Eighteenth Annual Willem C. Vis East International Commercial Arbitration Moot

# GUJARAT

# NATIONAL LAW UNIVERSITY


## MEMORANDUM FOR RESPONDENTS

**On behalf of**

–RESPONDENTS –

CamVir Ltd
112 Rue L. Pasteur
Oceanside, Equatoriana

AND

VectorVir Ltd
67 Wallace Rowe Drive
Oceanside, Equatoriana

**Against**

-CLAIMANT-

RespiVac Plc
Rue Whittle 9 Capital
City, Mediterraneo

**COUNSEL**

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GUJARAT • REPUBLIC OF INDIA

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## LIST OF ABBREVIATIONS

| | |
|---|---|
| **%** | percentage |
| **&** | And |
| **§** | Section(s) |
| **¶/¶¶** | paragraph/s |
| **AIR** | All India Reporter |
| **App.** | Appeal |
| **App'x** | Appendix |
| **ARB** | Arbitration |
| **Art.** | Article |
| **ASA** | Swiss Arbitration Association |
| **Assocs.** | Association |
| **Aus.** | Australia |
| **Aust.** | Austria |
| **Auth.** | Author |
| **Belg.** | Belgium |
| **Bull.** | Bulletin |
| **Cal.** | California |

| | |
|---|---|
| **Can.** | Canada |
| **CEO** | Chief Executive Officer |
| **Cir.** | Circuit |
| **CISG** | United Nations Convention on Contracts for the International Sale of Goods |
| **CISG-AC Opinion** | CISG Advisory Council Opinion |
| **CIV** | Civil |
| **CJEU** | Court of Justice European Union |
| **Cl.** | Claimant |
| **cl.** | Clause |
| **CLOUT** | Case Laws on UNCITRAL Texts |
| **Co.** | Company |
| **Comm.** | Commercial |
| **Corp.** | Corporation |
| **CoV** | Coronavirus |
| **COVID-19** | Coronavirus Disease |
| **CPC** | Code of Civil Procedure |
| **Crim LR** | Criminal Law Review |
| **Ct.** | Court |

| | |
|---|---|
| **Div.** | Division |
| **Doc.** | Document |
| **EC** | European Commission |
| **E-Commerce** | Electronic Commerce |
| **Ed.** | Editor |
| **Edn.** | Edition |
| **e-mail** | Electronic mail |
| **Emp** | Employment |
| **Emps** | Employees |
| **et al.** | et alii (and following) |
| **EUR** | Euros |
| **EWHC** | England and Wales High Court |
| **Ex.** | Exhibit |
| **FCA** | Federal Court of Australia |
| **Fra.** | France |
| **GD** | General Division |
| **Ger.** | Germany |
| **GMP** | Good Manufacturing Practice |

| | |
|---|---|
| **GorAdCam** | Gorilla Adenovirus |
| **HEK cells** | Human Embryonic Kidney Cells |
| **HKIAC** | Hong Kong International Arbitration Centre |
| **HKO** | Hong Kong Ordinance |
| **Hosp.** | Hospital |
| **i.e.** | Id est |
| **IBA** | International Bar Association |
| **IBM** | International Business Machines |
| **ICC** | International Chamber of Commerce |
| **ICCA** | International Congress and Convention Association |
| **ICDR** | International Centre for Dispute Resolution |
| **ICSID** | International Centre for the Settlement of Investment Disputes |
| **ICTR** | International Crime Tribunal of Rwanda |
| **Inc.** | Incorporated |
| **Ind.** | India |
| **Invs.** | Investments |
| **IOC** | International Olympic Committee |
| **IP** | Intellectual Property |

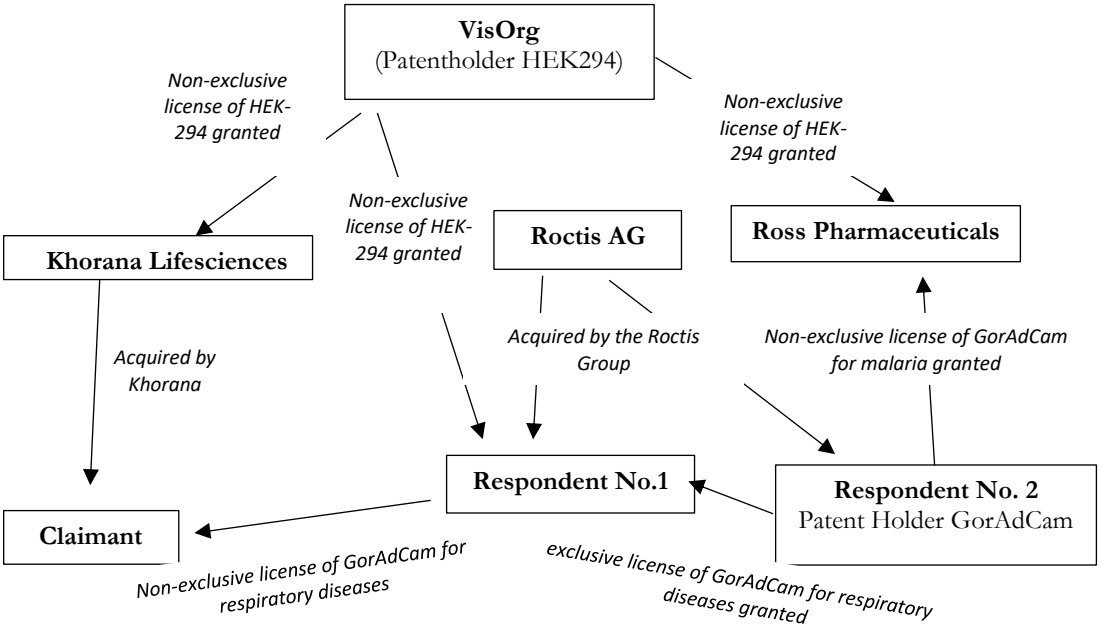
| | |
|---|---|
| **It.** | Italy |
| **Ker.** | Kerala |
| **Kg** | Kilograms |
| **L.A.** | Los Angeles |
| **LCIA** | London Court of International Arbitration |
| **LGDJ** | Librairie générale de droit et de jurisprudence |
| **Ltd.** | Limited |
| **M** | Million |
| **MERS** | Middle East Respiratory Syndrome |
| **Mex.** | Mexico |
| **Mgmt.** | Management |
| **MIMB** | Methods in Molecular Biology |
| **Misc.** | Miscellaneous |
| **Model Law** | UNCITRAL Model Law on International Commercial Arbitration |
| **Mr.** | Mister |
| **N.S.W.S.C** | Supreme Court of New South Wales |
| **nCoV** | Novel Coronavirus |
| **Ned.** | Netherlands |

| | |
|---|---|
| **No.** | Number |
| **NY** | New York |
| **O.T.C** | Ontario Court of Justice |
| **OECD** | Organisation for Economic Cooperation and Development |
| **Ors.** | Others |
| **p.** | Page(s) |
| **PCLA** | Purchase, Collaboration and License Agreement |
| **PICC** | Principles of International Commercial Contracts |
| **plc** | Public Limited Company |
| **PLLC** | Private Limited Liability Company |
| **PO1** | Procedural Order No. 1 |
| **PO2** | Procedural Order No. 2 |
| **pp.** | pinpoint |
| **Pty.** | Proprietary |
| **r.** | Rule |
| **r/w** | Read with |
| **Res.** | Respondent |
| **Rev.** | Review |

| | |
|---|---|
| **Rus.** | Russia |
| **SARS** | Severe Acute Respiratory Syndrome |
| **SCAI** | Swiss Chambers' Arbitration Institution |
| **SCC** | Stockholm Chamber of Commerce |
| **SCC** | Supreme Court of Canada |
| **SGHC** | Singapore High Court |
| **SIAC** | Singapore International Arbitration Centre |
| **Sing.** | Singapore |
| **Spa.** | Spain |
| **Supp.** | Supplement |
| **Swiss Rules** | Swiss Rules of International Arbitration |
| **Switz.** | Switzerland |
| **Sys.** | System |
| **TCC** | Technology and Construction Court |
| **U.N.** | United Nations |
| **U.C.C.** | Uniform Commercial Code |
| **UK** | United Kingdom of Great Britain and Northern Ireland |
| **ULIS** | Uniform Law on the International Sale of Goods |

| | |
|---|---|
| **UN** | United Nations |
| **UNCITRAL** | United Nations Commission on International Trade Law |
| **UNIDROIT** | International Institute for the Unification of Private Law |
| **USA** | United States of America |
| **v.** | versus |
| **Vol.** | Volume |
| **WHO** | World Health Organization |
| **WIPO** | World Intellectual Property Organization |
| **WLR** | Weekly Law Report |
| **y/o** | Years old |
| **ZPO** | Zivilprozessordnung (German Code of Civil Procedure) |

## ECONOMIC ANALYSIS




The outbreak of COVID-19 has upended the pharmaceutical industry, which is engaged in the race to develop a vaccine. So far, *GorAdCam*-based vaccines are inching towards the finish line. The vaccine requires two materials for production – *GorAdCam* viral vectors and HEK-294 cells.

VisOrg has licensed the HEK-294 cells to three players in the world – Khorana Lifesciences, Ross and RESPONDENT NO. 1. In 2018, CLAIMANT and RESPONDENT NO. 1 entered into the PCLA to create a framework ensuring that CLAIMANT purchases all its needs for HEK-294 cells from RESPONDENT NO. 1. These future purchases were agreed to take place at a cost of EUR 2 Million per batch of HEK-294 cells. Two years later, CLAIMANT became a subsidiary of Khorana Lifesciences. Khorana has the capacity to supply CLAIMANT with HEK-294 cells as well, albeit at a lower price than RESPONDENT NO. 1.

In the business world, a competitor's lower prices do not supersede existing purchase commitments set in stone by a written contract. CLAIMANT disrespects this edict and has initiated these arbitral proceedings to escape its obligations under the PCLA. Despite its weak case, it hopes to place RESPONDENTS at peril and divert the EUR 200 Million that it would have otherwise paid RESPONDENTS, to its own parent company. No commercial entity should be allowed to unjustly benefit this way.

## STATEMENT OF FACTS

*If Greed were a disease, it would be a disease with no cure.*

*The proceedings at hand concern the mala fide actions of Khorana and CLAIMANT who have acted out of greed.*

RespiVac ("**CLAIMANT**"), CamVir ("**RESPONDENT NO. 1**") and VectorVir ("**RESPONDENT NO. 2**") are the parties to this arbitration proceeding.

CLAIMANT is a biopharma start-up in Mediterraneo. Its parent company is Khorana Lifesciences ("**Khorana**"). CLAIMANT is engaged in the research and development of vaccines for respiratory diseases. RESPONDENT NO. 1 is a contract manufacturing organization in the pharmaceutical industry. RESPONDENT NO. 2 is the patent holder to the *GorAdCam* vectors. RESPONDENTS are located in Equitoriana and are owned by the same parent corporation, Roctis AG ("**Roctis**").

**15 June 2014** RESPONDENT NO. 2 grants an exclusive license to Ross Pharmaceuticals ("**Ross**") for *GorAdCam* vectors in the field of "Malaria and related infectious diseases" by way of the Ross Agreement.

