(2) CISG, a gap must first be identified [*Schlechtriem, p. 292*]. Since CISG does not contain an express provision dealing with non-conformity of licenses as goods, but governs the general non-conformity of goods, there is a gap regarding this matter. Gap-filling is an instrument for developing CISG and adjusting it to modern needs of trade and commerce [*Schwenzer I, p. 8*]. Three gap-filling methods, provided by legal theory are the application of general principles upon which the legal instrument is based, filling of gaps by using legal rules contained in other legal instruments or other legal systems, which in contrast relies on external legal principles and combination of both methods [*Kotrusz; Sica, p. 4*]. Third method, enacted in Art. 7(2) CISG is relevant in the present case, as it ensures that primarily independence and integrity of international legal instruments will be observed and secondly, the usage of domestic law will be relevant. In the present case, there are no general principles that could provide sufficient solution for gap-filling. Hence, gap should be supplemented by domestic law, which is applicable by virtue of private international law. Both states in which the Parties are based, have a general contract law that is a verbatim adoption of UNIDROIT Principles [*PO1, p. 52, § 3*], therefore UNIDROIT Principles can be used for gap-filling.

86 UNIDROIT Principles will be used for interpretation in gap-filling in the provisions of CISG, leading to an autonomous clarification of the provisions in CISG [*Schwenzer Commentary, p. 122, § 5; Magnus, p. 173; Monberg, § 2.1.1*]. However, the UNIDROIT Principles will be applicable only when the principles on which CISG is based and the principles that underlie UNIDROIT Principles are not conflicting [*Carvalhal Sica, p. 22*]. In the case at hand, Art. 9.1.15 UNIDROIT Principles is reasonably the same, but more specific than Art. 42 CISG, as both provisions regard the position where the subject of the contract must be free of any third-party rights.

87 Under Art. 9.1.15(b) UNIDROIT Principles assignor undertakes that it is entitled to assign the right, hence there is no contractual or legal prohibition that prevents assigning the right to assignor. Pursuant to following section in Art. 9.1.15(c), the UNIDROIT Principles explicitly demand 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*]. RESPONDENT NO. 1 breached its obligation under the said provisions as exclusive license for GorAdCam viral vectors granted in PCL Agreement to CLAIMANT was actually previously assigned to Ross Pharmaceutical under Ross Agreement.

88 To conclude, in case previous assignment was made in order to set up security purpose, the right is still assignable with proper disclosure [*Vogenauer, p. 1128*]. However, in the case at hand, exclusive license was not granted to Ross Pharmaceutical for any security reason as Ross Agreement specifically states that exclusive license is for research and development of products using GorAdCam viral vectors [*Ex. R3, p. 32*]. As the right dispensed to CLAIMANT was previously assigned to another assignee and was not free from third party's right, Art. 9.1.15 of UNIDROIT Principles is applicable.

CONCLUSION ON ISSUE IV

89 RESPONDENT NO. 1 breached Arts. 11.1.3 and Art. 11.1.4 of the PCL Agreement by failing to perform its obligations as stipulated in Art. 42 CISG. The non-conformity of the delivered goods amounts to a fundamental breach under Art. 25 CISG. Alternatively, RESPONDENT NO. 1 failed to deliver conforming goods under Art. 9.1.15 UNIDROIT Principles.

* * *

REQUEST FOR RELIEF

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

1. deny the request for joinder of Ross Pharmaceuticals;
2. order a fully remote hearing of witnesses and experts in the 2nd Hearing of 3 to 7 May 2021;
3. find that CISG is applicable to Purchase, Collaboration and License Agreement;
4. declare that RESPONDENT NO. 1 breached the Purchase, Collaboration and License Agreement by delivering GorAdCam viral vectors which were not free from any third-party rights or claims.
5. order RESPONDENTS NO.1 and NO. 2 to bear the costs of these arbitration proceedings.

Respectfully signed and submitted by counsel on 10 December 2020.

Jan Dolenc

Jasmina Mitev

Nuša Šaloven

Ema Turnšek

University of Maribor

CERTIFICATE

Maribor, 10 December 2020

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

Nuša Šaloven

Ema Turnšek