

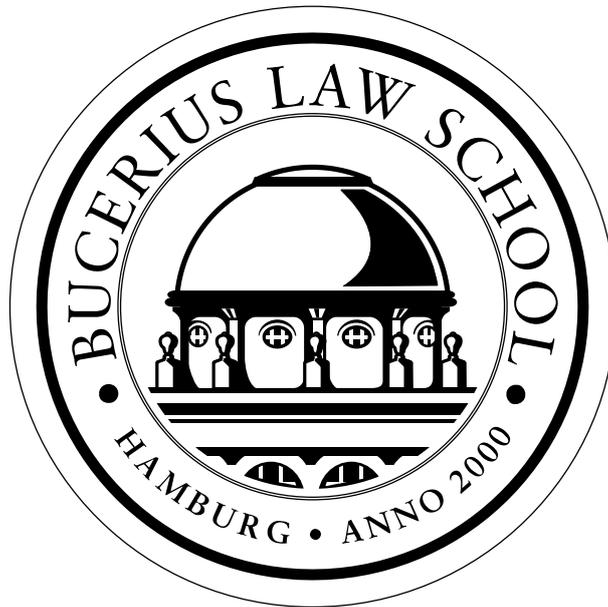
18th Annual

Willem C. Vis (East) International Commercial Arbitration Moot

March 14 – March 20, 2021

Hong Kong

MEMORANDUM FOR CLAIMANT
BUCERIUS LAW SCHOOL
Hamburg, Germany



on behalf of

RESPIVAC PLC

Rue Whittle 9 | Capital City | Mediterraneo

- CLAIMANT -

against

CAMVIR LTD
112 Rue L. Pasteur
Oceanside
Equatoriana

- RESPONDENT NO. 1 -

VECTORVIR LTD
67 Wallace Rowe Drive
Oceanside
Equatoriana

- RESPONDENT NO. 2 -

MAXIMILIAN BITTER | JONAS KLEIN | MANYEDI LIECK | STELLA WESTENHOFF

Max Bitter *Jonas Klein* *M. Lieck* *Stella Westenhoff*



TABLE OF CONTENTS

INDEX OF ABBREVIATIONS	IV
INDEX OF AUTHORITIES	VI
INDEX OF COURT DECISIONS.....	XII
INDEX OF ARBITRAL AWARDS.....	XVII
STATEMENT OF FACTS.....	1
SUMMARY OF ARGUMENTS	2
ISSUE 1: MOTION TO DISMISS JOINDER OF ROSS PHARMACEUTICALS	3
I. Legal basis to constitute an admissible joinder under Art. 4 para. Swiss Rules.....	3
A. Application of the Swiss Rules	3
B. No legal basis for joinder without explicit consent of Ross	3
1. Consent cannot be replaced by an identical agreement.....	3
2. The contracts are not sufficiently related	4
C. Consent of CLAIMANT	6
1. Necessity of consent.....	6
2. Foreseeability of interest of including the third party	6
II. Discretion of the Arbitral Tribunal	7
A. Factors governing the use of discretion	7
B. Balance of interests clearly against joinder.....	8
1. The dispute between RESPONDENT No. 2 and Ross is irrelevant for the case at hand	8
2. Clear objection of CLAIMANT and Ross	9
3. Vulnerability to challenges and anti-enforcement actions	9
a. Nonexisting Arbitration Agreement ground for setting aside/refusal of recognition	9
b. Influence on composition of the Tribunal is prerequisite for recognition	10
ISSUE 2: THE TRIBUNAL SHOULD ORDER REMOTE HEARINGS	10
I. The Tribunal has the inherent power to order remote hearings	10
A. Remote witness examination can be conducted under Swiss Rules and DAL	11
B. An agreement by the parties is not a prerequisite for ordering remote hearings as remote hearings are a form of normal oral hearings	11
1. The dispute resolution clause constitutes no agreement to hold oral hearings	12
2. Remote oral hearings equal in-person oral hearings	13
3. The parties are treated equally in remote hearings.....	14



4.	Remote hearings can remain confidential	15
II.	The Tribunal should order remote expert and witness examinations	15
A.	The applicable standard is an overall balancing exercise	15
B.	The Tribunal should order remote hearings when considering the relevant factors..	15
1.	Postponing the hearing would lead to unreasonable costs and delay	16
2.	The uncertain situation within a pandemic serves as good reason to order for remote hearings.	16
3.	The witness and expert examinations in the second hearing of 3-7 May 2021 are suitable to take place in a remote hearing	17
4.	It is possible to conduct remote examinations in a technically appropriate form .	18
	ISSUE 3: THE CISG IS APPLICABLE TO THE PCLA	19
I.	The parties opted for the application of the CISG	19
A.	The parties opted for the application of the CISG	19
B.	The parties did not exclude the application of the CISG under Art. 6.....	20
II.	In any event, according to Artt. 1-5 CISG the CISG is applicable to the PCLA.....	20
A.	The Parties concluded an international agreement in the sense of Art. 1 para. 1 (a) CISG	20
B.	The PCLA is a “sale of goods” in the sense of Art. 1 para. 1 CISG.....	20
1.	RESPONDENT NO. 1 is obliged to primarily deliver goods in the sense of the CISG	20
a.	The PCLA requires RESPONDENT NO. 1 to deliver goods in the sense of the CISG	21
i.	GorAdCam viral vectors	22
ii.	Embodied intellectual property rights.....	22
iii.	The HEK-294 cells, the cell culture growth medium, or a possible vaccine	23
iv.	Know-how.....	23
b.	The transfer of know-how does not constitute the preponderant part of the PCLA	23
i.	Wording	24
ii.	The sales of goods according to the PCLA are also financially of great importance.....	24
iii.	Circumstances surrounding the conclusion of the PCLA	25
2.	The PCLA is a contract of sale in the sense of Artt. 1 para. 1, 3 para. 1 CISG	26
a.	The PCLA is a contract of sale	26



b. The PCLA is no pure financing agreement but a contract of sale 27

ISSUE 4: RESPONDENT NO. 1 BREACHED ART. 42 CISG 27

I. RESPONDENT NO. 1 breached its obligation under Art. 42 para. 1 CISG..... 27

A. The license granted to Ross amounts to a right based on intellectual property in terms of Art. 42 para. 1 CISG 27

1. The mere assertion by Ross is sufficient to invoke Art. 42 CISG..... 28

a. CLAIMANT can invoke Art. 42 CISG even though Ross has not filed a court case 28

b. In any way, there is a risk that Ross will enforce their IP rights 28

2. RESPONDENT NO. 1 knew of the assertion of an existing right by Ross..... 29

B. In any way, the GorAdCam vectors are encumbered with an existing right based on intellectual property of Ross at the time of contract conclusion 29

1. The Ross Agreement also includes infectious respiratory diseases 29

a. Preliminary negotiations 29

b. Conduct of the parties subsequent to contract conclusion..... 30

c. Nature and purpose of the contract 30

2. RESPONDENT NO. 1’s obligation under Art. 42 CISG is not excluded due to territorial limitations 30

3. RESPONDENT NO. 1 knew that the license granted to Ross concerned respiratory diseases or could not have been unaware 30

a. RESPONDENT NO. 1 knew of the scope of the Ross Agreement 31

i. The knowledge of Mr. Doherty is to be attributed to RESPONDENT NO. 1 .. 31

ii. Due to their status as sister companies, the knowledge of RESPONDENT NO. 2 is to be attributed to RESPONDENT NO. 1 32

b. Alternatively, RESPONDENT NO. 1 could not have been unaware about the scope of the Ross Agreement 32

II. The exclusion of Art. 42 para. 2 CISG does not apply 33

A. CLAIMANT did not know of the right or claim 33

B. CLAIMANT did not have culpable lack of knowledge..... 34

III. The exclusion of Art. 43 CISG does not apply 35

PRAYER FOR RELIEF..... 35



INDEX OF ABBREVIATIONS

ANA	Answer to the Notice of Arbitration
Art./Artt.	Article/Articles
CE	CLAIMANT'S Exhibit
CEO	Chief Executive Officer
cf.	conferre (confer)
CISG	United Nations Convention on Contracts for the International Sale of Goods
CISG-online	Internet database on CISG decisions and materials, available at www.cisg-online.org
Co.	Company
Corp.	Corporation
DAL	Danubian Arbitration Law [UNCITRAL Model Law of International Commercial Arbitration]
ed./eds.	edition/editor/editors
e.g.	exempli gratia (for example)
et al.	et alii (and others)
et seq.	et sequens (and that which follows)
et seqq.	et sequentes (and those which follow)
EUR	Euro
IBA Rules	Rules of the International Bar Association on the Taking of Evidence in International Arbitration
ibid.	ibidem (in the same place)
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
i.e.	id est (that is)



Inc.	Incorporation
LbS	Letter by Sinoussi, 4 September 2020, p. 46 et seq.
Ltd.	Limited
NA	Notice of Arbitration
No.	Number(s)
NYC	The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards
OGH	Oberster Gerichtshof (Austrian Supreme Court)
OLG	Oberlandesgericht (German Regional Court of Appeals)
p./pp.	page/pages
para./paras.	paragraph/paragraphs
PCLA	Purchase Collaboration and Licensing Agreement
PO1	Procedural Order 1 of 9 October 2020
PO2	Procedural Order 2 of 7 November 2020
RE	RESPONENTS' Exhibit
S.p.A.	Società per azioni
supra	above
Swiss Rules	Swiss Rules of International Arbitration
ULIS	Convention Relating to a Uniform Law on the International Sale of Goods, The Hague, July 1, 1964
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
v.	versus
WIPO	World Intellectual Property Organisation



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Country	Date	Court	Case
Austria	6 February 1996	Oberster Gerichtshof	1 Ob 518/96, CISG-online no. 224 [cited as: <i>Propane Gas Case</i> , cited at: para. 66]
	1 June 2004	Oberlandesgericht Wien	3 R 68/04y, CISG-online no. 954 [cited as: <i>Hydraulic Pressure Units Case</i> , cited at: para. 79]
	21 June 2005	Oberster Gerichtshof	5 Ob 45/05m, CISG-online No.: 1047 [cited as: <i>Software Case (1)</i> , cited at: para. 66]
	8 November 2005	Oberster Gerichtshof	4 Ob 179/05k, CISG-online no. 1156 [cited as: <i>Glass Recycling Ma- chine Case</i> , cited at: paras. 76, 82]
	18 December 2007	Oberlandesgericht Innsbruck	1 R 273/07t, CISG-online no. 1735 [cited as: <i>Steel Bars Case</i> , cited at: para. 82]
	23 July 2020	Oberster Gerichtshof	18 ONc3/20s [cited as: <i>OGH Austria</i> , cited at: paras. 30, 39, 45, 48, 49, 52]
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	13 May 2013	Supreme Court of the United States	569 U.S. 278 (2013) [cited as: <i>Bowman v. Monsanto Co.</i> , cited at: para. 70]
	12 August 2020	United States Dis- trict Court for the Northern District of Illinois Eastern Division	Case No. 20 C 4700 [cited as: <i>Carlos Legaspy v. Fi- nancial Industry Regulatory Au- thority, Inc</i> , cited at: para. 30]



INDEX OF ARBITRAL AWARDS

<i>Institution</i>	<i>Date</i>	<i>Case</i>
NAFTA	15 January 2001	Decision of the Tribunal on Petitions from Third Persons to Intervene as Amici Curiae [cited as: <i>Methanex Corp. v. United States</i> , cited at: para. 39]
ICSID	16 May 1986	ARB/81/1 [cited as: <i>Republic of Indonesia v. Amco Asia Corp., and others</i> , cited at: para. 39]
	15 October 2008	ARB/07/23, Decision on Provisional Measures [cited as: <i>R.R. Dev. Corp. (U.S.A.) v. Repub. of Guatemala</i> , cited at: para. 38]
ICC	23 September 1982	Interim Award of 23 September 1982 in No. 4131 [cited as: <i>Dow Chemical France & Ors. v. ISOVER Saint Gobain</i> , cited at: para. 111]
	1 December 1996	8769, CISG-online no. 775 [cited as: <i>Electrical Appliances Case</i> , cited at: para. 56]
	1 June 1999	9187 [cited as: <i>Coke Case</i> , cited at: para. 109]
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	11 November 2011	HKZ Case No. 12171, award on preliminary issues [cited as: <i>HKZ Case No. 1271</i> , cited at: para. 39]



STATEMENT OF FACTS

CLAIMANT is a biopharmaceutical company engaged in the development of vaccines, incorporated in Mediterraneo.

RESPONDENT NO. 1 is a Contract Manufacturing Organization, producing pharmaceutical base materials, incorporated in Equatoriana.

RESPONDENT NO. 2 is engaged in commercialization and development of patents in the field of viral vectors, incorporated in Equatoriana.