**2018** Ross recognizes the potential of *GorAdCam* to cure respiratory diseases.

**Summer 2018** Ross makes an acquisition offer to RESPONDENT NO. 2 to get access to *GorAdCam* vectors for respiratory diseases. To gain an upper-hand in negotiations, Ross raises a claim that it already has access to *GorAdCam* for respiratory diseases due to the Ross Agreement. Ross realizes that its claim is futile and negotiations fail. Ross does not enforce its claim.

**August 2018** Roctis acquires RESPONDENT NO. 2. RESPONDENT NO. 2 grants an exclusive license to RESPONDENT NO. 1 for *GorAdCam* in the field of all "respiratory diseases."

**6 December 2018** Ross, by way of e-mail, offers to get a non-exclusive license of *GorAdCam* for respiratory diseases. The offer was disguised in the form of Ross' previous claim. It sent the email to Mr. Doherty, the head of the Legal Department of RESPONDENT No. 2.

**1 January 2019** RESPONDENT NO. 1 and CLAIMANT conclude the Purchase, Collaboration and Licensing Agreement ("**PCLA**"). RESPONDENT NO. 1

licenses out *GorAdCam* vectors to CLAIMANT in the field of all respiratory diseases.

**13 January 2019** CEO of the Roctis Group replies to Ross' e-mail by emphasising that Ross does not have access to *GorAdCam* vectors for respiratory diseases and highlighting that they would defend their position in legal proceedings as well. Ross does not pursue its claim after this.

**1-2 May 2020** CLAIMANT's parent company, Khorana brings the Ross Claim to CLAIMANT's attention on 1 May 2020. CLAIMANT informs RESPONDENT NO. 1 of this claim by e-mail on 2 May 2020.

**4 May 2020** RESPONDENT NO. 1 responds to CLAIMANT's concerns over the alleged Ross Claim by e-mail, in which it clarifies them. CLAIMANT does not reply to this e-mail.

**15 July 2020** CLAIMANT initiates arbitration proceedings against RESPONDENTS, alleging that RESPONDENT NO. 1 had licensed out goods to CLAIMANT which were a subject to a third-party IP claim of Ross. CLAIMANT provides notice to the Swiss Chambers of Arbitration ("**SCAI**").

**14 August 2020** RESPONDENTS request the joinder of Ross to the arbitral proceedings.

**4 September 2020** The Tribunal consults the parties on conducting a remote hearing for the examination of witnesses and experts.

**2 October 2020** CLAIMANT expresses its objection to the joinder of Ross, while assenting to the question of remote hearings. RESPONDENTS object to remote hearings.

CLAIMANT seeks to initiate arbitration proceedings so as to escape its obligation to acquire its need for HEK-294 cells from RESPONDENT No. 1 under the PCLA. It seeks to purchase such cells from its parent company, Khorana for a much lesser price, at the peril of RESPONDENT No. 1. CLAIMANT has initiated these proceedings out of the greed to earn more profit and escape its contractual obligations.

## ARGUMENTS ON PROCEDURE

## ISSUE 1: ROSS SHOULD BE JOINED TO THE ARBITRAL PROCEEDINGS

**1.** RESPONDENTS have requested the joinder of Ross to the arbitral proceedings under Art. 4(2) of the Swiss Rules of International Arbitration ("**Swiss Rules**") to deal with the entire issue conclusively, particularly to exclude comparable allegations by other parties as well as to put an end to the discussion with Ross *[Answer to Notice, ¶21]*. Under Art. 4(2), the joinder of a party to arbitration proceedings is permissible after the tribunal has consulted with "*all of the parties, including the person or persons to be joined, taking into account all relevant circumstances*."

**2.** In its written submissions, CLAIMANT asserts that the consent of the "original parties" is necessary for the "intervention" of a third party *[Cl. Memorandum, ¶52]*. "Intervention" refers to the request of a third party to be added as an additional party to the arbitration *[Born, p. 2759]*. On the other hand, "joinder" refers to the request of an existing party to an arbitration to add another party, not originally named as a party to an arbitration *[Born, p. 2759; Carrion, p. 481]*. Presently, RESPONDENTS have requested the addition of Ross *[Answer to Notice, ¶21]*. Hence, contrary to the references made by CLAIMANT, the present case involves joinder, and not intervention *[Cl. Memorandum, passim]*. Therefore, the Tribunal should disregard any authority cited by CLAIMANT or its submissions related to intervention as they are irrelevant.

**3.** The Tribunal has broad discretion to decide on joinders. The Tribunal should favorably exercise this discretion to join Ross to these proceedings because CLAIMANT and RESPONDENT NO. 1 agreed to joinders in the PCLA**[I]**. Furthermore, the Tribunal has jurisdiction over Ross **[II]**. Finally, all the relevant circumstances surrounding the joinder are in its favor **[III]**.

### I. CLAIMANT AND RESPONDENT NO. 1 AGREED TO JOINDERS IN THE PCLA

**4.** The consent of both parties is implicitly incorporated into the dispute resolution clause of the PCLA **[1]**. Moreover, the Swiss Rules do not require express consent of the parties for the joinder to take place **[2]**. Finally, the Danubian Arbitration Law allows joinders **[3]**.

#### 1. CLAIMANT's consent to joinder is incorporated in the cl. 14.1 of the PCLA

**5.** CLAIMANT erroneously asserts that the lack of an express clause allowing joinder implies that the parties to the PCLA did not agree to the eventuality *[Cl. Memorandum, ¶58]*. An express provision is not required for a joinder to take place *[Voser, p. 369; Roos, p. 414; Siig, p. 78; Kleinschmidt, p. 146]*. It is possible to implicitly consent to joinders by agreeing to institutional rules permitting them

*[Steingruber, ¶10.73; Born, §15.02(c)]*. The original parties are deemed to have given anticipatory consent to joinders ordered by the tribunal on incorporating the Swiss Rules into the agreement *[Carrion, p. 497; Bamforth/Maidment, p. 8; Gilliéron/Pittet, ¶12; de Ly p. 69; Steingruber, ¶10.17]*. The PCLA has incorporated the Swiss Rules, and Art. 4(2) thereof *[PCLA, cl. 14.1]*.

**6.** It was CLAIMANT who initially recommended the incorporation of the Swiss Rules in the dispute resolution clause contained in the PCLA *[PO2, ¶31]*. It is expected that it was not just aware of, but also consented to the delegation of procedural decisions as laid down in the Swiss Rules *[Lew/Kröll/Mistelis, p. 36; Koch Oil case, 1985 (USA); Diemaco v. Colt, 1998 (USA); P v. Q, 2017 (UK)]*. Hence, CLAIMANT's submission about joinder not being discussed during negotiations holds no ground *[Cl. Memorandum, ¶59]*. Therefore, by consenting to the Swiss Rules, CLAIMANT gave anticipatory consent to all joinder orders of the Tribunal.

### 2. Swiss Rules do not require express consent of the "original parties" for joinder

**7.** The Swiss Rules give the tribunal the discretion to order a joinder despite opposition of an original party *[Roos, p. 424; Bamforth/Maidment, p. 12; Schramm, p. 498; Smith, p. 179; Hanotiau, p. 333]*. This is further evidenced by the fact that Art. 4(2) states that the tribunal "shall" decide on joinder. The provisions for joinder in various other institutional rules wherein express consent to joinder is mandatory, expressly provide for it *[ICDR Rules, Art. 7; HKIAC Rules, Art. 27.1; SIAC Rules, r. 7.1]*. However, unlike the aforementioned institutional rules, the Swiss Rules mandate mere consultation with the parties, and not their express assent to the joinder *[Swiss Rules, Art. 4(2)]*. If express consent were a requirement under the Swiss Rules, it could have been explicitly prescribed. Therefore, Swiss Rules do not require express consent of the parties for the joinder to take place. Thus, CLAIMANT's objection to the joinder does not preclude the Tribunal from ordering one.

### 3. The Danubian Arbitration Law allows joinders

**8.** The Danubian Arbitration Law is silent on the specific aspect of joinders. It, however, allows parties to decide the procedural mechanisms to be adopted during the proceedings *[Model Law, Art. 19(1); Broches, p. 93]*. One such mechanism is joinders *[Carrion, p. 480; Greenberg/Ferris/Albanesi, p. 172; Menz, p. 1894]*. Under Danubian Law, joinder of a third party can take place if consistent with the intentions of the parties *[Model Law, Art. 8(1); Born, §18.02(B)(2)(a)]*.

**9.** Joinder is within the scope of the PCLA as the parties adopted the Swiss Rules in the dispute resolution clause. The Swiss Rules allow for joinders to take place *[Res. Memorandum, ¶5]*. This indicates that a joinder was within the intentions of the party. Hence, an order for the joinder of

Ross is within the scope of the Danubian Arbitration Law. Therefore, consent for the joinder of a third party was already incorporated at the time of the conclusion of the PCLA.

## II. THE TRIBUNAL HAS JURISDICTION OVER ROSS

**10.** The Tribunal can order a joinder only if it holds that it has the authority decide over Ross. Under the *kompetenz-kompetenz* principle, a tribunal has the authority to decide whether it has jurisdiction over the third person *[Bartsch/Petti, p. 62; Lew/Kröll/Mistelis, p. 380]*. In the present case, the Tribunal has jurisdiction over Ross as its express consent to the joinder is not required **[1]**. In any case, Ross has implicitly consented to joinder by agreeing to arbitrate under the Swiss Rules **[2]**. Furthermore, the PCLA and the Ross Agreement contain an identical dispute resolution clause **[3]**. Finally, the Tribunal has jurisdiction over the Ross Dispute **[4]**.

### 1. Ross' express consent to the joinder is not required

**11.** RESPONDENTS have requested the joinder of Ross under Art. 4(2) of the Swiss Rules. Art. 4(2) only mandates consultation with the third person. The third party's consent is immaterial, even if it is not a party to the agreement *[Carrion, p. 504; Smith, p. 179]*. Therefore, Ross' objection to the joinder does not by itself, preclude the Tribunal from joining Ross to the arbitration proceedings.

### 2. Ross implicitly consented to joinder by agreeing to the Swiss Rules

**12.** When there are multiple contracts incorporating the Swiss Rules, the tribunal can interpret consent of the third party to joinder, if such an intention can be inferred at the conclusion of the agreement *[Carrion, p. 497; Schramm p. 498]*.

**13.** The Ross Agreement and the PCLA incorporate the Swiss Rules in their dispute resolution clauses *[PCLA cl. 14; Res. Ex. R3, cl. 14]*. Ross and CLAIMANT were fully aware of the wide joinder provisions under Art. 4(2) of the Swiss Rules, and that such a provision would be used to join them to proceedings with other parties with alleged conflicting IP rights *[Answer to Notice, ¶22]*. The present proceedings involve an alleged overlap in the IP rights of CLAIMANT and Ross *[Res. Memorandum, ¶18]*. Therefore, it falls within the intentions of the parties at the time of the conclusion of the Ross Agreement and the PCLA. Hence, Ross has impliedly consented to being joined to the present proceedings.