Ross Pharmaceuticals is a life-science Company incorporated in Danubia

15 June 2014 RESPONDENT NO. 1 and Ross conclude a Collaboration and License Agreement for the use of GorAdCam viral vectors.

10 September 2018 RESPONDENT NO. 1 grants RESPONDENT NO. 2 an exclusive license for the use of GorAdCam viral vectors.

6 December 2018 Ross informs RESPONDENT NO. 2 about their view that the Ross Agreement includes respiratory diseases.

14 December 2018 Biopharma Science reports on issues between RESPONDENT NO. 1 and Ross concerning the scope of their Agreement.

1 January 2019 The PCLA concluded between RESPONDENT NO. 1 and CLAIMANT becomes effective.

2 May 2020 Mr. Metschnikow contacts RESPONDENT NO. 1 with regards to the article published in Biopharma Science.

15 July 2020 Notice of Arbitration sent by CLAIMANT and received by SCAI.

14 August 2020 Answer to the Notice of Arbitration sent by RESPONDENTS.

8 October 2020 The Parties agree on first virtual hearing regarding legal questions between 27 to 30 March 2021.



SUMMARY OF ARGUMENTS

- 1 The Tribunal should not order for the joinder of Ross. As Art. 4 para 2 Swiss Rules requires the consent of all parties, the objections of CLAIMANT and Ross hinder a joinder. Even under the assumption that a joinder could be ordered absent the Parties' consent, a legitimate exercise of the Tribunal's discretion leads to the same consequence. The specific circumstances of the case do not justify a joinder, as the dispute between Ross and RESPONDENT NO. 2 is irrelevant to the case and a joinder jeopardizes the recognition of the award [**Issue 1**].
- 2 The tribunal should order remote hearings, as it has the capacity to do so. Firstly, Art. 25 para. 4 Swiss Rules explicitly allows for the remote examination of witnesses and experts. Secondly, remote hearings fulfil the requirements of an oral and adversarial exchange of arguments and a live communication. Therefore, they are in line with Art. 24 para. 1 Danubian Arbitration Law. Furthermore, the tribunal should order remote hearings in this instance. When balancing all relevant factors, the costs and more importantly the delay caused by postponing the hearings due to the Covid-19 pandemic are unreasonable and deprive CLAIMANT of its right to effective legal protection. [**Issue 2**].
- 3 In clause 15.2 of the PCLA the Parties specifically opted for the application of the CISG to the PCLA. Also, according to Artt. 1-5 CISG the CISG is applicable as the PCLA is a sale of goods. In particular, the PCLA obliges RESPONDENT NO. 1 to deliver GorAdCam vectors including their associated intellectual property rights. The sale of such pharmaceuticals which are subject to intellectual property rights is regarded as the sale of goods. Furthermore, the PCLA obliges RESPONDENT NO. 1 to transfer know-how regarding the amplification of the GorAdCam vectors. Know-how qualifies as a good in the sense of the CISG as well. In any event, the transfer of know-how is not the preponderant part of the PCLA in the sense of Art. 3 para. 2 CISG and thus does not preclude its qualification as a sale of goods [**Issue 3**].
- 4 By providing CLAIMANT with GorAdCam vectors, RESPONDENT NO. 1 breached its obligation under Art. 42 CISG. As it is unbearable for CLAIMANT to carry the risks of legal disputes in the sphere of RESPONDENTS, the mere assertion of Ross that their license included respiratory diseases is sufficient for a breach of Art. 42 para. 1 CISG. Alternatively, as it was the intention of Ross and RESPONDENT NO. 2 in 2014 to include respiratory diseases, the exclusive license granted to Ross amounts to a right or claim of a third party based on intellectual property. Further, due to Mr. Doherty's factual work in the sphere of RESPONDENT NO. 1, its knowledge about the scope of the Ross Agreement is to be attributed to RESPONDENT NO. 1. As CLAIMANT is not excluded to rely on Art. 42 CISG, RESPONDENT NO. 1 breached the contract [**Issue 4**].



ISSUE 1: MOTION TO DISMISS JOINDER OF ROSS PHARMACEUTICALS

5 CLAIMANT requests the Tribunal to dismiss RESPONDENT’s motion for a joinder of Ross Pharmaceuticals [Ross]. Under Art. 4 para. 2 Swiss Rules the legal requirements for a joinder are under these factual conditions not met (**I.**). Even if they were met, the Arbitral Tribunal has discretion whether to join the third party or not. It would need to dismiss the joinder with respect to procedural economy, protection of the parties’ interests, and the enforceability of the arbitral award (**II.**).

I. Legal basis to constitute an admissible joinder under Art. 4 para. Swiss Rules

6 The legal requirements for a joinder under Art. 4 para. 2 Swiss Rules are not fulfilled. The RESPONDENT is requesting the joinder of Ross [ANA, p. 24]. Both CLAIMANT and Ross [ANA, p. 24] are objecting to the joinder. The Swiss Rules are the applicable set of arbitral rules [POI No. II, p. 51]. Thus, the pending arbitral proceedings are subject to the Swiss Rules (**A.**). Their legal requirements for a joinder, however, are not fulfilled. There is no legal basis on which Ross can be joined without explicitly consenting to the joinder (**B.**). Correspondingly, CLAIMANT’s consent is required (**C.**). As those requirements are not fulfilled, the legal basis for a joinder under Art. 4 para. 2 Swiss Rules is not present.

A. Application of the Swiss Rules

7 The Swiss Rules are the governing procedural rules. CLAIMANT and RESPONDENT No. 1 have agreed to arbitration for the resolution of disputes arising from their “Purchase, Collaboration and License Agreement” from January 2019 under the Swiss Rules [CE2, p. 16].

B. No legal basis for joinder without explicit consent of Ross

8 There is no legal basis on which Ross can be joined without expressly consenting to the joinder. Ross has not consented to join the arbitral proceedings and is not bound by the arbitral agreement between CLAIMANT and RESPONDENT No. 1 [CE2, p. 16]. The lack of consent of a third party can generally not be compensated for by another identical arbitration agreement stating the same set of arbitral rules (**1.**). Specifically, the identical arbitration agreement between Ross and RESPONDENT No. 2 does not suffice to replace the consent of Ross, even if it was considered possible to deem a party to have consented to being joined by signing an identical arbitral agreement with one of the parties to the pending proceedings (**2.**).

1. Consent cannot be replaced by an identical agreement

9 Consent of a third party to join arbitral proceedings cannot be substituted by an identical arbitral agreement. Since Ross has not consented to join the arbitral proceedings and is not bound by the arbitral agreement between the CLAIMANT and RESPONDENT No. 1 as a signatory or a non-



signatory, only the identical arbitral agreement between Ross and RESPONDENT No. 2 could be considered to replace the necessary consent of Ross to the joinder. CLAIMANT and RESPONDENT No. 1 have signed an arbitral agreement under which CLAIMANT has initiated arbitral proceedings against the latter and RESPONDENT No. 2 [NA, p. 3]. RESPONDENT No. 2 has willingly submitted itself to the arbitral proceedings [ANA, p. 24]. RESPONDENT No. 2 and Ross have signed an arbitral agreement identical to the one between CLAIMANT and RESPONDENT No. 1 [RE3, pp. 33 et seq.]. Not all identical arbitration agreements, however, can be interpreted to mean that their signatories have consented to join other arbitral proceedings. Most arbitration institutions offer model clauses for arbitration agreements. With the number of arbitration institutions being limited, so are the popular sets of model arbitration clauses. Considering the frequent use of arbitration clauses in commercial agreements, the coincidental use of identical arbitration clauses is likely to occur in many cases. Most certainly, parties will have impliedly agreed that the arbitral proceedings with one another would be confidential and that they would participate in the selection of the arbitral tribunal in such cases [Born, p. 2584]. Hence, a common reason for the refusal of recognition of the arbitral award is the absence of the possibility for a party to defend itself due to the lack of influence on the composition of the arbitral tribunal [Colectivo de Empresarios de Mudanzas S.L. v. Doña Paula, Madrid Court of Appeals, 58/2008]. As a basic principle, arbitration depends on the existence of an agreement between the disputant parties. The terms of the arbitral agreement therefore define and limit arbitral jurisdiction [Pryles/Waincymer, p. 3]. Every arbitral proceeding is necessarily based on a mutual agreement in respect of chosen arbitral jurisdiction.

2. The contracts are not sufficiently related

- 10 The consent of Ross cannot be replaced by the identical arbitration agreement. Even if it was possible to replace the necessary consent with an identical arbitration agreement, the requirements under which such an implicit consent could be viewed as admissible are not met in the present case. Admissibility is considered by some commentators when the third person is the signatory of an identical agreement with the parties to the pending proceedings, or at least the party requesting the joinder [cf. De Ly, p. 69]. This is based on the assumption that any party signing an arbitration agreement for arbitration under the Swiss Rules is deemed to have accepted its own joinder to other proceedings [Practitioners Guide/Schramm, p. 497]. However, Art. 4 para. 2 Swiss Rules is only declaratory, pointing out the competences of the Tribunal as such. It cannot substitute the consent of the parties or a third person [Bärtsch/Petti, in: Zuberbühler, Art. 4 para. 46].



- 11 Even if the Tribunal followed the assumption identical agreements would suffice, it only applied if that identical arbitration agreement is between the third party and the parties to the pending proceedings, or at least the party which is requesting the joinder. To constitute a sufficient relation of the contracts, the hierarchy of the contracts has to be considered. When there is series of master contracts and subcontracts, the contracts are usually related in a way that it is foreseeable at the time of signing the contract and arbitration agreement which parties are related to the matter in a way that they might become parties of future legal proceedings. Further, it is much easier to prove with the existence of a substantial argument that the parties have impliedly accepted the possibility of joinder [*P/R Clipper Gas v. PPG Indus., Inc.*, 804 F.Supp. 570].
- 12 The two contracts containing the arbitration agreements, the Ross Agreement and the PCLA between CLAIMANT and RESPONDENT No. 1 are not related to each other. The PCLA does not concern the contractual relation between RESPONDENT No. 2 and Ross. The relationship is created only through the existence of a lawsuit. Connecting two separate arbitral agreements between four different parties in such a way that these proceedings are joined is a very volatile method. Further, it does not comply with the expectations of the parties at the time of the signing of the arbitral agreements. Both CLAIMANT and Ross are active in researching and developing vaccines and drugs [CE1 pp. 4 et seq.], a field of business where confidentiality is a key issue as regards competitors. Ross and Khorana Lifescience, as the corporate holding companies of CLAIMANT, have both been competitors in the market for vaccines and drugs for the treatment of influenza since 2010. Therefore, both companies and CLAIMANT itself, being in a legal sense directly dependent on Khorana Lifescience, have a strong interest in not unnecessarily exposing any confidential information during any such proceedings.
- 13 It has to be assumed that Ross would not have signed such an arbitration agreement had it foreseen at the time that it could be joined to arbitral proceedings under those conditions. While there is another contract between RESPONDENTS, this is not a master contract. In fact, the contracts between RESPONDENT NO 2 and Ross on the one hand and CLAIMANT and RESPONDENT NO 1 on the other hand were both formed individually at different times. The Ross Agreement took effect in June 2014 [RE3, p. 32] whereas the PCLA was negotiated much later, at the end of 2018 [RE2, p. 31]. With regard to the lack of sufficient relation of the contracts to each other, the conditions under which two identical arbitration agreements can be reasonably interpreted to mean that the parties have consented to a joinder are not met.



C. Consent of CLAIMANT

14 Irrespective of whether the arbitral agreements establish the necessary basis for a conceivable joinder of Ross, the necessary consent of CLAIMANT has also not been given. Consent is always required (1.). CLAIMANT'S consent can only be implied if it was foreseeable at the time of contracting that its contract partner would potentially have an interest in including Ross in the resolution of the subject matter of the dispute, which was not the case (2.).

1. Necessity of consent

15 CLAIMANT has to give some form of consent to the joinder. I cannot be argued that consent is not necessary. The interpretation that agreeing to the Swiss Rules in the arbitration agreement must be deemed to be a sufficient agreement to a joinder under Art. 4 para. 2 Swiss Rules [*see Kleinschmidt, SchiedsVZ 2006, p. 148*], is to be rebutted, as the rule is merely declaratory [*see supra para. 10*].

16 Generally, the jurisdictional powers of the arbitral tribunal are set by the boundaries of the mutual arbitration agreement between the parties [*Schlabrendorff, pp. 454 et seqq.*]. Hence, in private arbitration, joinders of third parties are only admissible in very specific cases. The more the material basis of arbitration agreements is relied on as the basis for a joinder, the narrower the circumstances have to be under which a joinder can be admissible. Therefore, the requirements for a joinder under Art. 4 para 2 Swiss Rules cannot be too extensive when the joinder is based on two separate arbitration agreements. The arbitration agreement between CLAIMANT and RESPONDENT No. 1 does not have a bearing on the contractual relation between RESPONDENT No. 2 and Ross.