### 3. Identical arbitration clauses can be used to effectuate the joinder

**14.** One of the factors that a tribunal needs to take into consideration while adjudicating on joinders is if the contracts in question have identical and compatible dispute resolution clauses. This is

because, identical clauses may signify the parties' intention to submit the entire dispute to the same tribunal *[Fouchard/Gaillard/Goldman, ¶521; ICC Case No. 5989 (1989); Employment Termination Case, 2008 (Switz.); Meier, p. 2513]*. Arbitration agreements are "compatible" when they provide for the same place of the arbitration and method of constituting the arbitral tribunal or are at least not inconsistent in those aspects *[Grierson/Van Hooft, p. 108; SIAC Rules, Art. 8(7)]*.

**15.** In the present case, the dispute resolution clauses in the PCLA and the Ross Agreement have the same institutional rules, same method of selecting arbitrators, and the same seat of arbitration. Hence, both clauses are compatible in nature. Furthermore, the present dispute and the Ross Dispute, together, form a single complex dispute *[Res. Memorandum, ¶33]* Therefore, the identical nature of these two dispute resolution clauses should be used to join Ross.

### 4. The Ross Dispute is within the jurisdiction of the Tribunal

**16.** CLAIMANT may allege that the Ross Dispute is beyond the jurisdiction of the Tribunal and therefore, joinder of Ross would be redundant. However, CLAIMANT would be misguided in this regard. The Tribunal has the jurisdiction to decide all disputes "arising out of" or "in relation to" the PCLA *[PCLA, cl. 14]*. The Ross Dispute is "in relation to" to the PCLA.

**17.** The term "in relation to" has been interpreted very broadly to encompass any dispute with a factual relationship with the contract *[Chelsea v. Medco, 2008 (USA); Ashville v. Elmer Co., 1988 (UK); DFT 121 III 495, 1995 (Switz.); Janin v. Encore, 2011 (Fra.)]*. It embraces every dispute having a significant relationship to the contract regardless of the label attached to it *[Greenville v. Hazelhurst, 2015 (USA)]*. The term has also been extended to disputes arising out of other contracts *["Relating to" Case, 2011 (Switz.); Negligent Management Case, 2012 (Switz.)]*.

**18.** The Ross Agreement granted Ross an exclusive license for "malaria and related infectious diseases" *[Res. Ex. R3, cl. 5.2]*. Ross alleges that this license extends to infectious respiratory diseases as well *[Res. Ex. R4]*. The PCLA grants CLAIMANT a license over *GorAdCam* vectors for infectious and non-infectious respiratory diseases *[PCLA, cl. 5.2]*. There is an alleged conflict of the IP rights of CLAIMANT and Ross at "infectious respiratory diseases." A significant relationship exists between the Ross Dispute and the PCLA. Therefore, the Ross Dispute is "in relation to" the PCLA, and the Tribunal has jurisdiction over it.

**19.** Since Ross implicitly agreed to the joinder, and furthermore, the Ross Dispute is within the jurisdiction of the Tribunal, it has jurisdiction over Ross.

## III. THE RELEVANT CIRCUMSTANCES FAVOR JOINING ROSS

**20.** As per Art. 4(2) of the Swiss Rules, the tribunal must consider all the relevant circumstances surrounding a joinder before it takes place. CLAIMANT contends a joinder should not take place *[Cl. Memorandum, ¶77]*. On the contrary, after considering the relevant circumstances, Ross must be joined to the present arbitral proceedings. There is a possibility of conflicting awards otherwise **[1]**. Furthermore, a joinder was foreseeable when the PCLA was concluded **[2]**. Joinder is in RESPONDENTS' legitimate interest **[3]** and the joinder will not unduly disadvantage CLAIMANT **[4]**.

### 1. There is a possibility of conflicting awards

**21.** The Tribunal may order a joinder if it foresees the possibility of conflicting awards while dealing with common questions of law or fact *[Voser/Meier, p. 116; Bartsch/Petti, p. 65; The Lucerna, 1986 (USA)]*. CLAIMANT contends that such a risk does not exist as the present dispute and the Ross Dispute are different from one another and the decision in one will have no impact on the decision of the other *[Cl. Memorandum, ¶79]*. This argument fails for the following reasons:

**22.** *First*, the PCLA and Ross' allegations regarding the scope of the exclusive license granted to it overlap at "infectious respiratory diseases" *[Res. Memorandum, ¶18]*. Hence, there is a common question of fact in both the disputes. *Second*, one of the questions before the Tribunal is whether the Ross Dispute constitutes a valid claim *[Res. Memorandum, ¶¶118-124]*. The same question will also have to be answered should the Ross Dispute require separate arbitration. If two different tribunals adjudicate these matters, two different opinions on the same matter may arise. As a result, there is a risk of attaining conflicting awards, causing unjust loss to the parties involved. In order to eliminate such risks, Ross should be joined to the present proceedings.

### 2. Joinder was foreseeable at the time of the drafting of the PCLA

**23.** Joinder of a third person against a party's will is possible if the party could have foreseen at the time of contracting that the other party would potentially have an interest in including a third party in the resolution of any future dispute *[Schramm, p. 499; Ducto Case, 1992 (Fra.)]*.

**24.** The parties entered into the PCLA on 1 January 2019 *[Notice for Arbitration, ¶11]*. At the time of the PCLA's conclusion, CLAIMANT must have at least been aware that RESPONDENT NO. 2 had granted licenses of the *GorAdCam* vectors to other companies *[Res. Memorandum, ¶¶135-138]*. Furthermore, it was CLAIMANT who recommended arbitration in accordance with the Swiss Rules, aware of the flexible joinder provisions. This was done with an understanding that a joinder could

take place in case of alleged conflicted IP rights *[Answer to Notice, ¶22]*. Therefore, joinder of a third party was clearly foreseeable at the time of the drafting of the PCLA.

### 3. Joinder is a legitimate interest of RESPONDENTS

**25.** Joinder of a third party should take place if it is in the legitimate interest of the requesting party, including close links between the subject-matter of the arbitration and the third party's claims *[Schramm, p. 500; Bartsch/Petti, p. 65]*. Presently, joinder is a legitimate interest of RESPONDENTS. There is a close link between the subject-matter of the present arbitration and the Ross Dispute *[Res. Memorandum, ¶18]*, thereby making it a legitimate interest of RESPONDENTS to join Ross. Moreover, a non-joinder will unjustly harm RESPONDENTS for the following reasons:

**26.** *First,* as indicated hereinabove, the present dispute and the Ross Dispute are overlapping *[Res. Memorandum, ¶18]*. The present claim is such that it may eventually be raised by Ross *[Answer to Notice, ¶21],* in which case, two long arbitral proceedings with a fictitious claim will result in RESPONDENTS incurring significant costs. *Second,* if conflicting awards arise out of the decisions of multiple tribunals *[Res. Memorandum, ¶22]*, a legal ambiguity over RESPONDENT NO. 1's title on *GorAdCam* vectors may ensue, causing further loss to RESPONDENTS. Therefore, RESPONDENTS have a legitimate interest to join Ross to these proceedings.

### 4. Joinder will not unduly disadvantage CLAIMANT

**27.** CLAIMANT cited Mr. Doherty's crucial role in the conclusion of the collaboration and licensing agreements and the fact that RESPONDENT NO. 2 is the patent holder of the *GorAdCam* vector as the reasons for joining RESPONDENT NO. 2 to these proceedings *[Notice for Arbitration, ¶24]*. Adopting the same reasoning, Ross is the party whose dispute with RESPONDENT NO. 2 has resulted in this claim. Furthermore, the test of validity of that claim will require the interpretation of the Ross agreement, to which Ross is a party. Hence, if it is necessary to join RESPONDENT NO. 2 to these proceedings, it is equally important to join Ross.

**28.** However, CLAIMANT has raised frivolous concerns regarding Ross' joinder, alleging that the joinder will unduly disadvantage it *[Cl. Memorandum, ¶84]*. The Tribunal must examine if the objection to joinder is based on legitimate grounds *[Schramm, p. 500]*. CLAIMANT's concerns are unfounded as the Tribunal can apportion costs due to the joinder **[4.1]**, CLAIMANT's confidential information will not be released **[4.2]**, and joinder will not cause unnecessary time delays **[4.3]**.

### 4.1. The Tribunal can apportion costs due to the joinder

**29.** CLAIMANT alleges that the joinder will cause financial strain to it *[Cl. Memorandum, ¶85]*. However, the tribunal has broad discretion to allocate a portion of the costs of the arbitration to each party, depending on the outcome of the claim *[Voser, p. 367; Born, §18.01]*. Under the Swiss Rules, the tribunal has the authority to apportion costs based on the circumstances of the case, if it deems such apportionment reasonable *[Swiss Rules, Art. 40(1)]*. Therefore, if Ross is joined to these proceedings, the Tribunal will have the authority to distribute costs in a reasonable manner so as to ensure that no party has to bear undue financial strain.

### 4.2. CLAIMANT's confidential information will not be released to Ross

**30.** CLAIMANT fears that Ross may have access to its confidential information during the arbitral proceedings if the joinder takes place *[Cl. Memorandum, ¶86]*. This apprehension is misplaced, as the present dispute does not envisage any discussions over confidential information.

**31.** If Ross is joined to these proceedings, the discussion will be limited to the scope of the license granted to Ross, operating mode of the vectors, and the differences between the various applications of the virus *[Letter by Fasttrack, p. 49]*. Information related to the vectors has already been shared with both the parties for the purpose of collaboration *[PO2, ¶21]*. Information related to CLAIMANT's vaccine will not be discussed during the proceedings, as it is not connected to the present dispute in any way. Therefore, CLAIMANT's confidentiality concerns do not hold ground.

### 4.3. Joinder will not cause unnecessary time delays to CLAIMANT

**32.** CLAIMANT erroneously asserts that a joinder may cause delays, thereby impacting procedural efficiency *[Cl. Memorandum, ¶87]*. The tribunal can plan the entire arbitration in a provisional timetable, while accounting for all unforeseen events *[Swiss Rules, Art. 15(3)]*. In fact, a joinder may even lead to a speedier resolution of a complex issue *[Voser, p. 353; Geimer, p. 164]*.

**33.** The present dispute and the Ross Dispute overlap *[Res. Memorandum, ¶18]*, forming a complex issue. As a result, there is a possibility of new proceedings being initiated between RESPONDENT NO. 2 and Ross, and even between Ross and CLAIMANT, should the Tribunal rule in favor of CLAIMANT, as Ross has a policy of strictly enforcing its IP rights *[PO2, ¶15; Cl. Ex. C7, ¶13]*. There is a possibility of multiple proceedings, which can be avoided by a joinder. Therefore, a joinder may make the resolution of the overall dispute speedier.

**34.** Furthermore, even if the joinder results in additional time, it will not constitute an unnecessary delay under Art. 15(7) of the Swiss Rules. It will be done after the Tribunal rules in favor of the

joinder after considering all relevant circumstances *[Res. Memorandum, ¶¶20-33]*. Therefore, in the unlikely scenario in which the joinder results in additional time, Art. 15(7) will not be breached.

**CONCLUSION**

**35.** Under Art. 4(2) of the Swiss Rules, the Tribunal has the authority to order a joinder without express consent from CLAIMANT and Ross. On evaluation of the relevant circumstances surrounding the joinder, it is evident that there exists a risk of conflicting awards in the absence of a joinder. Furthermore, a joinder is in the legitimate interest of RESPONDENTS and will not unduly harm CLAIMANT. Therefore, Ross must be joined to the present proceedings.

## ISSUE 2: EXAMINATION OF WITNESSES AND EXPERTS SHOULD NOT BE CONDUCTED REMOTELY

**36.** CLAIMANT has requested that the hearing from 3 to 7 May 2021 be held remotely, pursuant to Art. 25(4) of the Swiss Rules *[PO1, ¶2]*. However, RESPONDENTS strongly object to holding any hearings remotely *[Letter by Fasttrack, p. 49],* especially those involving examination of witnesses and experts that are scheduled to take place from 3 to 7 May 2021 *[PO1, ¶3]*.

**37.** The second hearing should be conducted in-person in accordance with the PCLA **[I]**. Furthermore, remote hearings possess the risk of an unenforceable award **[II]** and the balance of interests does not lie in favor of conducting a remote hearing **[III]**.

### I. THE PCLA FORESEES IN-PERSON EXAMINATION OF WITNESSES AND EXPERTS

**38.** CLAIMANT asserts that there are no mandatory provisions which prohibit conducting the hearings virtually *[Cl. Memorandum, ¶100]*. However, the dispute resolution clause in the PCLA assumes that the hearing will be held in-person **[1]** and its interpretation does not favor a remote hearing **[2]**. A virtual hearing will violate Danubian law **[3]**. Furthermore, by a deviation in the PCLA, the RESPONDENTS have denied implicit consent to Art. 25(4) of the Swiss Rules **[4]**.

#### 1. The dispute resolution clause in the PCLA assumes an in-person hearing

**39.** CLAIMANT alleges that by determining a specific place for hearings, the parties did not deviate from Art. 25(4) of the Swiss Rules *[Cl. Memorandum, ¶94]*. Rather, the parties are bound by the dispute resolution clause in the PCLA, a deviation agreed to by both parties *[PCLA, cl. 14]*. In case of a conflict between the arbitration agreement and the procedural rules, the former will prevail *[Swiss Rules, Art. 1(5); Born, §4.04; Brady v. The Williams, 2007 (USA); Nevada v. L.A., 2012 (USA)]*.

**40.** The dispute resolution clause in the PCLA *[PCLA, ¶14.1]* provides that proceedings and hearings would he held "*either in Vindobona or city where the RESPONDENT has its place of business".* In light of the deliberate and explicit use of two physical places, i.e. "Vindobana" or the "place" of business, it is reasonable to assume that the specific language used is based on the notion that arbitrators, parties and witnesses are personally present during the hearing.

**41.** Moreover, the parties themselves have modified the model arbitration clause of SCAI *[SCAI, Model Arb Clause]*, to include the above provision *[Letter by Fasttrack, p. 49]*. Furthermore, the merger clause in the PCLA prevents the parties from relying on any negotiations, surrounding the PCLA *[PCLA, cl. 15.3],* thereby establishing that the deviation from Art. 25(4) of Swiss Rules superseded all other contemporaneous negotiations. Therefore, the PCLA is based on the assumption that hearings are to be conducted in-person.

### 2. The interpretation of the PCLA does not favor a remote hearing

**42.** CLAIMANT relies on the negotiation and drafting history to interpret a clause which is plainly straightforward in nature *[Cl. Memorandum, ¶95]*. Contrary to CLAIMANT's arguments, interpretation of the dispute resolution clause of the PCLA does not favour a remote hearing as per provisions of Art. 8(1) of Convention on Contracts for the International Sale of Goods ("**CISG**") **[2.1]** and Art. 6.2.2 and 6.2.3 of UNIDROIT Principles of International Commercial Contracts ("**PICC**") **[2.2]**.

#### 2.1. Interpretation based on Art. 8(1) of CISG does not favor a remote hearing

**43.** CLAIMANT cannot invoke Art. 8(1) since the CISG is not applicable to the PCLA *[Res. Memorandum ¶¶72-114]*. Even if it were, CLAIMANT's interpretation is not accurate. The circumstances surrounding the formation of the PCLA clarify that both parties could not have been unaware of the real intent of the clause. As CLAIMANT itself submits, the drafting history suggests the dispute resolution clause was amended to do away with documents-only arbitration and there was no discussion on the possibility of a remote hearing *[Cl. Memorandum ¶95; PO2, ¶32]*. Hence, RESPONDENT NO. 1's true intent is reflected in clause 14.1 which explicitly provides the place of hearing *[PCLA, cl. 14.1]*. The language of clause 14.1 is clear and unambiguous.

**44.** RESPONDENT NO. 1 wilfully deviated from the SCAI model arbitration clause and CLAIMANT accepted it as fair *[Letter by Fasttrack, p. 49; PO2, ¶32]*. Under such circumstances CLAIMANT has an obligation to rely on the true intent of the parties *[Organic spelt kernels Case, 2017 (Ger.); Schlechtriem/Schwenzer/Schmidt-Kessel, p. 176; Ferrari, p. 181]*. Since CLAIMANT has relied on a specific objective meaning, it bears the burden of proving it *[Brunner/Gottlieb, p. 94; Achilles, ¶8]*. However,

the relevant circumstances show that RESPONDENT NO. 1, through the PCLA, intended to hold an in-person hearing and CLAIMANT has erroneously interpreted clause 14.1.

### 2.2. Interpretation based on Art. 6.2.2 and 6.2.3 of PICC does not allow invoking defence of hardship

**45.** CLAIMANT seeks the defence of hardship under Art. 6.2.2 and 6.2.3 of PICC contending an alteration in the equilibrium of the PCLA *[Cl. Memorandum, ¶¶98-99]*. However, in order to validly deviate from Art. 25(4) of Swiss Rules under this defence, such alteration has to be fundamental in nature *[Heinrichs, ¶29; Kälin, p. 253-254]*. Contrary to CLAIMANT's assertions, the mere fact that what was expected to be a profitable transaction has turned to be a losing one is not enough to establish the defence of hardship *[Farnsworth, p. 625; Swift v. Banet, 1955 (USA)]*.

**46.** CLAIMANT rightfully states that consequences of COVID-19 could not have been reasonably foreseen *[Cl. Memorandum, ¶99]*. However, the real test is not foreseeability but whether frustration of the purpose of the contract is wholly unavoidable due to such consequences *[Brunner, p. 475]*. So long as the purpose of the contract can be achieved, the defence of hardship will fail *[Corbin/Perillo, p. 258; Beals v. Tri-B Assocs., 1982 (USA); PICC, Art. 6.2.1 & 6.2.2]*. Only a fundamental change in the commercial balance of the contract will meet the high threshold required to invoke the defence *[Berger, p. 1353-1355; Fouchard/Gaillard/Goldman, ¶36]*. The witness examination can be carried out on a later date as per prescribed COVID-19 protocols, without violating the terms of the contract. Thus, in the presence of available means to carry out physical hearing, the Tribunal cannot grant the defence of hardship to CLAIMANT.

## 3. Remote hearings violate Danubian law

**47.** The law of the arbitral seat directly governs the procedural law of the proceedings *[Born, §11.01(B)(2), §11.04(C)(1), §22.01(B)(4)]*. The PCLA assigns Danubia as the seat of arbitration *[PCLA, cl. 14.1]*. The Code of Procedure of Danubia does not permit a remote hearing *[PO2, ¶37]*. Though there are some exceptions, they do not apply to the present case.

**48.** *First,* none of the participants have any health issues that may prevent them from travelling *[PO2, ¶34]*. *Second,* remote hearings may be conducted only if all parties to the dispute agree to it *[PO2, ¶37]*. However, RESPONDENTS have expressly objected to remote hearings *[Letter by Fasttrack, p. 49]*. *Third*, remote hearings are permitted if required by public interest *[PO2, ¶37]*. CLAIMANT asserts that since the dispute is related to development of vaccine, it is a matter of public interest *[Cl. Memorandum, ¶106]*. However, the interest of CLAIMANT in the present dispute is purely economic in nature. Considering Khorana's recent acquisition, CLAIMANT now possesses the

technical and financial ability to produce *GorAdCam* vectors and HEK-294 cells itself *[Res. Ex. R1, ¶3]*. As a result, the costs will be considerably lower than payments due under the PCLA. The proceeding initiated by CLAIMANT is merely a thinly concealed effort for the termination or renegotiation of an unfavourable contract *[Answer to Notice, p. 25, ¶3]*. Hence, the question of public interest does not arise. Therefore, permitting a remote hearing violates Danubian law.

#### 4. RESPONDENTS have denied implicit consent to Art. 25(4) of the Swiss Rules

**49.** In case of a dispute regarding conducting hearings by videoconference, the tribunal requires the consent of both parties *[Schrer, p. 12; Musielak/Voit, §1047; Lindskog, p. 653; Spohnheimer, p. 308, PO2, ¶37]*. RESPONDENTS have expressly objected to remote hearings *[Letter by Fasttrack, p. 49]*.

**50.** By adopting an amended clause providing for a "place" of hearings *[Res. Memorandum, ¶41]*, RESPONDENTS have deliberately denied implicit consent to remote hearings under Art. 25(4) of the Swiss rules. In absence of any express or implied consent of RESPONDENTS, the Tribunal does not have the authority to hold the second hearing in a remote manner.

### II. REMOTE HEARINGS MAY RENDER THE ARBITRAL AWARD UNENFORCEABLE

**51.** Contrary to CLAIMANT's assertion that enforceability of a possible award is not at stake, procedural impediments in conducting remote hearings are widely accepted as valid grounds of challenge *[NY Convention, Art. 5; Vienna Protocol, Art. I(1); English Act, §103(2)(c); French CPC, Art. 1520(4)]*.

**52.** Arbitral tribunals have a foremost duty to render final awards, which are entirely enforceable *[Swiss Rules, Art. 32(2); Van Den Berg, p. 114; Horvath, p. 1]*. The Tribunal, by permitting a remote hearing, may violate the mandatory requirements of arbitral procedure **[1]**, the right of the parties to be heard **[2]** and right to equal treatment under Art. 18 of the Danubian Arbitration Law **[3]**, thereby rendering the award unenforceable.

#### 1. Remote hearings violate the right to a prescribed arbitral procedure

**53.** An award may be refused enforcement if the arbitral procedure adopted is not in accordance with the agreement of the parties *[NY Convention, Art. V(1)(d)]*. The dispute resolution clause in the PCLA provides for a physical hearing *[Res. Memorandum, ¶41]*. Therefore, departure from the prescribed arbitral procedure in the agreement compromises the award's enforceability.