2. Foreseeability of interest of including the third party

17 CLAIMANT'S consent could only be implied if it was foreseeable at the time of contracting that its contract partner would potentially have an interest in including Ross in the resolution of the subject matter of the dispute [*see Practitioners Guide/Schramm, p. 499*]. However, this requirement is not met in the present case. Some academic commentators view consent not to be necessary when the other party to the proceedings has foreseen Art. 4 para. 2 Swiss Rules [*Meier, p. 106*]. It is irrelevant whether CLAIMANT was aware of Art. 4 para. 2. Swiss Rules. Being a publicly available source, the governing rules for the arbitral proceedings are hardly something the parties can contend they did not know about. Having no direct contractual relationship with Ross and not being aware of Ross's research ventures [*PO2 para. 8, p. 54*], CLAIMANT could by no means have foreseen that Ross would become a potential party in arbitral proceedings. Hence, the mere foreseeability of the legal consequences of Art. 4 para. 2 cannot suffice to



imply CLAIMANT's consent. In line with the argument above, the threshold for foreseeability has to be set appropriately high. Already, CLAIMANT could not have been reasonably aware of the possible interest of RESPONDENT NO. 1 in including Ross in any arbitral proceedings in relation to their contractual relationship. First, the only available source from which any information regarding a possible connection of matters or shared or diverging interests between and among the parties could have been taken was an article in the magazine Biopharma Science, published 14 December 2018 [CE4, p. 18]. Second, CLAIMANT was factually not aware of this article at the time of signing the arbitration agreement [PO2 para. 8, p. 54, supra 119]. Third, the article refers to transactions between RESPONDENT No. 2 and Ross, not RESPONDENT No. 1. This source of information is, therefore, of little weight and below any threshold to appropriately regard the interest of RESPONDENTS in joining Ross to this matter to be foreseeable.

II. Discretion of the Arbitral Tribunal

- 18 Even assuming the requirements for a joinder of Ross would be fulfilled, the Arbitral Tribunal may not order the joinder. The Arbitral Tribunal may only order the joinder if, considering all relevant circumstances, the balance of interest is clearly in favor of the joinder (**A.**). The circumstances of the present case weigh clearly against a joinder (**B.**).

A. Factors governing the use of discretion

- 19 The Tribunal may only order the joinder if, taking into account all relevant circumstances, the balance of interest is clearly in favor of the joinder. The Tribunal has to consider a number of factors pertaining to the efficiency, effectiveness and legality of commercial arbitration in regard to the joinder of a third party, and should especially give weight to the disadvantages that are likely to arise from it [see *Born p. 2600*]. Generally, proceedings should not be unwieldy or unduly prolonged, the costs of the proceedings should not be unnecessarily increased, especially if not recoverable, and confidential information concerning the parties should not be put at risk of undue or unnecessary disclosure to direct opponents in a certain market [*Bärtsch/Petti, in: Zuberbühler, Art. 4 para. 50; CI Arb, Practice Guideline 15, Art. 5.5*]. A multiparty arbitration is desirable or should be ordered if it serves procedural economy, and reduces the risk of inconsistent awards, and if the parties involved can have equal influence on the composition of the tribunal. In contrast, it should not be ordered if the award will be vulnerable to challenges and anti-enforcement actions [*Lew/Mistelis/Kröll, pp. 407 et seq.*]. In particular, when the party not requesting the joinder does not consent, a joinder may, under Art. 4 para. 2 Swiss Rules only be ordered if the balance of interests is clearly in favor of the joinder [*Practitioners Guide/Schramm, p. 499*]. In order to correctly exercise its discretion, the Tribunal has to take



into account all the above-mentioned factors and determine whether the balance of interests is in favor of the joinder.

B. Balance of interests clearly against joinder

20 The circumstances of the present case clearly weigh against a joinder. Hence, the Tribunal must in its discretion dismiss the joinder of Ross, as the dispute between RESPONDENT No. 2 and Ross is not relevant to the subject matter of the pending proceedings (1.), both CLAIMANT and Ross object to the joinder (2.), and any arbitral award would be vulnerable to challenges and anti-enforcement actions (3.).

1. The dispute between RESPONDENT No. 2 and Ross is irrelevant for the case at hand

21 The joinder would not meaningfully contribute to any possible resolution in respect of the subject-matter of this dispute. The most basic prerequisite for joining a party to a pending matter is that the issue argued in relation to the third party must be relevant to the pending matter [*Bärtsch/Petti, in: Zuberbühler, Art. 4 para. 50*]. A joinder must be used only to enhance the efficiency of the arbitral proceedings, considering the relationship between the different cases [*Born, p. 2600*]. In regard to Art. 42 CISG, CLAIMANT argues that the mere possibility of an infringement suffices for a breach of contract [*NA, p. 8*]. Whether Ross actually had an exclusive license is not of relevance to the pending case. As the actual legal situation between Ross and RESPONDENT No. 2 is of no legal relevance to the pending case, there is no need to hear Ross on the issue [*see infra, paras. 94 et seqq.*]. To finally resolve the dispute between RESPONDENT No. 2 and Ross may be in RESPONDENTS' interests [*ANA, p. 28*]. However, it does not contribute to establishing the legal findings for the breach of contract under Art. 42 CISG, but only to resolve legal questions that do not pertain to CLAIMANT's sphere of interest. Henceforth, it contravenes Ross's interest in not resolving this issue at the given point. Furthermore, it can be assumed that the RESPONDENTS have an interest mainly in backing their case with a supporting party at their side with quantitatively and qualitatively strong legal advisors and financial power. Such assumption can be derived from the fact that Ross vigorously enforces IP rights against its market competitors [*CE7, p. 21*]. Therefore, dedicating valuable time and resources to finding a decision on the matter will unduly prolong the proceedings and increase the costs for all the parties involved. Hence, hearing and arguing that matter would unduly be conducted at the expense of CLAIMANT. This situation contradicts both CLAIMANT's and RESPONDENTS' interest in resolving the pending issues quickly and efficiently.



2. Clear objection of CLAIMANT and Ross

22 The clear objection of CLAIMANT as well as of Ross being the party which has been requested to join weighs heavily against the joinder being granted. Even if the RESPONDENTS' interest in joining Ross had been foreseeable, the balance of interest would not be in favor of the joinder, as both CLAIMANT and Ross object to the joinder. Generally, a party cannot be forced to submit itself to arbitration against its deliberate will, meaning consent to arbitration on the matter at any point in time up to the beginning of the proceedings [*Dell Computer Corp. v. Union des consommateurs*, ¶51; *Granite Rock Co. v. Int'l Bhd of Teamsters* (p. 2857); *Swiss Federal Tribunal, 2003, p. 679*]. In circumstances where a party to the pending proceedings requests the joinder of a third party, three parties are in the position to give their consent to the joinder or express an objection to it. While the consent of the party requesting the joinder will be clear from the request itself, the consent of the other parties will not. In the absence of the requirements of Art. 4 para. 2 Swiss Rules, the consent of all parties in regard to the joinder would be necessary. Only in certain circumstances can this consent be dispensed with. The actual will of all parties, as a general principle in arbitration, needs to be considered when the Tribunal exercises its discretion. It is not in the interest of either CLAIMANT or Ross to be joined to the proceedings. Their interest goes beyond the mere avoidance of proceedings or further extending proceedings. Both parties want to maintain their party autonomy in respect of submitting themselves to arbitration under such circumstances. Ross itself could not have foreseen the PCLA between CLAIMANT and RESPONDENT No. 1. The arbitration agreement between CLAIMANT and RESPONDENT No. 1 does not concern itself with the contractual relations between RESPONDENT No. 2 and Ross. The RESPONDENTS' interests in a joinder carry considerably less weight than the principle of privity of contracts.

3. Vulnerability to challenges and anti-enforcement actions

23 Lastly, if Ross were joined to the proceedings, any arbitral award would become vulnerable to motions to set aside the award at the courts in Danubia and the refusal of recognition in Danubia. According to Art. 34 para. 2 (a)(i) and (iv) DAL as regards the setting aside of an award and Artt. 35 para. 1, 36 para. 1 (a)(i) and (iv) DAL, Art. V para. 1 (a) and (d) NYC as regards the recognition of the award, Ross may request that the award is to be set aside respectively recognition is refused. This is for the fact that Ross is not a signatory to an arbitration agreement (a.) and in any regard had no influence of the composition of the Tribunal (b.).

a. Nonexisting Arbitration Agreement ground for setting aside/refusal of recognition

24 Joining Ross would violate the prerequisite of consent to arbitration. As there is no contractual relationship between CLAIMANT and RESPONDENT No. 1 to Ross, there is no valid arbitration



agreement between the CLAIMANT and RESPONDENT NO. 1 and Ross [*supra para. 22*]. Joining parties beyond the scope of the arbitral agreement is a violation of fundamental principles of arbitration. Consent is the basis for any international arbitral process [*Dell Computer Corp. v. Union des consommateurs*, ¶51; *Granite Rock Co. v. Int’l Bhd of Teamsters*; *Swiss Federal Tribunal, 2003, p. 679*], this understanding is shared by all national legal systems [*Born, p. 3188*].

b. Influence on composition of the Tribunal is prerequisite for recognition

25 As Ross would have no influence in the composition of the Tribunal, the award will be set aside or recognition will be refused. The NYC is applicable to questions of joinders [*Born, p. 2570*]. The specific terms of the party agreement have an overriding status as regards Art. V para. 1 (d) NYC [*Born, p. 2572*]. As there is no agreement to join Ross, the default right of any party to appoint the arbitral tribunal applies.

26 As “the principle of equality of the parties in the designation of arbitrators is a matter of public policy” [*Siemens v. Dutco*], joining Ross is a violation of Art. V para. 1 (d) NYC. If the Tribunal has already been selected where an additional party is joined on the request of a respondent, the party to be joined is deprived of its right to choose an arbitrator [*Born, p. 2608*]. Joining Ross would make no exception. Whereas this could be accepted given close corporate connections between existing parties and the new party [*Born p. 2608, para 221*], Ross has no close corporate connection to the RESPONDENTS. Further, Ross’ interests regarding the GorAdCam viruses are not aligned with the interests of the RESPONDENTS, as they have different positions regarding the IP rights; it is in fact contrary to the RESPONDENTS interests.

ISSUE 2: THE TRIBUNAL SHOULD ORDER REMOTE HEARINGS

27 The Tribunal has the capacity to order remote hearings (**I.**) under the Swiss Rules and the DAL even absent parties’ agreement, and should order remote hearings for these proceedings (**II.**), as they grant procedural rights as well as provide for an effective procedure.

I. The Tribunal has the inherent power to order remote hearings

28 The Tribunal has a wide discretion regarding procedures such as remote hearings. Aside from the Tribunal’s discretion, questions of party autonomy and procedural agreements between the parties determine the arbitral procedure. However, both can be overruled by the basic procedural principles of a fair trial [*Born, pp. 2163 – 2164*]. Swiss Rules as well as DAL allow for remote witness examination (**A.**). A party agreement is not a prerequisite for such an examination, and the Tribunal may order remote hearings despite the objection of a party (**B.**).



A. Remote witness examination can be conducted under Swiss Rules and DAL

29 Art. 25 para. 4 Swiss Rules clearly provides for the remote examination of witnesses and experts. This admissibility is in line with the procedural requirements set out in Art. 25 para. 1 Swiss Rules. The wording of Art. 25 para. 1 Swiss Rules (“any oral hearing may”) provides for the discretion to hold oral hearings as a part of proceedings, but does not contain any obligation to hold oral hearings in any form [*Klaus Muller, et al. in: Zuberbühler Art. 25, para. 6*]. Specifically, in conjunction with Art. 15 para. 2 Swiss Rules [*ibid.*], this shows that no greater weight is placed on oral testimony generally. Art. 15 para. 7 Swiss Rules in its amended form after the 2012 revision of Swiss Rules obliges the parties as well as the Tribunal to avoid unnecessary delay. This can justify decisions like an order for a remote hearing, which ensures that the requirement of Art. 15 para. 7 Swiss Rules is fulfilled [*Müller, in: ASA Special Series No. 44, p. 37*].