#### 2. Remote hearings violate RESPONDENTS' right to be heard

**54.** Tribunals have an obligation to ensure all parties involved in arbitral proceedings get a full opportunity to present their side in a fair manner *[Model Law, Art. 18; Born, §15.04(B)(1)]*. This

right applies equally to the examination of witnesses and experts *[U.N. Doc. A/CN.9/264, ¶9]*. Technical difficulties interfering with the manner of furnishing evidence cause an unfair disadvantage to RESPONDENTS *[Dorajay v. Aristrocrat, 2007 (Aus.); Hanson v. Leyonhjelm, 2019 (Aus.); Campaign v. Forty two, 2010 (Aus.)]*. Since tribunals attach importance to being able to assess the demeanour of witnesses and experts, their credibility will be compromised in remote hearings *[Bachmeer v. Ong Chih, 2018 (Sing.); Scherer/Bassiri/Wahab, p. 84-85]*.

**55.** The requirements of witness examination are usually more complex in nature *[Scherer/Bassiri/Wahab, p. 74]*. Although RESPONDENTS might have the technical equipment to conduct a remote hearing, it is not adequate to facilitate witness examination. CLAIMANT is misguided in stating that the dispute is based on uncontested facts *[Letter by Langweiler, p. 48]*. In order to justify that Ross does not hold a broad exclusive license for the *GorAdCam* vector, RESPONDENTS will have to present witness and expert testimony. It will entail difficult technical explanations which have to be conveyed with precision *[Letter by Fasttrack, p. 49]*. However, in the absence of in-person hearing, this process will be severely hampered.

**56.** Remote hearings and witness examination unduly curtail the parties' ability to properly present their case and cannot be considered as "oral hearings" *[Born, §15.07(Z)(2); Lindskog, p. 653; Münch, p. 1047; Schütze, p. 1047]*. This violates Art. 24 of Danubian Arbitration Law since the parties have not agreed for a documents-only proceeding *[Model Law, Art. 24]*. Hence, RESPONDENTS' right to be heard will be violated by denying an in-person hearing.

### 3. Remote hearings violate RESPONDENTS' right to equal treatment

**57.** Right to equal treatment implies that neither party should be favoured or disfavoured *[Holtzmann/Neuhaus, pp. 550, 564; Bantekas, p. 524; Noble v. Cheong, 1998 (Can.)]*. Procedural neutrality cannot be violated by favouring one party over the other, explicitly or implicitly *[Dell v. Union, 2007 (Can.); Born, §15.01(A)]*. The need to ensure fundamental right of equal treatment usually outweighs the concerns of efficiency and cannot override parties' procedural agreements *[Born, §15.04(B)(1); Weightlifting Case, 2017 (Switz.); IOC Case, 2011 (Switz.)]*. The tribunal cannot exceed its right to exercise discretion, which is limited by mandatory protections of procedural fairness and regularity *[Model Law, Art. 18 r/w Art. 19; U.N. Doc. A/CN.9/246, ¶62; Impex v. Elenjikal, 2008 (Ind.)]*.

**58.** While CLAIMANT might be able to present its side of the case in a satisfactory manner, RESPONDENTS will be prejudiced if witness and expert examination is carried out remotely *[Res. Memorandum, ¶55]*. It cannot and should not be assumed that all parties and witnesses have similar

access to the relevant technological requirements, as alleged by CLAIMANT *[Cl. Memorandum, ¶114]*. Technical equipment is better on CLAIMANT's side *[PO2, ¶38]*, and if the difference in quality is of consequence, it disproportionately affects one side over the other. Thus, even if remote hearings might provide an opportunity to both parties, CLAIMANT gets a disproportionate advantage, since its arguments are primarily based on legal questions and it possesses better technical equipment *[Letter by Langweiler, p. 48; PO2, ¶38]*. The mandatory requirement of equality in treatment forbids such bias *[Born, §15.04(B)(1),(2)]*. Therefore, if hearings are conducted remotely, RESPONDENTS' right to equal treatment will be violated.

**59.** Accordingly, in lieu of the circumstances stated hereinabove, remote hearings possess the risks of rendering the final arbitral award unenforceable.

## III. BALANCE OF INTERESTS DOES NOT LIE IN FAVOR OF A REMOTE HEARING

**60.** CLAIMANT has wrongfully trivialized RESPONDENTS' concerns to establish balance of interests in its favour. By conducting a remote hearing, confidential information of the parties may be prejudiced **[1]**. It may lead to unnecessary costs **[2]** and negatively affect the efficient cross-examination of witnesses and experts **[3]**. Furthermore, contrary to CLAIMANT's assertion, a physical hearing will not cause unnecessary delays **[4]**.

### 1. Remote hearings may prejudice the confidential information of the parties

**61.** CLAIMANT alleges that RESPONDENTS' objections to remote hearings based on grounds of data protection are vague *[Cl. Memorandum, ¶116]*. However, confidentiality of arbitral proceedings forms a valid consideration especially in matters of intellectual property disputes *[WIPO Rules, Art. 75-78; Reuben, p. 54; UNCITRAL Rules, Art. 28(3); IBA Rules, Art. 3(13)]*. Conducting remote hearings will require the assistance of an outside provider *[PO2, ¶35]*. As online platforms are exposed to data breaches, hiring an outside provider exposes the hearings to a risk of possible breach of confidentiality *[Libananco v. Turkey, 2011 (ICSID)]*. Moreover, absence of third-party interference cannot be guaranteed *[PO2, ¶35]*. RESPONDENT NO. 1 being one of the only two companies to possess the know-how of developing a suitable cell culture medium, the concerns of unauthorised access to the hearings are completely reasonable *[Cl. Ex. C2, ¶6]*. Thus, RESPONDENTS are justified in opposing a remote hearing *[PO2, ¶35]*.

**62.** CLAIMANT contends that RESPONDENTS' participation in the first remote hearing and request for joinder of Ross whilst rejecting virtual witness examination indicates hypocrisy *[Cl. Memorandum, ¶117]*. However, these arguments are not valid. *First*, telephonic conference in October was to only discuss further conduct of the proceedings. It did not involve any discussion about the

particulars of the matter *[PO1, ¶1]*. Therefore, there was no risk of disclosing any confidential information. *Second,* RESPONDENTS' request to join Ross to the proceedings does not interfere with the claims of data protection *[Res. Memorandum, ¶¶30-31]*. Thus, RESPONDENTS' actions by no means diminish their concerns regarding data protection.

### 2. Remote hearings result in unnecessary costs

**63.** Under the Swiss Rules, all participants must act in good faith to avoid unnecessary costs in the proceedings *[Swiss Rules, Art. 15(7); Born, §6.40]*. Contributing to an efficient proceeding by avoiding unnecessary costs is a manifestation of the principles of good faith *[Jermini/Gamba, p. 219]*. The Tribunal has taken note of Art. 15(7) of the Swiss Rules and have assured that the arbitration will be conducted diligently and efficiently *[Consent to Appointment, p. 40]*.

**64.** To ensure an efficient remote hearing, the parties need to arrange multiple cameras, video-conferencing technology, document management software, relevant hardware, amongst others. These would ultimately increase the costs of the hearing eventually *[PO2, ¶35; Scherer p. 18; Amina, p. 336]*. Therefore, by insisting on conduct the hearings remotely, CLAIMANT is violating Art. 15(7) of the Swiss Rules by apportioning excessive costs to the parties.

### 3. Remote hearings impede the efficient cross-examination of experts and witnesses

**65.** In order to present RESPONDENTS' submission effectively, the efficient cross-examination of witnesses and experts is paramount *[Redfern et. al., ¶6.129; Stephen QC, p. 3]*. This cannot be done remotely *[Galindo, p. 147]*. Courts and tribunals have accepted the view that cross-examination by video-link is unsatisfactory due to technical difficulties *[Spohnheimer, p. 308, White & Case Survey, p. 32; Hanson v. Leyonhjelm, 2020 (Aus.); Campaign v. Forty-Two, 2010 (UK)]*. Entire proceedings have been vacated on this basis *[Quince v. Quince, 2020 (Aus.)]*. The tribunal must consider procedural concerns while determining the issue of presenting the case remotely *[Miles, p. 124; Schrer, p. 13]*.

**66.** *First*, it becomes difficult to remotely assess the credibility of a witness or expert, due to the loss of non-verbal cues and the inability to scrutinize the person's demeanour *[Prosecution v. Zigiranyirazo, 2010 (ICTR); Dorajay v. Aristrocrat, 2005 (UK); Hanson v. Leyonhjelm (Aus.)],* which is an important consideration for a successful cross-examination *[M. D. Roth, p. 185]*.

**67.** *Second*, cross-examination may be more difficult as witness testimonies and documents have to be produced in an unfamiliar manner and there may be a delay in voice transmission *[Sunstate v. Chicago, 1986 (UK); Stuke v. ROST, 2012 (Aus.); Australian Securities v. Rich, 2009 (Aus.)]*.

**68.** *Third*, in a remote hearing, a witness or expert might be coached or otherwise unduly influenced *[Capic v. Ford Motor, 2020 (Aus.); Rowden, p. 504; Anne/Emma, p. 698],* which is against the principles established by International Arbitration *[IBA Rules, r. 4(3); IBA Guidelines, r. 21; Redfern et. al., ¶1.236; R v. Momodou, 2005 (UK)]*. To address these concerns, CLAIMANT suggests the use of 360 Cameras and other IT tools, *[Cl. Memorandum, ¶112]* which further increase the cost of the proceedings significantly, thereby making their use unfeasible *[Res. Memorandum, ¶63]*. Therefore, a remote hearing impedes the procedural efficiency of the hearings.

### 4. Physical hearings will not cause unnecessary delays

**69.** CLAIMANT asserts that by delaying the hearings by four months *[PO2, ¶42(a)],* it may face economic losses *[Cl. Memorandum, ¶116]*. If any delay occurs in conducting the proceedings in person, the tribunal must uphold party autonomy rather than insisting on expeditiousness *[Rowley/Wisner, p. 321, Sachs/Tom, p. 281; Pryles, p. 327].* The PCLA provides for a physical hearing *[Res. Memorandum, ¶41]*. The principle of unnecessary delay thus, cannot be invoked in response to the conduct of proceedings in a manner prescribed by the agreement itself.

**70.** While balancing the benefits of a remote hearing with potential prejudices, it is evident that the balance of interests lies in favour of conducting in-person hearings as the same will cause no harm to CLAIMANT whereas, a remote hearing will be detrimental to RESPONDENTS.

## CONCLUSION

**71.** The PCLA assumes an in-person hearing and cannot be interpreted otherwise. Remote hearings violate RESPONDENTS' right to a fair hearing and equal treatment. Remote hearings also violate the Danubian Arbitration Law. Further, balance of interests does not lie in favour of a remote hearing as it will lead to unnecessary costs and delays, impeding cross-examination and risking confidentiality of the proceedings. Hence, the examination of witnesses and experts should not take place remotely.

## ARGUMENTS ON SUBSTANCE

## ISSUE 3: THE CISG IS NOT APPLICABLE TO THE PCLA

**72.** CLAIMANT asserts that the CISG is applicable to the PCLA as it fulfils the conditions of applicability under Art. 1(1) and governs the Sale of Goods *[Cl. Memorandum, ¶1]*. CLAIMANT further contends that the sales element is the preponderant part of the contract *[Cl. Memorandum, ¶8]*. On the contrary, CISG is not applicable to the PCLA as it predominantly involves the transfer of know-how **[I]** and is not a sale of goods **[II]**. The preponderant element of the contract is non-sales in nature and is thereby exempted from application under Art. 3 of the convention **[III]**. Lastly, the parties intended the PCLA to be a licensing and collaboration agreement **[IV]**.