30 The DAL does not contain an explicit permission for remote hearings. Therefore, the procedural principles pertaining to a fair trial and the parties’ right to be heard need to be followed. These limit the broad discretion of the Tribunal and questions of party autonomy, which is the guiding principle of the DAL, as can be seen, for example, in Art. 19 para. 1 DAL [*Born, pp. 2130, 2133; Nigel et. al., in: Redfern et al., para. 6.07*]. Under Art. 28 para. 1 UNCITRAL Arbitration Rules, oral hearings are not mandatory [the relevant wording is “in the event of an oral hearing”]; [*Castello in: Practitioner’s Handbook, para. 16.280*] and remote witness examination is allowed (see. Art. 28 para. 4 UNCITRAL Arbitration Rules) [*Castello in: Practitioner’s Handbook, para. 16.291; Patocchi/Niedermaier, in: Schütze, chapter XII, Art. 28 para. 21*]. Even under an a restrictive approach, assuming the DAL suggests parties to have a fundamental right to an oral hearing, an “oral hearing” does not necessarily mean an in-person hearing [*Mak, para. 7*]. Thus, remote witness examination is not contrary to the procedural principles of the DAL. Arbitral tribunals, as well as national courts ruling on the challenges of awards in Model Law jurisdictions, have found the use of videoconferencing technology to be in line with procedural requirements such as the parties’ right to be heard [*Carlos Legaspy v. Financial Industry Regulatory Authority, para. I.A.2; OGH Austria, 18 ONc 3/20s, paras. 11.1.4, 11.2*].

B. An agreement by the parties is not a prerequisite for ordering remote hearings as remote hearings are a form of normal oral hearings

31 Given the broad discretion of the Tribunal, it can order remote hearings absent the parties’ agreement to this, primarily because remote hearings are a form of oral hearing. The dispute resolution clause does not provide for an agreement to hold any particular form of oral hearings, so remote hearings fulfil the requirements of the PCLA (1.). A remote hearing must be deemed



to be an “oral hearing” because the remote conduct of hearings serves the purpose of granting the parties the right to be heard (2.) as well as the right to equal treatment during procedures. Concerns about the confidentiality of the proceedings do not change this position, as these can be addressed and managed in arbitral proceedings.

1. The dispute resolution clause constitutes no agreement to hold oral hearings

- 32 The discretion of the Tribunal includes the decision whether to hold in-person hearings at all. The parties merely modified the model arbitration clause of the Swiss Rules by specifying the places where an in-person hearing should take place, and only if the Tribunal orders such. This addition must be interpreted as a mere determination of location in case of in-person oral hearings. The parties did not agree on a documents-only arbitration [*PO2, p. 57, para. 32*], so remote hearings are well within the scope of the agreement, as they serve all the purposes of an in-person hearing. The phrase “at the discretion of the Tribunal” would be redundant if it meant only leaving the choice of location to the Tribunal. If the Parties determine that any in-person hearings must be held in Vindobona or the RESPONDENT’s place of business, the remaining scope of decision lies with the Tribunal [see *Born, p. 2143: Art. 15 para. 1 Swiss Rules empowers the Tribunal to decide upon procedural matters; para. 15.03, p. 2145; Art. 19 para. 2 Model Law*].
- 33 This interpretation can also be justified on the basis of the mere choice of the Swiss Rules by the parties, when applying Art. 8 para. 3 CISG [*applicable to the clause, see PO1 para. III.4*] as a rule of interpretation for the arbitration clause. The Swiss Rules provide for a very modern set of rules that are flexible as regards the different methods and techniques chosen by the Tribunal [*Besson/Thommesen, in: Zuberbühler, Introduction, paras. 21, 52*]. Allowing for the remote conduct of hearings is typical of this modern approach, and also furthers the objective of conducting proceedings as efficiently as possible, which has been strengthened by the amendment of the Swiss Rules in this regard [*Balkaya, in: ASA Special Series No. 44, p. 157*]. The parties have chosen these rules conscious of this modern approach. If the parties had wanted to agree on the requirement that in-person hearings be held in all instances, they would not have chosen the Swiss Rules for the purposes of the proceedings, but rather other more conservative arbitration rules not in conflict with this requirement. Furthermore, RESPONDENT decided to use the Swiss Rules after CLAIMANT suggested that an arbitration may be held at any respected and neutral institution [*PO2, p. 57, para. 31*]. Mr Doherty was free to choose more traditional rules, but instead chose the Swiss Rules with their modern approach [*PO2, p. 57, para. 32*]. RESPONDENT cannot now escape this conscious decision.



2. Remote oral hearings equal in-person oral hearings

- 34 The starting point when considering the parties' right to be heard is the unenforceability of any award under Art. V para. 1b NYC if the parties have not had sufficient opportunity to present their case. However, remote hearings do not render an award unenforceable under Art. V para. 1b NYC. As is the case with state courts, arbitral proceedings are obedient to the principle of the parties' right to be heard as a principle of basic procedural fairness [*Born*, p. 2175; *Holtzmann/Neuhaus*, Art. 18 p. 550], as Art. 18 DAL provides [*Born*, p. 2175]. But an award is unenforceable only if a party is entirely deprived of the right to present its case in a sufficient manner [e.g. *Latvian Shipping Case.*, ¶144; *Paklito Investment Limited v. Klockner East Asia Limited*, ¶38]. Furthermore, CLAIMANT will be seeking to enforce the award in Equatoriana, where RESPONDENT has its place of business. Courts in Equatoriana have rendered remote hearings possible even over parties' objections to them [*PO2*, pp. 57 et seq., para. 37]. Therefore, the award will be enforceable in Equatoriana.
- 35 Given this precedent, it is tenuous to assert that the right to be heard is realised only when both parties to a hearing are physically present in the same room and exchanging arguments and examining witnesses. The critical requirements are rather the oral and adversarial exchange of arguments, as well as a live communication involving a simultaneous and immediate exchange of arguments [*Scherer*, in: *Scherer et al.*, Chapter 4, para. 3.2.1]. These aspects of a party's right to be heard are given effect to by remote hearings.
- 36 In the given case, remote hearings are discussed with regard to the examination of witnesses. Therefore, it needs to be assessed whether conducting examinations remotely is in line with the parties' right to a hearing. That the remote examination of witnesses is permissible is proven by the fact that this is expressly allowed in Art. 25 para. 4 Swiss Rules, which is based on the Model Law and its principles. The *ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic* (para. 22) emphasises the Tribunal's broad discretion to hold remote hearings and the possibility of it interpreting the Art. 25 para. 2 ICC Rules phrase "in person" to mean merely the opportunity for a live adversarial exchange of arguments. Art. 26 para. 4 ICC Rules, providing for appearance "in person" must be interpreted in the same manner [*Flecke-Giammarco/Bücheler/Zahner*, p. 136 et seq.].
- 37 The wording of Art. 24 para. 1 DAL indicates that the Tribunal must hold hearings after a request in this regard by one of the parties. Therefore, the discretion of the Tribunal could fall away if a party requests an oral hearing [*Müch*, in: *MüKoZPO Sec. 1047 para. 5, 6*]. However, if remote hearings serve the purpose of granting the parties a right to be heard just as effectively



as a physical hearing, remote hearings must be considered sufficient to fulfil the conditions of Art. 24 para. 1 and, more importantly, Art. 18 DAL. Without doubt, communication via videoconferencing technology must be considered an oral hearing [MüncH, in: *MüKoZPO Sec. 1042 para. 50*]. Furthermore, a videoconference hearing is sufficient to allow for the simultaneous exchange of arguments between CLAIMANT and RESPONDENT that is typical of a hearing. Specifically, the cross-examination of witnesses in a remote hearing functions in the same way as in a courtroom. A “live” conversation between the Tribunal counsel, witnesses, RESPONDENTS and CLAIMANT will be possible.

38 This understanding is supported by the IBA Rules. They define an ‘Evidentiary Hearing’ as “any hearing, [...], at which the Arbitral Tribunal, whether in person, by teleconference, videoconference or other method, receives oral or other evidence” [*IBA Rules, p. 4*]. The parties have not agreed upon the IBA Rules, yet they “are used widely by international arbitral tribunals as a guide even when not binding upon them. [They] reflect the experience of recognized professionals in the field and draw their strength from the intrinsic merit and persuasive value rather than from their binding character.” [*R.R. Dev. Corp. (U.S.A.) v. Repub. of Guatemala, ¶15.*].

3. The parties are treated equally in remote hearings

39 The principle of equal treatment as a key aspect of a fair trial does not mean that there is an obligation to treat the parties in the exact same way [*See Swiss Federal Court, X. and Y., para. 4.2; See Methanex Corp. v. United States, para. 35 et seq.; OGH Austria, 18 ONc 3/20s, para. 10.2.1; Republic of Indonesia v. Amco Asia Corp., and others, para. 53 et seq.; Born, pp. 3494-3495, 3520; Gielen/Wahnschaffe, p. 260; Schlosser, in: Stein/Jonas ZPO, Sec. 1042, para. 40*]. Only significant and unreasonable differentiation in the treatment of parties can constitute a breach of this principle [*HKZ Case No. 1271, para. 5.2.2.3*]. Where one party requests remote hearings and the other party objects to this, not upholding this objection cannot constitute unfair unequal treatment. To do this would simply be to paralyze the management of the arbitral process. Rather, both parties must have equal opportunities when presenting their cases [*ibid.*]. Essentially, when holding remote examinations, both parties may present their witnesses and experts only remotely. The manner in which cross-examination takes place will not differ between the parties. Therefore, it seems difficult to establish a violation of the principle of the equal treatment of the Parties. If the risk of technical difficulties is resolved beforehand, the fact that one party is equipped with a slightly better technical set-up also cannot constitute the unequal treatment of the parties [*Gielen/Wahnschaffe, pp. 259 et seq. with further references*]. In addition, the time difference between the parties’ locations does not construe a breach of this



requirement. Travelling to the location of the arbitration and managing jetlag would be far more tiring than merely preparing to negotiate at off-peak hours [*OGH Austria, 18 ONc 3/20s, para. 10.2.8*]. It is eminently possible to find a time for the hearing that is acceptable to all parties.

4. Remote hearings can remain confidential

40 Another procedural requirement of arbitral proceedings is confidentiality, especially in cases where trade secrets are discussed. But the risks associated with data leakage or storage of the data are not as great as they seem. Cybersecurity has improved dramatically through new technologies such as multi-factor-authentication, encrypting data and implementing endpoint protections [*Rahman, para. 8*]. However, as is the case with influencing witnesses, confidentiality can also not be guaranteed in an in-person setting. After all, participants in the arbitration are not checked for spyware before a hearing. Maintaining a balance between issues of cybersecurity and the technical costs associated with it will ensure sufficient confidentiality.

II. The Tribunal should order remote expert and witness examinations

41 The Tribunal should order remote hearings. The applicable standard is an overall balancing exercise (**A.**). After taking into account all the relevant factors in such exercise, the Tribunal should order that remote hearings be held (**B**Fehler! Verweisquelle konnte nicht gefunden werden..).

A. The applicable standard is an overall balancing exercise

42 Since neither the DAL nor the Swiss Rules provides expressly for a standard applicable when determining whether remote hearings should be ordered, the Tribunal needs to take into account all relevant factors of the specific case. Therefore, it is reasonable to follow the method of an overall balancing exercise [*Scherer, in: Scherer et al., Chapter 4, para. 5.2.2*]. Through this method, the broad discretion of the Tribunal can be exercised [*Scherer, in: Scherer et al., Chapter 4, para. 5.2.2*] and all the relevant aspects of the specific proceedings can be considered. The reasons for the remote hearing, the planned content of it, the technical framework for it, and a comparison between the remote hearings and possible in-person options are the most important issues to be considered. Critically, the obligation of the Tribunal to avoid unnecessary costs and delays under Art. 15 para. 7 Swiss Rules and Art. 19 para. 2 DAL must be taken into consideration [*Müller, in: ASA Special Series No. 44, p. 11*].

B. The Tribunal should order remote hearings when considering the relevant factors

The Tribunal should order remote hearings after considering the following factors: The delay and costs caused by postponing the hearings would be unreasonable (**1.**), especially during a



pandemic (2.). The examination of witnesses and experts is a procedure suitable for a remote hearing (3.), especially as appropriate technical conduct is possible (48.).

1. Postponing the hearing would lead to unreasonable costs and delay

43 Art. 15 para. 7 Swiss Rules as well as Art. 19 para. 2 DAL oblige the Tribunal to avoid unnecessary costs and delays. These would include delays caused by not holding remote hearings and rather waiting until transnational in-person meetings are possible again. Under the special circumstances of a pandemic causing worldwide lockdowns, travel restrictions and quarantine obligations in most countries, as the Tribunal pointed out [*LbS*, pp. 46 et seq., para. 5], it would give rise to very high costs to wait for the unpredictable situation to calm down to an extent that would enable the parties to hold in-person meetings. It is simply not foreseeable when in-person hearings will be possible once again. Additionally, while both parties are able to virtually attend the scheduled hearings, conflicting schedules will make a postponed in-person hearing impossible for at least four months [*PO2*, p. 58, para. 42a]. Therefore, a significant delay and high costs are to be expected if the hearings are not held remotely.