### I. THE PCLA PREDOMINANTLY INVOLVES THE TRANSFER OF KNOW-HOW

**73.** The PCLA is a license agreement as the transfer of know-how is the most important obligation for RESPONDENT NO. 1 *[Answer to Notice, ¶19]*. Know-how refers to the technical, scientific and practical knowledge *[Licensing Guide WIPO, 2004]*. In the pharmaceutical industry, an orientation towards the technical knowledge of vectors is required for vaccine and drug development. Similarly, there is a transfer of know-how in the PCLA based for the following reasons:

**74.** *First,* the transfer of know-how occurs through the collaborative activities stated under the Research Collaboration clause *[PCLA, cl. 3]*. The transfer of know-how is witnessed through the creation of joint research committees between the parties *[PO2, ¶¶21, 25]*. Therefore, the transfer of know-how evidently takes place through the Research Collaboration Clause.

**75.** *Second,* the PCLA provided CLAIMANT with a license to use RESPONDENT NO. 1's know-how over *GorAdCam* vectors *[PCLA, cl. 5.2]*. The PCLA facilitated a know-how transfer through the licensing of 'any intellectual property' which includes Foreground IP and "Results" *[PCLA, cl. 1.4, 1.6]*. The PCLA defines "Results" as *"all material information, know-how, data, documents, measurement results" [PCLA, cl. 1.12]*. Since CLAIMANT is granted a license for Foreground IP and Results, this evidences the parties' intention to transfer know-how as an important obligation.

**76.** *Third,* the Agreement contemplated frequent and regular payments for the transfer of know-how. Payment terms for the know-how transfers by RESPONDENT NO. 1 to CLAIMANT were stipulated under the Research Plan Payment Clause, whose payment frequency was every calendar quarter *[PCLA, cl. 9.1]*. Therefore, the PCLA provides the transfer of know-how as one of the major obligations of the agreement.

**77.** Furthermore, know-how does not constitute "Goods" under the CISG. CLAIMANT rightly asserts that the object of a contract is a good under Art. 1(1) of the CISG, if it is movable and tangible at the time of delivery *[Cl. Memorandum, ¶6]*. "Goods" under CISG refers only to material goods *[Schlechtriem/Butler, p. 30; Davies/Snyder, p. 48; PVC Case, 1999 (Switz.)]*. However, sale of know-how does not fall under the CISG as it has no relation to this notion of "Goods" *[Brunner/Meier/Stacher, Art. 2 ¶3; Westermann, Art. 1 ¶6]*. CISG was held to be inapplicable to a contract of market research as the object of the contract was not about the "goods" but about the intellectual work, even if it was materialized in some form *[Market Study Case, 1994 (Ger.)]*. Know-how, being the predominant element in the PCLA, is not "Goods" under the CISG. Therefore, the CISG is not applicable to the PCLA as it does not fall under Art. 1(1) of the CISG.

## II. THE PCLA DOES NOT INVOLVE A SALE OF GOODS

**78.** CLAIMANT alleges that the PCLA is a contract for sale of goods as *GorAdCam* vectors qualify as goods under the CISG, and the transfer of these vectors occurs in the form of a sales transaction *[Cl. Memorandum, ¶5]*. RESPONDENTS oppose CLAIMANT's interpretation of the PCLA as a sales agreement because the basics elements of a sale are not fulfilled in the transactions.

**79.** The CISG does not define the term "sale". However, it is widely accepted that a sales transaction is one which contains elements in the form of obligations for both the buyer and the seller, as highlighted under Art. 30 and Art. 53 of the CISG *[Bridge ¶1.14; BVBA Marinus v. BV Pannenclaer, 2005 (Belg.); Mitias v. Solidea, 2008 (It.)]*. The transfer of *GorAdCam* under the PCLA does not contain sellers' obligations **[1]**. Moreover, CLAIMANT does not have ownership or the rights of a buyer **[2]**. Although not argued by CLAIMANT, RESPONDENTS assert that the obligations mentioned under the Purchase Obligations Clause are not sales transactions **[3]**.

### 1. The Transfer of *GorAdCam* vectors does not constitute a sale

**80.** CLAIMANT incorrectly assumes that the mere transfer of vectors for a price constitutes a sale of goods *[Cl. Memorandum, ¶7]*. However, the transfer of goods as a sale must obligate the seller to deliver the goods and transfer the "property in goods" to the buyer *[CISG, Art. 30]*. A delivery of goods would mean "any action or obligation to place the goods in the possession of the buyer" *[Lookofsky, §4; Del Duca/Del Duca, ¶9(a); Jose v. Nez, 1993 (Mex.)]*. The PCLA provided for a delivery of the *GorAdCam* vectors by RESPONDENT NO. 1 to CLAIMANT *[PCLA, cl. 9.2]*. However, such a delivery was not in the capacity of a sales transaction, as there was no transfer of property in goods.

**81.** As opposed to CLAIMANT's assertions, RESPONDENT NO. 1 did not transfer the property in the *GorAdCam* vectors to CLAIMANT. A transfer of property in goods means the transfer of ownership

and rights attached to the goods *[Laemilli/Christie, p. 6; Schlectriem/Schwenzer, Art. 30, ¶9]*. The rights transferred must be associated with absolute control *[E Visser, p. 79; Bridge, ¶2.22; Quo Thang, ¶1.3]*. The PCLA does not provide CLAIMANT with ownership status over the *GorAdCam* vectors nor any rights associated with absolute control. Without any actual transfer of property, the transaction is not a sale and would only be a licensed transaction. Therefore, PCLA does not create seller's obligations thus resulting in a non-sales transaction.

### 2. CLAIMANT does not have any ownership rights of a buyer over *GorAdCam* vectors

**82.** In contracts where IP-based products are sold, it is necessary to assess whether the license transferred any rights which create the effect of a sale *[Fausing, p. 7; Usedsoft v. Oracle, 2012 (CJEU); The Mayor & Burgesses of London v. IBM, 2011 (UK)]*. The license granted must prove to have an "overriding sales effect" in order to be considered as a transfer of property in goods *[Mowbray, ¶2.1.1; Larson, p. 468; Communications v. Warner Inc., 1988 (USA); CWS v. Vendorlink, 2015 (Ned.)]*. A perusal of the License Grant Clause would reflect whether the transfer of the vectors provided CLAIMANT with such ownership rights *[PCLA, cl. 5.2]*. Jurisprudence on software transactions has discussed the requirement of a license transaction for it to amount to a sale *[Fausing, p. 11]*. It may assist the Tribunal while assessing whether the PCLA license grant contains an "overriding sales effect". For a license to contain overriding sales effects, certain requirements need to be fulfilled:

**83.** *First,* for a sale to be effectuated under a license agreement, the transaction must have a single definite payment *[Standard Software Case, 1995 (Ger.); Schwenzer/Hachem/Kee, p. 105; Usedsoft v. Oracle, 2012 (CJEU), ¶42]*. The PCLA license does not provide for a single payment to be made by CLAIMANT in return for rights over the *GorAdCam*, and instead requires CLAIMANT to make several payments in the form of Milestone Payments and Research Plan Payments *[PCLA, cl. 9.3]*. This indicates that the rights are not ownership rights.

**84.** *Second,* licensed IP granted subject to the payment of royalties is considered to be a non-sale agreement *[Standard Software Case, 1995 (Ger.); Fakes, p. 582; Vujinović, p. 543]*. This has been considered as the primary requirement to decide whether a transaction is a sale or a non-sale one *[Software Case, 2005 (Aust.); Staudinger/Magnus, Art. 1 ¶46]*. The PCLA license granted is subject to the payment of royalties as it is "royalty-bearing" *[PCLA, cl. 9.3]*. These payments of multiple royalties indicates that a buyer does not have control over the use of his purchased goods. Presently, the PCLA requires CLAIMANT to pay RESPONDENT NO. 1 multiple royalties and license fees. This indicates that the rights granted to CLAIMANT are not ownership rights.

**85.** *Third,* the degree of control which the licensee can exercise over the licensed goods reflects whether the licensee has actual ownership rights *[CWS v. Vendorlink B.V, 2015 (Ned.); Karollus, p. 21; Usedsoft v. Oracle, 2012 (CJEU)]*. Although CLAIMANT has certain rights, they are subject to RESPONDENT NO. 1's approval in the form of the joint Research Plan and its collaborative development *[Cl. Ex. Cl3, cl. 2, 3.1]*. Additionally, CLAIMANT is liable to make payments to RESPONDENT NO. 1 for initiating any research and development over the vaccines *[PCLA, cl. 9.4]*. This indicates a lack of control which CLAIMANT has over the use of the vectors.

**86.** Sales transactions require not only a physical delivery of goods but also a transfer of ownership rights, as contemplated in the CISG *[CISG, Art. 30; Lookofsky, §4; Del Duca/Del Duca, ¶9(a); Jose v. Nez, 1993 (Mex.)]*. Although the PCLA provides for the physical delivery of goods, it fails to provide for a transfer of ownership rights, which are important to effectuate a sale. The rights provided to CLAIMANT are the rights of a licensee and not a buyer. Therefore, the transfer of *GorAdCam* vectors does not constitute a sale in any capacity as represented by CLAIMANT and is instead a licensed transaction.

### 3. Purchase Obligations of HEK-294 and Cell Culture Medium are not sales transactions under the CISG

**87.** CLAIMANT has not argued that the Purchase Obligation Clause of the PCLA is a sales transaction. In any case, the transaction is not a valid sale. Under the Purchase Obligation Clause of the PCLA, there is a compulsory and an optional obligation. The compulsory obligation is that CLAIMANT, in the event of commercialization of a vaccine, must acquire the required HEK-294 cells and cell culture medium from RESPONDENT NO. 1 *[PCLA, cl. 16.1]*. Optionally, CLAIMANT may ask RESPONDENT NO. 1 to produce its vaccine *[PCLA, cl. 16.2]*. The Purchase Obligation Clause does not create a sales transaction for the following reasons:

**88.** *First,* the Purchase Obligation Clause is a framework agreement meant to facilitate potential purchases *[PCLA, cl. 2]*. A framework agreement is an agreement that provides for the terms of future transactions between contracting parties *[OECD, Brief 19; EC Directive 2004/18, Art. 11(5); Kröll/Mistelis/Viscasillas, p. 48; Helen v. Australian Products, 1997 (USA)]*. Framework agreements are usually not recognized by the CISG as sales agreements *[Perovi, p. 187; Ferrari/Flechtner (1999), p. 129; Heuze, p. 75]*. The Purchase Obligation Clause only contains terms for future transactions and therefore is a framework agreement, not recognized under the CISG.

**89.** *Second,* the clause cannot be recognized as a valid sales agreement as it does not create any buyer and seller obligations. For an agreement to be a valid sales agreement, it must contain obligations

under Art. 30 and Art. 53 of the CISG *[Bridge ¶1.14; BVBA Marinus v. BV Pannenclaer, 2005 (Belg.); Mitias v. Solidea, 2008 (It.)]*. Any agreement, if void of such considerations, ceases to be a sales agreement *[Vidamed v. Schmidt, 1997 (Ned.); Perovic, p. 259-69; Schlectriem (2005), p. 27]*. The Purchase Obligation Clause as a whole, does not create any transaction between the parties and fails to oblige RESPONDENT NO. 1 to deliver the goods to CLAIMANT. Additionally, HEK-294 are goods with an IP attached to it *[PO2, ¶2]*. For CLAIMANT to use the HEK-294 cells, it must have a license granted to it by RESPONDENT NO. 1. The PCLA provides CLAIMANT with a license only to *GorAdCam* vectors and not to HEK-294 cells *[PCLA, cl. 5.2 & 1.2]*. Therefore, it fails to transfer any property and consequently, is not a valid sales clause.

**90.** *Third,* for sales agreements to constitute valid offers, they must be "sufficiently definite" *[CISG, Art. 14(1); Chinchilla Furs Case, 1994 (Aust.); Live Fish Case, 1998 (Ger.); SRO v. SRT, 2013 (USA)]*. The same threshold is endorsed in the Danubian Law under the UNIDROIT Principles of International Commercial Contracts *[PICC, Art. 2.1.1, Art 2.1.2; PO1 ¶3]*. For an offer to be a valid sales offer, it must either have a definite price and quantity of the goods or sufficiently definite provisions to determine the price and quantity *[CISG, Art. 14(1); DiMatteo, p. 205; Machinery Case, 2001 (Ger.)]*. Presently, the Production Option Clause is not sufficiently definite in terms of both the price and quantity of the future transaction *[PCLA, cl. 16.1]*.

**91.** Additionally, both the clauses are speculative as they can only be invoked in case of commercialization of a vaccine *[PCLA, cl. 16.1 & 16.2]*. The commercialization of a vaccine cannot be definitely ascertained by the parties or the Tribunal. Therefore, the clauses lack sufficiency in the terms of the time of purchase as well.

**92.** Since the Purchase Obligation Clause does not confer buyer and seller obligations upon the parties and is not sufficiently definite in its price and quantity, it does not qualify as a transaction. Additionally, the clause is a framework agreement and is devoid of any sales terms and conditions. Therefore, the clause is not a sales agreement.

### III. THE PCLA IS NOT A SALES AGREEMENT BY VIRTUE OF ART. 3 OF THE CISG

**93.** Art. 3(2) of the CISG deals with transactions in which the preponderant part of the obligations is the supply of labour or other services *[CISG, Art. 3(2), CISG-AC Opinion 4]*. It includes the transfer of "know-how" as a non-sales and service element *[Honsell, Art. 3 ¶6; Staudinger/ Magnus, Art 3 ¶25; Brunner/Gottlieb, Art. 3 ¶8]*. While assessing the preponderant obligations of such mixed contracts, the requirements laid down under Art. 3 of the CISG are to be considered. Preponderant relates to a test of majority value *[Cisterns Case, 2009 (It.); Hydraulic Pressure Unit Case, 2004 (Aust.)]*.

**94.** CLAIMANT submits that the PCLA has a preponderant obligation of sales alone *[Cl. Memorandum, ¶14]*. On the contrary, the economic value of the obligations is to be taken into prime consideration by the Tribunal *[AC Opinion No. 4, ¶9; Equipment Case, 2000 (Rus.); Roofing Materials Case, 1999 (Switz.)]*. In light of this threshold, the economic test relied upon by CLAIMANT is incorrect and flawed. Rather, the PCLA is entirely a non-sales agreement **[1]**. Furthermore, the economic test under Art. 3(2) of the CISG results in the non-applicability of the convention to the PCLA **[2]**. Finally, the CISG is also not applicable to the PCLA by virtue of Art. 3(1) of the CISG **[3]**.

### 1. The economic test proposed by CLAIMANT is incorrect as the PCLA is entirely a non-sales agreement

**95.** CLAIMANT proposes that the transfer of *GorAdCam* vectors is the only obligation prescribed by the PCLA which is to be taken into consideration while determining the nature of the agreement *[Cl. Memorandum, ¶13]*. It relies on the payment of EUR 2.5 Million which CLAIMANT had paid RESPONDENT NO. 1 to show that the aforementioned amount is the only consideration in the Agreement *[Cl. Memorandum, ¶13]*. RESPONDENTS disagree with this interpretation as CLAIMANT has incorrectly assessed the nature of the PCLA obligations.

**96.** The PCLA does not create a sales obligation. The transfer of *GorAdCam* vectors does not constitute a sale as prescribed under the CISG *[Res. Memorandum, ¶¶80-86]*. Additionally, the Purchase Obligation Clause does not constitute a transaction, nor does it create any sales obligation *[Res. Memorandum, ¶¶87-92]*. Therefore, the transfer of the *GorAdCam* vectors amounting to EUR 2.5 Million is a licensed transaction, which is non-sales in nature.

**97.** CLAIMANT has not taken into consideration the payments such as Milestone Payments, Research Plan Payments and Royalty Payments. It alleges that such payments are unpredictable *[Cl. Memorandum, ¶13]*. On the contrary, the Danubian Law recognizes an obligation if it is *first,* sufficiently definite and *second,* binds the parties to it *[PICC, Art. 2.1.1 & Art 2.1.2]*.

**98.** In order to be sufficiently definite, the obligation must specify the price and time of payment *[PICC, Art. 2.1.1]*. The Milestone Payment and Royalty Payments are sufficiently definite in terms of their price, as each payment obligation has a specific price to be paid *[PCLA, cl. 9]*. The PCLA is specific as to the time of payment as it lays down specific timeframes, on the completion of certain achievements. These time prescriptions are valid under the PICC *[PICC, Art. 6.1.1]*. The payment terms in the PCLA bind the parties to its terms and prevent any derogation.

**99.** Contrary to the Purchase Obligation Clause, these non-sales payments are definitive in terms of their time of payment and bind the parties to it when the condition is achieved. Therefore, they

are non-sale payments and must be included under the economic test calculations. These obligations are of non-sales nature as they fail to create any seller or buyer obligations under the CISG *[CISG, Art. 30 & Art. 53]*. The Milestone Payments are a consideration which amount to EUR 3 Million and the Royalty Payments will include a consideration of EUR 1.5 Million at minimum *[PCLA, cl. 9.3 & 9.5]*. Therefore, the total obligation created by the PCLA is for EUR 7 Million, which are non-sales obligations, thereby rendering the PCLA a non-sales agreement.

### 2. Economic test results in non-application of the CISG to the PCLA

**100.** Even if the Tribunal were to find that the upfront payment is considered to be a sales element, it still has elements of license payments, which is a non-sales obligation *[PCLA, cl. 9.2]*. Even though the exact division of the upfront payment of EUR 2.5 Million is not prescribed in the PCLA itself, the non-sales element will nevertheless be the preponderant part of the contract.

**101.** "Preponderant" relates to a test of majority value *[Cisterns Case, 2009 (It.); Hydraulic Pressure Unit Case, 2004 (Aust.)]*. The non-sales element should exceed 50% of the total value to be the preponderant part *[Huber/Mullis, p. 46; Brunner/Gottlieb, Art. 3 ¶8; Equipment Case, 2000 (Rus.)]*, with some courts requiring that the value of the non-sales obligation to "clearly" exceed the value of the goods *[Roofing Materials Case, 1999 (Switz.); Machines Case, 1999 (Switz.)]*.

**102.** The economic value of the obligations is to be taken into prime consideration *[AC Opinion No. 4, ¶9; Equipment Case, 2000 (Rus.); Roofing Materials. Case, 1999 (Switz.)]*. Where non-sales elements amount to more than 50% of the total obligations, the CISG is inapplicable *[UNCITRAL Digest, Art. 3; Honsell/Siehr, Art. 3 ¶9; Staudinger/Magnus, Art. 3 ¶25*; *Brand/Ferrari/Flechtner, p. 520; Market Study Case, 1994 (Ger.)]*. When the royalty payments are included in the test for preponderance under Art. 3(2) of the CISG, the PCLA will not be a sales agreement **[2.1]**. Even if the Tribunal does not consider the aforementioned royalty payments, non-sales will still remain the preponderant part of the PCLA **[2.2]**.

#### 2.1. Non-Sales is the preponderant part when royalty payments are considered

**103.** When royalty payments are included in the calculations for the economic test, the non-sales element will be the preponderant part. The total consideration in the PCLA amounts to EUR 7 Million, which consists of three sets of payments, i.e. Upfront Payment amounting to EUR 2.5 Million, Milestone Payment amounting to EUR 3 Million, and minimum Royalty Payments amounting to at least EUR 1.5 Million *[PCLA, cl. 9]*. Out of these, the non-sales considerations are the Milestone Payments and the Royalty Payments, amounting to a total of EUR 4.5 Million.

**104.** The only possible sales consideration is the Upfront Payment, amounting to EUR 2.5 Million. A part of this amount will be non-sales in nature as it includes the payment for access to licensed technology *[PCLA, cl. 9.2]*. Therefore, the non-sales obligations will amount to at least more than 65% of the total consideration, which is clearly more than the established threshold of 50%.

### 2.2. Non-Sales is the preponderant part when royalty payments are not considered

**105.** Alternatively, even if Royalty Payments are not considered in the test of preponderance, the non-sales element will still be the preponderant part. The total obligations in this case will amount to EUR 5.5 Million, where less than 2.5 Million will be the sales obligation *[PCLA, cl. 9]*. Therefore, the non-sales obligations will still amount to at least more than 55% of the total value, which is also well above the established threshold of 50%.

<table>
<tr><th colspan="4">Including Royalty Payments</th><th colspan="4">Excluding Royalty Payments</th></tr>
<tr><th colspan="2">Non-Sales Obligation</th><th colspan="2">Sales Obligation</th><th colspan="2">Non-Sales Obligation</th><th colspan="2">Sales Obligation</th></tr>
<tr><td>License Payments</td><td>EUR 3.0M</td><td rowspan="2">GorAdCam Vectors + License Payment</td><td rowspan="2">EUR 2.5M</td><td>License Payments</td><td>EUR 3.0M</td><td rowspan="2">GorAdCam Vectors + License Payment</td><td rowspan="2">EUR 2.5M</td></tr>
<tr><td>Royalty Payments</td><td>EUR 1.5M</td><td>License Payments</td><td>EUR 3.0M</td></tr>
<tr><td>Total Non-Sales</td><td>EUR 4.5M</td><td>Total Sales</td><td><EUR 2.5M</td><td>Total Sales</td><td>EUR 3.0M</td><td>Total Non-Sales</td><td><EUR 2.5M</td></tr>
<tr><td colspan="4">Percentage Total Obligations</td><td colspan="4">Percentage Total Obligations</td></tr>
<tr><td colspan="2">>65%</td><td colspan="2"><35%</td><td colspan="2">>55%</td><td colspan="2"><45%</td></tr>
</table>

**106.** Furthermore, the economic value test may also be combined with an assessment of the importance attached to the sales and non-sales obligations. This can be determined from the degree of detail which has been dedicated to the respective parts or the manner in which price is calculated in the contract *[Huber/Mullis, p. 47; Pizzaria Restaurant Case, 2000 (Ger.); Cylinder Case, 1998 (Ger.)]*. The PCLA has only dedicated a single sub-clause within the entire payment structure to the alleged sales consideration, which also includes license payments *[PCLA, cl. 9.2]*. Whereas, rest of the Payment Terms clause is dedicated to the non-sales licensing and royalty obligations *[PCLA, cl. 9]*. Hence, based on the amount of detail attached to the non-sales consideration as compared to the sales consideration, the non-sales element is the preponderant part of the PCLA.