44 Considering the worldwide health crisis, it is not only costly and unnecessary to postpone the witness examinations until in-person hearings are possible again, but also irresponsible. The parties are actors on the international stage for the development and production of vaccines which are crucial to ending the pandemic. It would be very disadvantageous to waste time waiting for the pandemic to be over when a solution to end the pandemic much more expeditiously could be found by the parties solving the dispute remotely.

45 Furthermore, a party's right to be heard is always complemented by the guarantee of effective legal protection [*OGH Austria*, 18 ONc 3/20s, para. 11.2.4; *Gielen/Wahnschaffe*, p. 259]. For CLAIMANT, the RESPONDENT's insistence on its right to be heard would constitute a violation of CLAIMANT's right to effectively enforce its claims against RESPONDENT, as waiting for the pandemic to abate so that in-person meetings could take place would cause an unforeseeable and unnecessary procedural delay [see *OGH Austria*, 18 ONc 3/20s, para. 11.2.4].

2. The uncertain situation within a pandemic serves as good reason to order for remote hearings.

46 The reason for holding remote hearings when examining witnesses and experts is the current pandemic [*LbS*, p. 46 f., para. 5]. Covid-19 has affected not only the ability of witnesses to engage in cross-border travel to participate in in-person hearings. An aggravating factor is that outbreaks of Covid-19 are not easily foreseeable, which makes the scheduling of hearings impossible. Travel bans could hinder an in-person hearing, and it is responsible not to travel so as



not to spread the virus further and undertake unnecessary health risks [*PO2, p. 57, para. 34*]. Therefore, the Covid-19 pandemic is an obvious reason for considering remote hearings.

3. The witness and expert examinations in the second hearing of 3-7 May 2021 are suitable to take place in a remote hearing

47 Hereinafter, the content of the proposed remote hearing becomes relevant. The Tribunal plans on examining witnesses and experts remotely. When assessing whether it is possible to hold this part of the hearing remotely one must bear in mind that the Swiss Rules explicitly allow for this part of the hearing to take place remotely. This is in line with the modern approach of the Swiss Rules to conduct procedures as efficiently as possible [*Balkaya, in: ASA Special Series No. 44, p. 157*]. Furthermore, the parties' right to be heard must again be considered. A violation of this right is not possible if remote hearings would guarantee the parties an opportunity to present their cases and examine witnesses just as effectively as in a physical hearing. As pointed out above, remote hearings allow for a live form of oral conversation and the exchange of arguments.

48 It could prove to be beneficial for witnesses to be examined in a familiar setting, where they behave more naturally and are not stressed out by a face-to-face-confrontation with the opposing counsel [*Scherer, in: Scherer et al., Chapter 4, para. 5.2.2.2.2*]. Additionally, the physical setting of an arbitration does not radiate judicial authority even in live circumstances, as it is mostly held in a neutral setting where no symbols, seating orders or outfits convey great authority to witnesses [*Scherer, in: Scherer et al., Chapter 4, para. 5.2.2.2.2*]. Therefore, a remote setting is not disadvantageous for the examination of witnesses. Modern technology enables the other participants to watch the witness more closely than in a courtroom hearing. This offers even better opportunities for testing a witness's credibility than an in-person setting, where participants can only watch the witness from one angle [*OGH Austria, 18 ONc 3/20s, para. 11.2.6; Scherer, in: Scherer et al., Chapter 4, para. 5.2.2.2.2*]. Furthermore, examinations can be recorded, which means the Tribunal can repeatedly listen to a witness's testimony to test its credibility [*OGH Austria, 18 ONc 3/20s, para. 11.2.6; Scherer, in: Scherer et al., Chapter 4, para. 5.2.2.2.2*]. Lastly, the argument relating to the possibility of there being undue influence on the witness through text messages or other persons in the room is unpersuasive. The witness can be required to show his room setting [*OGH Austria, 18 ONc 3/20s, para. 11.2.6; Scherer, in: Scherer et al., Chapter 4, para. 5.2.2.2.2*]. In any event, undue influence on a witness can also take place in a traditional courtroom [*OGH Austria, 18 ONc 3/20s, para. 11.2.5*].



4. It is possible to conduct remote examinations in a technically appropriate form

49 Witness examination and especially cross-examination are an important part of hearings. Therefore, a technically appropriate set-up granting the parties the opportunity to present their case in the same manner as a conventional physical hearing is crucial. But even cross-examination is possible with the right information technology. The possibility of unnoticed influence on the witness through third parties being present in the room or through chat functions as possible solutions. Insisting that there be a 360-degree camera or imposing an obligation on the witness to pan the camera through the room ensures that no other persons are present at the time evidence is given. Asking the witness to look directly into the camera ensures no chat messages can be read during the testimony. Testing these techniques beforehand will ensure the witness is familiar with the procedures and no technical problems arise during the remote hearing [Scherer, in: Scherer et al., Chapter 4, para. 5.2.2.3]. The remote conduct of hearings can also improve assessing a witness's credibility. In particular, being able to focus the camera closely on the witness's face makes it easier for the Tribunal to assess even small changes in facial expression. Lastly, even in a court room setting minimal undue influence on the witness cannot be completely avoided [OGH Austria, 18 ONc 3/20s, para. 11.2.5].

50 Further, different time zones cannot serve as reason not to hold remote hearings. With in-person hearings, jetlag would put much more of a strain on the parties. A hearing scheduled for 7am Mediterraneo time and 6pm Equatoriana time [see PO2, p. 57, para. 36] seems perfectly manageable. This becomes even more apparent when one considers how the parties have already agreed to a first virtual hearing and have raised any concerns regarding the timing of it [PO1, p. 51, para. II]. While Art. 25 para. 4 Swiss Rules expressly allows the remote examination of witnesses and experts, the parties voluntarily agreed to hold the first hearing dealing with legal questions from 27-30 March 2021 virtually. It seems contradictory to agree to have virtual hearings when there is no express allowance for this in the arbitration rules, but to oppose them in a setting where they are specifically referred to and allowed.

51 Issues may arise because of possible differences between the technological capabilities of the parties, both with regard to the availability of new IT tools and the skills to use them as well as access to a stable internet connection. Both parties and all other participants in the hearing have sufficient equipment and bandwidth [PO, p. 58, para. 38]. Therefore, the software and technological set-up, as well as the quality of the remote communications, can be tested beforehand and any issues arising resolved. The time and money saved as the parties do not need to travel may be used for ensuring the technical requirements for the remote hearings are met.



52 It may be costly to install the necessary technical requirements [*PO2*, p. 57, para. 35], but these costs are reasonable when one considers that the parties have a right to effective legal protection [*OGH Austria, 18 ONc 3/20s*, para. 11.2.4], which means avoiding undue delays, regardless of whether this saves money or incurs extra costs.

ISSUE 3: THE CISG IS APPLICABLE TO THE PCLA

53 The CISG is applicable to the PCLA [*CE3*, pp. 11 et seqq.] since the parties opted for its application (I.). In any event, however, the applicability follows from Artt. 1-5 CISG (II.).

I. The parties opted for the application of the CISG

54 In clause 15.2 of the PCLA [*CE3*, p. 16], the parties agreed to construe their PCLA in accordance with the laws of Danubia. Therefore, the parties opted for the application of the CISG (A.). In any event, clause 15.2 indicates that the parties did not want to exclude its application under Art. 6 CISG (B.).

A. The parties opted for the application of the CISG

55 From clause 15.2 of the PCLA, it can be inferred that the parties opted to apply the CISG. Art. 6 CISG provides that the application of the CISG is primarily determined by the will of the parties [*Schwenzer/Hachem, in: Schlechtriem/Schwenzer, Art. 6 paras. 4 et seqq.*]. The will of the parties is deemed so important that, the parties can exclude the application of the CISG according to Art. 6 CISG [*Officine Maraldi S.p.A. v. Intessa BCI S.p.A.; Used Car Case; Stencil Master 1621 Case*].

56 Although Art. 6 CISG does not clearly state whether the parties are able to opt-in to the CISG where its prerequisites for application are not met, such an option has been accepted [*Electrical Appliances Case; Manner/Schmitt, in: Brunner/Gottlieb, Art. 6 para. 12; Coyle, CISG in U.S. Contract Practice*, pp. 222 et seq.]. Opting-in to the CISG can be done by agreeing that the contract will be governed by the law of a contracting state. In arbitration, *Schwenzer* and *Hachem* even consider it constant practice “to apply the CISG where the parties have chosen the law of a Contracting State without further specifications [...]” [*Schwenzer/Hachem, in: Schlechtriem/Schwenzer, Art. 6 para. 16*]. During the Conference on the CISG of the United Nations it was even noted that it was unnecessary to expressly include an opt-in clause in the CISG since the principle of party autonomy would be sufficient to allow the parties to “opt-in” to the convention [*CISG Official Records*, pp. 86, 252 et seq.].

57 In clause 15.2 of the PCLA the parties agreed on the applicability of Danubian law [*CE3*, p. 16]. Since Danubia is a contracting state of the CISG [*PO1*, p. 52, III.3.], and its courts consider the law of Danubia to include the CISG [*PO2*, p. 58, para. 39], the parties opted for the CISG to



govern their PCLA. The question whether the Parties can choose to apply the CISG when it would not apply by itself does not matter in this case as the PCLA meets the general prerequisites for the application of the CISG [*supra paras. 60 et seqq.*].

58 Indeed, it was even RESPONDENT NO. 1 itself which advertised clause 15.2 of the PCLA [*NA, p. 6, para. 12*]. This shows that it was the intention of RESPONDENT NO. 1 to secure the application of the CISG. Therefore, clause 15.2 has to be understood as evidence of the fact that the parties specifically opted for the application of the CISG.

B. The parties did not exclude the application of the CISG under Art. 6

59 Moreover, clause 15.2 of the PCLA [*CE3, p. 16*] shows that the parties did not exclude the application of the CISG in accordance with its Art. 6. The fact that the parties disregarded the option of an easy exclusion in that sense strongly suggests they chose the application of the CISG, contrary to what RESPONDENT claims [*ANA, p. 28, para. 19*]. It is therefore submitted that the intention of the parties was to have the PCLA governed by the CISG.

II. In any event, according to Artt. 1-5 CISG the CISG is applicable to the PCLA

60 In any event, the CISG is applicable to the PCLA as the parties have their places of business in different contracting states (A.) and the PCLA governs a sale of goods (B.).

A. The Parties concluded an international agreement in the sense of Art. 1 para. 1 (a) CISG

61 According to Art. 1 para. 1 (a), the CISG is applicable only to international contracts if the contracting parties have their places of business in different contracting states [*Schwenzer/Hachem, in: Schlechtriem/Schwenzer, Art. 1 paras. 23 et seqq.*]. In terms of the PCLA, CLAIMANT and RESPONDENT NO. 1 have their places of business in different contracting states, being Mediterraneo and Equatoriana respectively [*CE3, p. 11; PO1, p. 52, III.3.*]. This was also apparent to both parties in the sense of Art. 1 para. 2 CISG at the time the contract was formed. Consequently, the parties have formed an international agreement in accordance with Art. 1 para. 1 (a) CISG.

B. The PCLA is a “sale of goods” in the sense of Art. 1 para. 1 CISG

62 According to Art. 1 para. 1 the CISG applies only to “sales of goods”. The PCLA concerns a sale of goods as the objects of the contract are primarily ‘goods’ (1.) and the contract itself is a contract of sale (2.).

1. RESPONDENT NO. 1 is obliged to primarily deliver goods in the sense of the CISG

63 The PCLA obliges RESPONDENT NO. 1 to deliver GorAdCam vectors along with the associated intellectual property rights and possibly HEK-294 cells, or a vaccine [*CE3, p. 17*]. All of these



pharmaceuticals are goods under the CISG (a.). Furthermore, RESPONDENT NO. 1 is obliged to transfer scientific results (i.e. know-how) which are a good as well as they are fixed in writing [*Magnus, in: Staudinger, Art. 1 para. 46*]. However, even if the Tribunal were to find that know-how is not to be regarded as a good under the CISG the PCLA would remain to be a sale of goods as the transfer of know-how does not constitute the preponderant part of the PCLA in the sense of Art. 3 para. 2 CISG (b.).

a. The PCLA requires RESPONDENT NO. 1 to deliver goods in the sense of the CISG

- 64 The CISG does not define the term “goods”. When interpreting the CISG, the meaning of certain terms cannot be inferred from a single system of laws or legal terminology. The CISG is a “unique, supranational collective of terms formed out of compromises between state delegates based on several systems of laws” and requires an autonomous interpretation of its terms in the sense of Art. 7 para. 1 CISG independent of domestic law [*Mistelis, in: Kröll et al., Art. 1 para. 36; Diedrich, Software and the CISG, p. 310*].
- 65 The decisive factor to determine how the term “goods” should be interpreted lies in determining whether, as a matter of fact, the rules of the CISG (Artt. 35 et seqq.) are capable of being applied to the subject matter in an appropriate manner. These rules allow for a broad interpretation [*Schwenzer/Hachem, in: Schlechtriem/Schwenzer, Art. 1 para. 16*] and lead to the wide definition that goods are all “moveable, tangible objects” [*Officine Maraldi S.p.A. v. Intessa BCI S.p.A.; Schlechtriem, Application, p. 786; Perović, Application, p. 193*].
- 66 The requirements of “moveability” and “tangibility” are not understood strictly. It especially has to be taken into account that the CISG aims to support international trade and “should therefore be applied wherever it may positively affect international commercial transactions and enhance the development of international commercial law” [*Primak, Software, p. 214*]. This line of reasoning is further supported by the wording of the French official text of the CISG. Whilst the French term used in the ULIS was *object mobiliers*, the French version of the CISG only refers to *marchandises* [*Schwenzer/Hachem, in: Schlechtriem/Schwenzer, Art. 1 para. 16*], a term that specifically leaves out the element of mobility. Furthermore, also fluid objects that have no fixed shape are considered to be “goods” (e.g. gas [*Propane Gas Case; Magnus, in: Staudinger, Art. 1 para. 45*]). Software or other intangible data is classified as a tangible commodity as well [*ICT v. Princen Automatisierung Oss; Software Case (1)*].
- 67 Moreover, the CISG even covers the sale of rights under certain circumstances. Artt. 41 et seq. indicate that the mere fact certain items are subject to intellectual property rights does not influence their character as goods [*Schwenzer/Hachem, in: Schlechtriem/Schwenzer,*



Art. 1 para. 22]. In other words, items of embodied intellectual property (i.e. objects which fall under intellectual property rights) are “goods” under the CISG as well [*Magnus, in: Staudinger, Art. 1 para. 57; Brunner/Meier/Stacher, in: Brunner/Gottlieb, Art. 2 para. 3*].

68 First and foremost, the PCLA obliges RESPONDENT NO. 1 to deliver GorAdCam vectors (i.) along with the associated rights (ii.) [*CE3, p. 13*]. Additionally, clause 16.1 of the PCLA refers to HEK-294 cells as well as the cell culture growth medium. Clause 16.2 refers to a vaccine CLAIMANT might develop [*CE3, p. 17*]. All of these pharmaceuticals are goods under the CISG (iii.). Finally, the PCLA provides that know-how [*CE3, p. 13*] is exchanged (iv.). All these obligations concern goods in the sense of the CISG.

i. GorAdCam viral vectors

69 Firstly, under clause 9.2 of the PCLA RESPONDENT NO. 1 is obliged to deliver a batch of GorAdCam vectors. The GorAdCam vectors are moveable and tangible objects within the meaning of the CISG, and thus goods. Specifically, GorAdCam vectors are protein shells which can be used to insert a certain nucleic acid into a host cell for replication. Although those viral vectors are not tangible, they fulfil the requirement of tangibility. With the tools of modern bio engineering, such viral vectors can be “made tangible” and processed (e.g. to serve as a vaccine [for Adeno-Associated Viruses see: *Naso et al., AAV, pp. 317 et seqq.*]). Such medical products are commonly recognized as goods in the sense of the CISG [*Tetracycline HCL Case; Geneva Pharmaceuticals Tech. Corp. v. Barr. Labs Inc.; Schwenger/Hachem, in: Schlechtriem/Schwenger, Art. 1 para. 16*].

ii. Embodied intellectual property rights

70 Secondly, according to clause 5.2 of the PCLA CLAIMANT is granted a license for the further usage of the GorAdCam vectors. Specifically, the GorAdCam vectors are subject to a patent which is recognized and protected in all jurisdictions concerned in this case and held by Roctis [*PO2, p. 54, para. 10*]. CLAIMANT is granted a non-exclusive [*CE3, p. 13*] license to use the GorAdCam vectors which are subject to that patent. Generally, the CISG does not cover the sale of rights [*Mistelis, in: Kröll et al., Art. 1 para. 39*]. However, according to the patent exhaustion doctrine, an authorized sale of goods which are subject to a patent terminates all the patentee’s rights which are of an exclusively commercial nature [*Bowman v. Monsanto Co.; Stack, Patent Exhaustion, pp. 666 et seqq.; WIPO, Exhaustion of IP Rights, p. 3*]. To that extent, CLAIMANT would not have to acquire any further rights from RESPONDENT NO. 1.

71 Notwithstanding, objects which fall under intellectual property rights are goods under the CISG as they “embody” the intellectual property rights. Therefore, the mere fact that the GorAdCam



vectors are subject to intellectual property rights, and those rights are being sold along with the viral vectors, does not contradict the notion of the PCLA being a sale of goods [see. *Magnus, in: Staudinger, Art. 1 para. 57; Schwenzler/Hachem, in: Schlechtriem/Schwenzler, Art. 1 para. 22*].

iii. The HEK-294 cells, the cell culture growth medium, or a possible vaccine

72 Thirdly, clause 16 of the PCLA [CE3, p. 17] contains two provisions of which one applies if a vaccine is successfully developed and commercialized. Clause 16.1 governs the situation where CLAIMANT produces a potentially developed vaccine on its own. CLAIMANT would then be obliged to acquire the HEK-294 cells along with the cell culture medium for this production from RESPONDENT NO. 1 [CE3, p. 17]. This potential obligation, however, also concerns pharmaceuticals such as the GorAdCam vectors, which are goods. [*supra para. 69*].

73 Under clause 16.2 of the PCLA, CLAIMANT could also outsource the production of a vaccine to RESPONDENT NO. 1. The latter would be obliged to deliver the vaccine to CLAIMANT who would then further commercialize it. The vaccine being a pharmaceutical product, however, is also regarded a good within the understanding of the CISG [*supra para. 69*].

iv. Know-how

74 Finally, clause 5.1 of the PCLA allows CLAIMANT to access RESPONDENT'S know-how regarding the GorAdCam vectors [CE3, p. 13; PO2, p. 55, para. 21]. In other words, the scientific results RESPONDENT acquired while working with the GorAdCam vectors are to be shared. Such scientific results that are fixed in writing are regarded as goods under the CISG [*Magnus, in: Staudinger, Art. 1 para. 46; Saenger, in: Bamberger/Roth, Art. 1 para. 8*].

75 In particular, RESPONDENT NO. 1'S obligation is only to transfer know-how. The compilation, however, which could be regarded as a service, is no longer necessary, as the know-how has already been commercialized under the Ross Agreement [RE3, p. 33].

b. The transfer of know-how does not constitute the preponderant part of the PCLA

76 The preponderant part of the PCLA is the sale and delivery of goods in the sense of the CISG. Even if the transfer of know-how was not regarded as a sale of goods the PCLA would still be a sale of goods, as the transfer of know-how only is a minor obligation under the PCLA. Art. 3 para. 2 CISG shows that a contract of sale can also oblige the seller to provide labor or other services as long as the preponderant part of the agreement consists in the delivery of goods. Whatever party argues that a sale of goods is not the preponderant part of the PCLA in the sense of Art. 3 para. CISG would have to prove this, here being RESPONDENT NO. 1 [*Glass Recycling Machine Case; Industrial Tools Case*].



77 In any event, the sale and delivery of the GorAdCam vectors and not the transfer of know-how is the preponderant obligation under the PCLA. If clause 16 came into effect, RESPONDENT NO. 1 would even have to deliver more goods [*supra para. 72 et seq.*]. This line of reasoning is supported by the wording of the PCLA (i.) as well as the financial value of the individual obligations (ii.). Finally, the circumstances surrounding the conclusion of the PCLA support this fact (iii.).

i. Wording

78 The title of the PCLA makes clear that the parties intended to conclude a purchase agreement, (i.e. a sale of goods, “*PURCHASE, Collaboration and Licensing Agreement*”). Compared with the Ross Agreement [*RE3, pp. 32 et seqq.*], the parties added the word “purchase” to the title in order to reflect its nature as a sale of goods. Furthermore, the PCLA prominently defines “Compound” in clause 1 as GorAdCam vectors or any new forms of GorAdCam vectors generated [*CE3, p. 11*]. Moreover, clause 2 of the PCLA states that everything governed by the PCLA only happens with respect to GorAdCam vectors [*CE3, p. 12*]. Even the payment is linked to the “work under the Research Plan” (i.e. research conducted using the GorAdCam vectors) [*CE3, p. 13*]. Hence, the wording of the PCLA reflects the key role the GorAdCam vectors play in the overall agreement between the parties.

ii. The sales of goods according to the PCLA are also financially of great importance

79 To identify the preponderant part of an agreement, the value of its obligations must be compared [*Waste Recycling Plant Case; Software Case (2); Hydraulic Pressure Units Case; Furniture Case; Volmari Werner v. Isocab NV; Prefabricated House Case*]. Under the PCLA, the GorAdCam vectors account for the largest part of the price:

80 RESPONDENT NO. 1 is obliged to deliver GorAdCam vectors in a quantity that is sufficient for CLAIMANT to conduct all of its research including all necessary clinical tests and also the amplification of the viral vectors for the production of a possible vaccine [*PO2, p. 53, para. 4*]. The price CLAIMANT has to pay for this delivery comes to a total of EUR 4,500,000 which makes for more than 80% of all payments that have to be made under the PCLA except for the royalties [*CE3, p. 14 et seq.*] and the payments according to clause 16.

81 Although clause 16 of the PCLA is not yet in effect it also governs the sale of goods [*supra para. 72 et seq.*]. Furthermore, according to internal calculations of the parties those sales are of great financial importance. If CLAIMANT opted for the purchase option according to clause 16.1 RESPONDENT NO. 1 would make a max. annual profit of EUR 31,250,000. If CLAIMANT opted for the purchase option according to clause 16.2 RESPONDENT NO. 1 would even make a



max. annual profit of EUR 70,250,000 [Appendix 1, p. 59]. This reflects the financial impact clause 16 governing the sale of goods has.

iii. Circumstances surrounding the conclusion of the PCLA

- 82 Under Art. 3 para. 2 CISG the circumstances surrounding the conclusion of the contract, namely the purpose of the contract [Yankee-Zylinder Case; Glass Recycling Machine Case] as well as the interests [Centerless Grinding Machine Case; Window Production Plant Case; Air-bag Systems Case; Steel Bars Case] and intentions [Schwenzer/Hachem, in: Schlechtriem/Schwenzer, Art. 3 para. 19] of the parties have to be taken into account.
- 83 Firstly, the recitals of the PCLA state that RESPONDENT NO. 1 produces and sells pharmaceutical base materials. According to “Lifescience Today”, the GorAdCam vectors are the “latest edition” to their portfolio [CE2, p. 10]. CLAIMANT is engaged in the research of innovative immune therapy [CE3, p. 11]. In other words, both parties mainly work with viral vectors themselves – either by producing them or by doing research with them. Clearly, a contract concluded between the parties in this context would reflect this focus of work.
- 84 Secondly, the GorAdCam vectors are the core of the PCLA. Only they allow CLAIMANT to conduct research into new vaccines and fulfil the milestones laid out by the parties [CE3, p. 14]. The PCLA reflects this when stating that “each [...] payment shall be paid only for the [...] achievement of a given milestone by a Compound or Product” [CE3, p. 14].
- 85 Thirdly, as Alexandra Flemming of RESPONDENT NO. 1 pointed out it is especially in the interest of RESPONDENT NO. 1 to sell the GorAdCam vectors as they can be sold at a price which is overall around 2 to 5% higher compared with other viral vectors [CE2, p. 10]. Furthermore, RESPONDENT NO. 1’s internal calculations show that also the sales laid out in clause 16 of the PCLA are very much in their (financial) interest [supra para. 81].
- 86 Finally, up until now no know-how regarding the GorAdCam vectors has been transferred to CLAIMANT [PO2, p. 55, para. 17] indicating the subordinated role that obligation plays. Furthermore, the know-how RESPONDENT NO. 1 could transfer is of only very little interest to CLAIMANT as RESPONDENT NO. 2 only conducted research into the use of ChAdCam vectors and not GorAdCam vectors [NA, p. 5, para. 7]. Also, RESPONDENT would only transfer know-how regarding the amplification of the GorAdCam vectors. This, however, might as well be of no use for CLAIMANT as the PCLA provides a very lucrative option under clause 16.2 to out-source the entire production of a vaccine to RESPONDENT NO. 1 [Appendix 1, p. 59].



2. The PCLA is a contract of sale in the sense of Artt. 1 para. 1, 3 para. 1 CISG

87 The PCLA is a contract of sale in the sense of Artt. 1 para. 1, 3 para. 1 CISG as it is a reciprocal sales contract directed at the exchange of goods against a price [*Schlechtriem, p. 787; Schwenzler/Hachem, in: Schlechtriem/Schwenzler, Art. 1 para. 8*]. As shown above, the PCLA is directed at the exchange of goods against a price [*supra para 63 et seqq.*]. Furthermore, the PCLA is a reciprocal contract of sale (a.) and not a financing agreement (b.).

a. The PCLA is a contract of sale

88 The fact that in terms of the PCLA CLAIMANT receives a non-exclusive license for the use of the GorAdCam vectors [*CE3, p. 13*] does not preclude the character of an exchange contract [for temporary licenses see *Corporate Web Solutions Ltd. v. Vendorlink B.V.*]. On the contrary, if CLAIMANT had received an exclusive license, as in the Ross Agreement, RESPONDENT NO. 1 would have been permanently obliged to refrain from using the viral vectors on their own. Such an obligation, however, goes beyond a one-time exchange of services and would thus be not typical for an exchange contract. Therefore, a non-exclusive license even speaks for the PCLA's character as an exchange contract.

89 Furthermore, also contracts of sale that remain under a condition such as those under clause 16 are sales of goods in the sense of the CISG [*Magnus, in: Staudinger, Art. 1 para. 14*].

90 According to Art. 3 para. 1 CISG, agreements that also oblige the seller to manufacture the goods to be sold are contracts of sale as well. If clause 16.2 came into effect RESPONDENT NO. 1 would have to produce a vaccine as well as deliver it. However, according to Art. 3 para. 1 CISG a contract of sale can include such an obligation as long as the buyer does not supply a substantial part of the material necessary for the production [*Schwenzler/Hachem, in: Schlechtriem/Schwenzler, Art. 3 para. 3*]. This is exactly the case here. In particular, RESPONDENT NO. 1 would be the one to contribute all necessary materials for the production of a vaccine as well as carry out the actual work at its facilities [cf. *Appendix 1, p. 59*]. If anything, the research CLAIMANT conducted could be seen as a contribution. However, non-physical contributions do not fall under Art. 3 para. 1 CISG as they are immaterial contributions and thus no 'materials necessary for the production' [*Schwenzler/Hachem, in: Schlechtriem/Schwenzler, Art. 3 para. 8; Arts Books Case*]. Both the medical products that are necessary for the production of a vaccine and the (modified) GorAdCam vectors would be provided by RESPONDENT NO. 1 (cf. clauses 1.2, 1.6, 5.2 of the PCLA) [*CE3, pp. 11 et seqq.*]. CLAIMANT also does not conduct its research solely in order to contribute to RESPONDENT NO. 1's production of a



vaccine. Much rather, according to clause 16.1 of the PCLA CLAIMANT has the option to produce a vaccine itself.

b. The PCLA is no pure financing agreement but a contract of sale

91 Finally, under clause 9.5 [CE3, p. 14] of the PCLA, CLAIMANT is obliged to pay royalties to RESPONDENT NO. 1. This obligation, however, does not render the PCLA a financing agreement as it is not supposed to compensate the use of the GorAdCam vectors. Much rather, clause 9.5 merely aims to further RESPONDENT NO. 1 participation in the success CLAIMANT might have with the commercialization of a newly developed vaccine.

ISSUE 4: RESPONDENT NO. 1 BREACHED ART. 42 CISG

92 By providing CLAIMANT with the GorAdCam vectors, RESPONDENT NO. 1 did not deliver goods free of rights or claims based on intellectual property of a third party and thereby breached Art. 42 para. 1 CISG (I.). Further, as CLAIMANT did not know about the right or claim and further gave notice within a reasonable time, the exceptions in Art. 42 para. 2 (a) CISG (II.) and Art. 43 CISG (III.) do not apply.

I. RESPONDENT NO. 1 breached its obligation under Art. 42 para. 1 CISG

93 The license granted to Ross in 2014 is intellectual property in terms of Art. 42 para. 1 CISG (A.) Applying a wide standard, the mere assertion by Ross regarding an existing right allows CLAIMANT to invoke Art. 42 CISG (B.). In any way, the GorAdCam vectors received were encumbered with an existing right in terms of Art. 42 para. 1 CISG (C.).

A. The license granted to Ross amounts to a right based on intellectual property in terms of Art. 42 para. 1 CISG

94 As licenses are rights related to patents, the license granted to Ross amounts to a right based on intellectual property in terms of Art. 42 para. 1 CISG. In 2014, RESPONDENT NO. 2 granted an exclusive license to Ross. This license must be a right based on intellectual property in terms of Art. 42 CISG. As the CISG does not define the term “intellectual property”, it must be interpreted autonomously [cf. *supra*, para. 64]. As the phrase “[...] and other intellectual property” in Art. 42 CISG was adopted at suggestion of the WIPO, the WIPO Convention can be used as a reference [*Secretariat’s Commentary*, p. 78; *Janal*, p. 207]. Thereafter, “all [...] rights resulting from intellectual activity in the industrial, scientific, literary or artistic field” and thus all rights related to patents, copyrights and trademarks are encompassed [*Shinn*, p. 122]. To ensure the intended limitation of the seller’s liability under Art. 42 CISG, this broad definition is to be applied [*Brunner/Schifferli*, in: *Mankowski*, Art. 42 para. 5]. Due to the assertion by Ross of an



existing right and RESPONDENT NO. 1's knowledge of it, RESPONDENT NO. 1 breached Art. 42 para. 1 CISG.

95 RESPONDENTS claim that they have not breached their duty laid down in Art. 42 CISG as no rights allegedly exist or form the basis of a claim [*ANA*, p. 28, para. 20]. However, in an e-mail of 6 December 2018 [*RE4*, p. 35], Ross asserted that their license included respiratory diseases. As the license granted under the PCLA explicitly included respiratory diseases [*CE3*, p. 12], Ross asserted the existence of an IP-right. This assertion is sufficient to invoke Art. 42 CISG (1.). RESPONDENT NO. 1 also knew of the assertion (2.).

1. The mere assertion by Ross is sufficient to invoke Art. 42 CISG

96 The assertion by Ross regarding an existent right or claim is sufficient to justify invoking Art. 42 para. 1 CISG for two reasons: First, a filed suit by the third party is not necessary to rely on Art. 42 CISG (a.). Second, a concrete risk that the third party will raise a claim is given (b.).

a. CLAIMANT can invoke Art. 42 CISG even though Ross has not filed a court case

97 The mere assertion of the existence of a right or a claim is sufficient for a breach of Art. 42 para. 1 CISG. The wording of Art. 42 CISG includes “rights or claims”. If this meant that only claims filed in court were covered, the buyer would find itself in an intolerable position: During the period of dispute, the buyer would have to bear the risk of uncertainty concerning the encumbrance of his goods [*Kröll, in: Kröll et. al, Art. 42 para. 10*]. This has special relevance in the present case: Start-ups like CLAIMANT focus their whole work on one product. Moreover, during the pressing threat of the COVID-19 pandemic, certainty is crucial for the development of a vaccine. If the claim was founded, the buyer would have to take steps against the seller, which is a time-consuming burden. However, even if the claim was unfounded, the buyer would have already suffered a loss of reputation [*Kröll, in: Kröll et. al., Art. 42 para. 10*]. In any way, the buyer has to face the burden of legal costs, which in the instant case, CLAIMANT as a small company cannot do [*CE5, p. 19*].

b. In any way, there is a risk that Ross will enforce their IP rights

98 Even if beyond the assertion of an existing right, the risk that the third party in fact enforced its rights was necessary [*Achilles, FS Schwenzler, p. 6*], this would be given in the present case. Ross has a policy of vigorously enforcing IP rights [*CE7, p. 21; CE5, p. 19*]. They are currently involved in two IP-litigations and one arbitration against third parties allegedly infringing their rights [*PO2, p. 54, para. 15*]. Ross indeed stated their preference to solve the matter amicably without going to courts [*RE4, p. 35*]. However, as even industry insiders are surprised that no solution has been found yet [*CE4, p. 18*], a risk that Ross will enforce its IP- rights is still given.



2. RESPONDENT NO. 1 knew of the assertion of an existing right by Ross

99 RESPONDENT NO. 1 further knew about the assertion by Ross of an existing right. Art. 42 CISG further requires that the seller had knowledge of the claim or right. It is sufficient that the seller had a basic knowledge of the defect in title – he must not deem the claim to be rightful [*Brunner/Schifferli, in: Mankowski, Art. 42 para. 9*]. Knowledge is assumed in all cases where the third parties have contacted the seller directly before delivery [*Kröll, in: Kröll et al., Art. 42 para 26*]. Ross informed RESPONDENT NO. 2 on 6 December 2018 about their view that the license also included respiratory diseases [*RE4, p. 35*]. As this was expressed to Mr. Doherty whose knowledge – despite his position at RESPONDENT NO. 2 at the time of contract conclusion – can be attributed to RESPONDENT NO. 1 [*cf. infra para. 108*], RESPONDENT NO. 1 knew of the assertion at the time of contract conclusion.

B. In any way, the GorAdCam vectors are encumbered with an existing right based on intellectual property of Ross at the time of contract conclusion

100 RESPONDENTS claim that “there is clearly no IP-right of Ross” [*ANA, p. 28, para. 20*] However, as Ross holds an exclusive license [*RE3, p. 33*] which includes respiratory diseases (1.) and no territorial limitations apply (2.), the vectors delivered to CLAIMANT intended for the use in the field of respiratory diseases [*CE3, p. 12*] are not free of IP-rights of a third party in terms of Art. 42 CISG. Furthermore, RESPONDENT NO. 1 knew of the existence of this right at the time of contract conclusion as the knowledge of RESPONDENT NO. 2 is to be attributed to RESPONDENT NO. 1 (3.).

1. The Ross Agreement also includes infectious respiratory diseases

101 As opposed to RESPONDENT NO. 1 [*RE5, p. 36*], Ross claims that the wording of the Ross Agreement “malaria and related infectious diseases” [*RE3, p. 32*] extends to respiratory diseases [*RE4, p. 35*]. When determining the content of a contract, contrary to its wording which only refers to unilateral statements, Art. 8 CISG is applicable [*Secretariat’s Commentary, p. 18; Schmidt-Kessel, in: Schlechtriem/Schwenzer, Art. 8 para. 3*]. Under Art. 8 CISG, the parties’ common intention has to be determined [*Replacement Parts for Ships Case*]. Pursuant to Art. 8 para. 3 CISG, preliminary negotiations (a.), the conduct of the parties subsequent to the conclusion of the contract (b.) and the nature and purpose of the contract (c.) must be taken into consideration.

a. Preliminary negotiations

102 During the negotiations, Ross also wanted to buy the ChAdCam vector which was held suitable for respiratory diseases [*CE7, p. 21*] and thereby expressed their interest in fields other than



malaria. Moreover, RESPONDENT NO. 2 extended the wording of the contract to “malaria and related infectious diseases” against an extra payment of EUR 600,000 [RE2, p. 30 para. 5; PO2, p. 55 para. 20]. As EUR 600,000 amounts to 1/5th of sum of the up-front payment of EUR 3,000,000 [CE1, p. 9], it is apparent that both parties agreed to include as many diseases as possible.

b. Conduct of the parties subsequent to contract conclusion

103 In a press statement on 15 June 2014 [CE1, p. 9], RESPONDENT NO. 2 itself admitted the license was granted for “malaria and infectious diseases”. Additionally, RESPONDENTS offered to grant a license for respiratory diseases to Ross on 13 January 2020 [RE5, p. 36]. As they thereby refrain from a purchase obligation clause despite their assertion that such clauses amount to a “major profitable advantage” [CE2, p. 10], it becomes apparent that RESPONDENTS are of the view that the Ross Agreement extends to respiratory diseases.

c. Nature and purpose of the contract

104 Further, the research plan listed “malaria and related infectious diseases (in particular cholera)” [PO2, p. 55, para. 20]. The term “in particular cholera” shows that “related infectious diseases” are not confined to cholera but also refer to diseases not closely related to malaria. Thus, contrary to RESPONDENT’s assertion, it was the common intention to keep the agreement as broad as possible and also include respiratory diseases in the Ross Agreement.

2. RESPONDENT NO. 1’s obligation under Art. 42 CISG is not excluded due to territorial limitations

105 RESPONDENT NO. 1’s obligation under Art. 42 CISG is not excluded due to territorial limitations. Art. 42 para. 1 CISG requires the seller to ensure that the goods are free of IP-rights under the law of the state where the buyer has its place of business or where the goods will be sold. Ross has its place of business in Brigantium; CLAIMANT in Mediterraneo. Neither the Ross Agreement, nor the PCLA determine the place where the goods will be sold. However, both agreements allow worldwide licensing of the products [CE3, p. 13; RE3, p. 33]. Thus, goods developed under the PCLA could be sold in any country where Ross would have rights to use it. Further, if Ross had IP-rights, the use of GorAdCam vectors would be protected under Mediterranean law as CLAIMANT’s place of business [PO2, p. 58, para. 40].

3. RESPONDENT NO. 1 knew that the license granted to Ross concerned respiratory diseases or could not have been unaware

106 Officially, RESPONDENT NO. 1 was not involved in the discussions of the Ross Agreement [PO2, p. 53]. However, as RESPONDENT NO. 2’s knowledge must be attributed to RESPONDENT



NO. 1 knew of the scope of the Ross Agreement (a.). In any way, RESPONDENT NO. 1 could not have been unaware of it (b.).

a. RESPONDENT NO. 1 knew of the scope of the Ross Agreement

107 As it was RESPONDENT NO. 2's intention to include respiratory diseases [*supra, paras. 101 et seqq.*], RESPONDENT NO. 2 knew that the GorAdCam vectors intended for use in the field of respiratory diseases sold to CLAIMANT would be encumbered with rights by Ross. This knowledge of RESPONDENT NO. 2 is to be attributed to RESPONDENT NO. 1 for two reasons: Firstly, the knowledge of Mr. Doherty is to be attributed to RESPONDENT NO. 1 (i.). Secondly, the knowledge of one sister company is to be attributed to another (ii.).

i. The knowledge of Mr. Doherty is to be attributed to RESPONDENT NO. 1

108 The knowledge of Mr. Doherty as a third person is to be attributed to RESPONDENT NO. 1. In 2014, Mr. Doherty was involved in the negotiations and signed the Ross Agreement [*RE3, p. 34*]. He thus had positive knowledge of its scope. As he played a leading role in the negotiations of the PCLA between RESPONDENT NO. 1 and CLAIMANT in 2018, his knowledge about the scope of the Ross Agreement must be attributed to RESPONDENT NO. 1.

109 The Court of Appeal of England and Wales held that personnel interconnections may lead to knowledge attribution as such may increase “the flow of information” [*Chandler v. Cape plc*]. At the time of contract conclusion at the end of 2018 [*RE2, p. 31, para. 13*], Mr. Doherty was officially employed by RESPONDENT NO. 2 but factually worked in the sphere of RESPONDENT NO. 1 [*RE2, p. 30*]. The CEO's collaborated by appointing him to take over negotiations [*PO2, p. 56, para. 24*]. This shows the personnel interconnections. Also, according to Art. 79 para. 2 CISG, in the event of a party's failure due to a third party's behavior, the behavior of the third person is to be attributed to the obligor. Art. 79 para. 2 CISG does not specifically address the question of knowledge attribution. However, it provides a general principle in the sense of Art. 7 para. 2 CISG that one has to carry the risks related to having obligations carried out by third persons as one benefits from the advantages [*Kröll, in: Kröll et al., Art. 79 para. 60*]. This general principle applies to the attribution of knowledge [*Brunner, in Brunner/Gottlieb, Art. 79 para. 570*]. Thus, the knowledge of third persons that the obligor used in relation to contract is to be attributed to him [*Coke Case; Kaiser, in: Staudinger, Art. 79 para. 43*]. Here, Mr. Doherty was asked by the CEO's of both RESPONDENTS [*PO2, p. 56, para. 24*] and was thereby appointed as an auxiliary third person for RESPONDENT NO. 1. He then conducted the negotiations [*RE2, p. 31*].



ii. Due to their status as sister companies, the knowledge of RESPONDENT NO. 2 is to be attributed to RESPONDENT NO. 1

110 Further, the mere fact that RESPONDENT NO. 1 and RESPONDENT NO. 2 are sister companies with a close structural connection justifies imputing RESPONDENT NO. 2's knowledge to RESPONDENT NO. 1.

111 The understanding that knowledge can be attributed solely due to the status as sister companies is supported by the ratio of the group of companies doctrine. Under this doctrine, a non-signatory of an arbitration agreement who plays an important role in conclusion, termination and performance of the contract may be bound to an arbitration agreement [*Dow Chemical France & Ors. v. ISOVER Saint Gobain*]. This doctrine does not require control of the companies, but the sole circumstance that the companies belong to the same corporate group is sufficient as all group members share the same "group personality" [*Manuchar Steel Hong Kong Ltd. v. Star Pacific Line Pte Ltd*]. The conclusion of an arbitration agreement is based on declarations of will as legal acts whereas the sole acquirement of knowledge does not involve any legal acts at all. Thus, if under the group of companies doctrine, declarations of intent can be attributed to a sister company, the same must *a fortiori* be apply to knowledge as well. Consequently, the fact that RESPONDENT NO. 1 and RESPONDENT NO. 2 amounted to Roctis is sufficient to establish attribution of knowledge.

112 Alternatively, even if beyond the circumstance that the companies belong to the same corporate group, a connection between the companies is required to attribute knowledge, this is given in the present case. Knowledge of companies can be attributed if a group forms in fact a single organization with respect to certain activities [*Katan, p. 299*]. While RESPONDENT NO. 1 is legally independent, strategic decisions, such as the acquisition of RESPONDENT NO. 2 and the "transfer" of IP-rights, are taken at a group level [*PO2, p. 53, para. 1*]. Moreover, the fact that both CEO's worked together when appointing Mr. Doherty to take over negotiations shows the close bond between the two companies. The transaction in question further involved the collaboration of the two companies as RESPONDENT NO. 1 conducted the research of the GorAd-Cam vectors while RESPONDENT NO. 2 commercialized them.

b. Alternatively, RESPONDENT NO. 1 could not have been unaware about the scope of the Ross Agreement

113 RESPONDENT NO. 1 had a duty to investigate the scope of the Ross Agreement and by failing to do so, it had culpable lack of knowledge in terms of Art. 42 CISG. Despite its knowledge about the existence of the Ross Agreement, RESPONDENT NO. 1 did not know about the scope of it.



Whether the seller has an obligation to investigate the existence and scope of intellectual property rights does not depend on whether intellectual property rights are registered or not [*Metzger*, p. 853]. Instead, a duty to investigate depends on the circumstances of the particular case [*Achilles*, Art. 42 para. 8]. Relevant factors are whether information that is reasonably at hand exists at the time of contract conclusion [*Shinn*, p. 127], the status of the seller and detectability of the right [*Kröll*, in: *Kröll et al.*, Art. 42 para. 30, para. 32].

114 RESPONDENT NO. 1 knew the Ross Agreement was the reason that the malaria application was excluded from the license granted to it from RESPONDENT NO. 1 in 2018 [*PO2*, p. 53]. Thus, information that gives occasion to investigate was at RESPONDENT NO. 1's hand. Furthermore, RESPONDENT NO. 1 is part of the Roctis Group, one of the biggest pharmaceutical companies in the world. It has its own contracting department [*RE2*, p. 30] and therefore the capacities to investigate Intellectual Property rights. As RESPONDENT NO. 1 is the sister company of RESPONDENT NO. 2, it would have been the normal course of action to ask RESPONDENT NO. 2 about the scope of the agreement. Furthermore, if the seller has other contacts with the particular market, it has increased reason to spend time and money on investigation of potential intellectual property rights [*Kröll*, in: *Kröll et al.*, Art. 42 para. 32]. In the present case, the fact that RESPONDENT NO. 1 was so far not involved in the area of viral vectors [*CE2*, p. 10] does not change that in 2018, RESPONDENT NO. 1 had been – together with Ross – the only recipient of an HEK-294-licnese and thus already a leading player on the market of viral vectors. Further, it also granted similar licenses to two other parties [*PO2*, p. 55, para. 18]. Therefore, it would have been reasonable to conduct further investigation.

II. The exclusion of Art. 42 para. 2 CISG does not apply

115 Moreover, as CLAIMANT did not know of the right or claim (A.) and also did not have culpable lack of knowledge, the exclusion of Art. 42 para. 2 CISG does not apply (B.).

A. CLAIMANT did not know of the right or claim

116 At the time of contract conclusion, CLAIMANT did not know that RESPONDENT NO. 2 had granted a license in relation to the GorAdCam vector to Ross. As – according to the clear wording of Art. 42 para. 2 (a) CISG – the time of contract conclusion is decisive, it is irrelevant that Rosaly Hübner who was part of the negotiation team of the Ross Agreement, was appointed CLAIMANT's CFO in March 2019, 3 months after contract conclusion in December 2018. As the acquisition of CLAIMANT by Khorona Lifescience occurred in 2020 and therefore after contract conclusion, it is irrelevant that Khorona Lifescience is a competitor of Ross [*PO2*, p. 54, para.



13] and therefore more likely to know about the scope of the Ross Agreement. At the time of contract conclusion in January 2019, CLAIMANT did not know of the right or claim.

B. CLAIMANT did not have culpable lack of knowledge

- 117 As opposed to the seller [*cf. para. 113*], the buyer does not have a duty to inquire about potential existing rights of third parties [*Tebel, in: Brunner/Gottlieb, Art. 42 para. 21*]. Otherwise, if a duty to investigate was imposed on the seller and on the buyer, Art. 42 CISG would hardly be applicable, as the exception of Art. 42 para. 2 CISG would always have to apply when the requirements of Art. 42 para. 1 CISG are given [*Rauda/Etier, p. 55*].
- 118 A duty to investigate can arise if information only available to the buyer exists and circumstances to undertake further investigations apply, existed [*Tebel, in: Brunner/Gottlieb, Art. 42 para. 311; Magnus, in: Staudinger, Art. 42 para. 26*], this is presently not the case.
- 119 As RESPONDENT NO. 1 is the sister company of RESPONDENT NO. 2. and received the license from the latter, RESPONDENT NO. 1 had superior information to investigate. Moreover, as RESPONDENT NO. 1 confirmed in clauses 11.1.2-11.1.4 of the PCLA [*CE3, p. 15*] that no rights of third parties existed, there was no reason for CLAIMANT to question this assertion. Furthermore, the article reporting about the dispute in Biopharma Science published on 14 December 2018 does not amount to a circumstance which requires the buyer to undertake further investigations for two reasons: First, the article mentioned that the differences concerned "the scope of an exclusive license granted to Ross in relation to malaria and comparable infectious diseases" but provided no further details [*PO2, p. 54, para. 8*]. Thus, it did not report that Ross had paid an extra sum of EUR 600,000, nor that the clause had been one of the contentious points. Thus, even if CLAIMANT had read the article, it wouldn't have known that the issue concerned its own license. Secondly, there was no obligation for CLAIMANT to read the article. Although Biopharma Science is popular with investors in the bioscience start-up scene, CLAIMANT was not aware of this article as CLAIMANT's CEO had terminated its subscription in January 2018 to reduce costs [*PO2, p. 54, para. 8*]. In any regard, the article from December 2018 only reported about the dispute between Ross and RESPONDENT NO. 1 without mentioning CLAIMANT. As the time of contract conclusion is decisive, it is irrelevant that Biopharma Science published an article in 2020 [*RE1, p. 29*] mentioning CLAIMANT's name. Furthermore, the article was published one year before contract conclusion. As it cannot be expected that CLAIMANT consults specialist journals until one year before contract conclusion which did not mention its name, the existence of the article published in Biopharma Science does not establish a duty to investigate.



III. The exclusion of Art. 43 CISG does not apply

120 As CLAIMANT gave notice to RESPONDENT NO. 1 the day after it became aware of the dispute between Roctis and Ross [CE5, p. 19], it did not lose its right to rely on Art. 42 CISG

PRAYER FOR RELIEF

CLAIMANT respectfully requests the Tribunal to

1. dismiss the motion for a joinder of Ross Pharmaceutical,
2. order remote taking of evidence on 3 to 7 May 2021,
3. find that the CISG is applicable to the “Purchase, Collaboration and License Agreement” concluded between CLAIMANT and RESPONDENT NO. 1,
4. find that RESPONDENT NO. 1 breached its contractual obligation to deliver conforming goods pursuant to Art. 42 CISG.

Respectfully submitted,

Hamburg, 10 December 2020

MAXIMILIAN BITTER |

JONAS KLEIN |

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EIGHTEENTH ANNUAL WILLEM C. VIS EAST INTERNATIONAL COMMERCIAL ARBITRATION MOOT & 2ND VVE

Certificate and Choice of Forum

To be attached to each Memorandum

I, Janusch Krasberg,

on behalf of the Team for Bucerius Law School hereby certify that the attached memorandum was prepared by the members of the student team, and that no person other than a student team member has participated in the writing of this Memorandum.

Check off the boxes as appropriate:

Our School will be participating only in the Vis East Moot and is not competing in the Vienna Vis Moot.

Our School is competing in both Vis East Moot and Vienna Vis Moot.

We are submitting two separately prepared, different Memoranda to Vis East Moot and to Vienna Vis Moot.

Or

We are submitting the same Memorandum to both Vis East Moot and Vienna Vis Moot, and we choose to be considered for an Award in (check one box)

Vis East Moot in Hong Kong, or

Vienna Vis Moot

Authorised Representative of the Team for Bucerius Law School

Name Janusch Krasberg

Signature _____