**107.** Therefore, the preponderant element of the PCLA, in any case, will be the non-sales obligations, which will render the CISG inapplicable.

### 3. CISG is not applicable to the PCLA by virtue of Art. 3(1) of the CISG

**108.** Although CLAIMANT has not argued this, RESPONDENTS assert that the PCLA falls under the ambit of Art. 3(1) of the CISG. As per Art. 3(1), CISG is not applicable to contracts which include goods yet to be manufactured, wherein the buyer provides a substantial part of the materials necessary for the manufacture *[CISG, Art. 3(1); CISG AC Opinion 4, ¶1.2; Brunner/Gottlieb, Art. 3 ¶3]*. CISG is written in six languages, all of which are equally authentic as per the testimonium clause of the Convention *[Davies/Snyder, p. 48]*. In the French text of the CISG, "*part essentielle"* implies an interpretation where the functionality of the materials supplied by the parties is to be considered *[Audit, p. 25-26; Window Production Plant Case, 1999 (Ger.); Vehicle Case, 2003 (ICC)]*.

**109.** CISG has been held to be inapplicable to a contract by virtue of Article 3(1) when the designs, specifications and instructions provided by the buyer were considered as a functionally "substantial part of the materials necessary" for the manufacture of the goods, based on this interpretation *[Adaptors Case, 1993 (Fra.)]*. Therefore, instructions or designs provided by parties are to be taken into account when they enhance the value of the materials or contribute to the originality, speciality or exclusivity of the goods *[CISG AC Opinion 4, ¶¶2.14 - 2.15]*.

**110.** Under the PCLA, RESPONDENT NO.1 is required to produce the *GorAdCam* vectors by adding disease specific gene inserts to the basic viral vector based on the instructions given by CLAIMANT *[Notice for Arbitration, p. 6, ¶14]*. This instruction is essential for the production of viral vectors as the entire research and subsequent production of a vaccine depends entirely on these gene inserts *[Oxford COVID Vaccine Trial Group, p. 100]*. While there may not be any economic value attached to this contribution, it is a "necessary material required for manufacture" as it is functionally of great value for the production of the *GorAdCam* vectors and thereby, the ultimate purpose of the contract. Therefore, the CISG is not applicable to the PCLA by virtue of this contribution of CLAIMANT in the form of providing the instruction for adding the disease specific gene insert.

## IV. THE PARTIES INTENDED FOR THE PCLA TO BE A COLLABORATION AND LICENSING AGREEMENT

**111.** CLAIMANT has paid special emphasis to the intention of the parties while trying to prove that the PCLA is a sales agreement *[Cl. Memorandum, ¶¶15-19]*. CLAIMANT is however misguided in making this submission as it has failed to consider the presence of the Entire Agreement clause in the

PCLA *[PCLA, cl. 15.2]*. It lays down that the PCLA *"supersedes all prior and contemporaneous negotiations, representations or agreements, either written or oral, regarding the subject matter of this Agreement"*.

**112.** The clause is valid under Danubian Law as Art. 2.1.17 of the PICC recognizes the validity of such clauses *[PICC, Art. 2.1.17]*. Therefore, the parties are precluded from relying on the extrinsic evidence rule contemplated by CISG under Art. 8 *[CISG AC Opinion 3, ¶4]*. Therefore, CLAIMANT is barred from using extrinsic evidence to show parties' intention behind concluding the PCLA. Parties' intention can only be assessed from the language and terms of the agreement.

**113.** The text of the PCLA reflects that the parties intended it to be a collaboration and licensing agreement. *First,* the scope of the PCLA reflects that the agreement only governs the collaborative activities and the consideration of the licensed IP *[PCLA, cl. 2]*. *Second,* the nature of the rights granted to CLAIMANT prevents it from having any ownership rights over the vectors. Additionally, there was no license granted to CLAIMANT for the use of HEK-294 cells *[PCLA, cl. 5]*. *Third,* the language of the agreement assesses the transfer of *GorAdCam* vectors as a "delivery" and not a sale *[PCLA, cl. 9.2]*. Additionally, the Research Plan Clause does not provide for a sale but only mere "deliverables". In light of these considerations, the parties never attempted to execute a sale under the PCLA.

### CONCLUSION

**114.** The PCLA is an agreement which is concerned with licensing and collaboration. The agreement is devoid of any seller or buyer obligations for the transfer of *GorAdCam* vectors. Moreover, the Purchase Obligation Clause is a framework agreement, which is not recognised under the CISG. The Economic Test conclusively proves that the PCLA is not a sales agreement as the preponderant part of the contract is non-sales in nature. Therefore, the CISG is not applicable to the PCLA.

## ISSUE 4: RESPONDENT NO. 1 DID NOT VIOLATE ART. 42 OF THE CISG

**115.** Even if CISG applies to the PCLA, RESPONDENT NO. 1 did not violate Art. 42 thereof. Art. 42 of the CISG prescribes that if a seller delivers goods to a buyer which have a third-party claim over the IP rights, then the seller is in violation of the CISG *[CISG, Art. 42]*. CLAIMANT alleges that RESPONDENT NO. 1 has sold its goods which were encumbered with the Ross Claim *[Notice for Arbitration, ¶19]*. CLAIMANT entered into the PCLA with RESPONDENTS on 1 January 2019 for the usage of *GorAdCam* viral vector for developing a vaccine *[Notice for Arbitration, p. 6, ¶11]*. However, it conveniently raised allegations of a contractual breach against RESPONDENTS one and a half

years later *[Cl. Ex. C5]*. This was immediately after CLAIMANT was acquired by Khorana which has the necessary equipment for producing the vaccines *[Answer to Notice, p. 25, ¶ 2]*.

**116.** CLAIMANT's allegations are a series of moonshine defences created to escape its obligations under the Purchase Obligation Clause of the PCLA. Contrary to CLAIMANT's assertions, RESPONDENT NO.1 has not breached its obligations under Art. 42(1) of the CISG **[I]**. In any case, RESPONDENTS can be exempted from their liability to seller conforming goods under Art. 42 of the CISG **[II]**.

## I. RESPONDENT NO. 1 HAS NOT BREACHED ITS OBLIGATION UNDER ART. 42(1)

**117.** In order to constitute a violation of Art. 42 of the CISG, there has to be a third party right or claim attached to the goods sold. Additionally, at the time of conclusion of the contract of sale, the seller of such goods must have either been aware of the claim or could not have been unaware of it. Presently, none of these conditions is fulfilled as the alleged Ross Claim is not a claim under Art. 42 of the CISG **[1]**. Additionally, RESPONDENT NO. 1 neither had any knowledge about, nor could have been aware of the claim at the time of conclusion of the PCLA **[2]**.

### 1. The alleged Ross Claim is not a claim under Art. 42

**118.** CLAIMANT alleges that RESPONDENT NO. 1 transferred the *GorAdCam* vectors with a third-party claim attached thereto *[Cl. Memorandum, ¶25]*. However, CLAIMANT is misguided as Ross has not raised a claim. Interpretation of Art. 42 of the CISG must be done in good faith *[CISG, Art. 7; PICC, Art. 1.7]*. The "claims" under Art. 42 of the CISG must be made in good faith *[Sunprojouce v. Sebastian, 2007 (Spa.); Potting Soil Case, 2006 (Ned.)]*. Ross has made offers falsely disguised as claims **[1.1]**. Such an alleged claim is spurious, baseless and frivolous **[1.2]**. In light of these considerations, the alleged "Ross Claim" is not a valid claim under Art. 42 of the CISG.

#### 1.1. Ross has made offers falsely disguised as claims

**119.** Ross raised the alleged claim on two occasions. On both these occasions, the alleged claim was actually an offer, falsely disguised as a claim. They were raised to gain substantial bargaining power in negotiations *[Answer to Notice, ¶13]*. The offer was first raised in the summer of 2018 when Ross wanted to acquire RESPONDENT NO. 2 *[Answer to Notice, ¶7]*. Ross realized the limited success of its tactics and the negotiation failed. The contention over the license of the *GorAdCam* vector was not raised again for over six months after the negotiations failed *[Answer to Notice, ¶¶8-9]*.

**120.** These offers were further disguised as claims when an email was sent to RESPONDENT NO. 2 on 6 December 2018 *[Res Ex. 4]*. The e-mail offered to get a non-exclusive license for *GorAdCam* vectors in the field of respiratory diseases for no cost *[Res. Ex. 4]*. To get this no-cost license, Ross

highlighted that it already had access to research into the field of respiratory diseases. The nature of the e-mail was merely an offer to get a free of cost non-exclusive license from RESPONDENT NO. 2, indicating that the claim was an effort to gain false bargaining power. Therefore, the offers Ross made do not constitute claims as under Art. 42 of the CISG.

### 1.2. The alleged claim is spurious, baseless and frivolous

**121.** CLAIMANT alleges that mere claims are sufficient to trigger Art. 42 of the CISG *[Cl. Memorandum, ¶26]*. However, CLAIMANT is misguided in asserting this. If a claim is frivolous and baseless, it is liable to be quashed *[Schlectriem/Schwenzer, Art. 41 ¶10; Metzger, p. 73]*. As highlighted above, "claims" under the CISG must be *bona fide* in nature *[Res. Memorandum, ¶118]*. The alleged claim is not sufficient to invoke Art. 42 for the following reasons:

**122.** *First,* Ross did not pursue these claims for over three years. Ross is a company which strictly enforces its IP claims in litigation and arbitration *[Answer to Notice, ¶13 PO2, ¶15]*. A delay of three years indicates that all Ross ever wanted was to negotiate an agreement for a non-exclusive license. This is indicative of the frivolous nature of the claim.

**123.** *Second,* CLAIMANT alleges that the extra payment of EUR 600,000 was to specifically include the scope of respiratory diseases *[Cl. Memorandum, ¶31]*. In 2014, at the time of conclusion of the Ross Agreement, it was not known that *GorAdCam* vectors could be used to cure respiratory diseases *[Notice for Arbitration, ¶¶6-7]*. It was only four years after the conclusion of the Ross Agreement, in 2018, that it was discovered that *GorAdCam* vectors can be used to cure respiratory diseases *[Answer to Notice, ¶8]*. The claim is spurious and baseless because at the time of conclusion of the Ross Agreement, the functionality of *GorAdCam* vectors for respiratory diseases was unknown, thus making it impossible to grant a license in that field.

**124.** *Third,* the claim is further baseless as respiratory diseases are distinct from malaria. The two diseases are different in the transmission of the diseases *[WHO, MERS Fact Sheet 2017; Perlman, 2015]*. Respiratory diseases are transmitted through air or water or contact with an infected person *[Oliveira et. al., p. 459-464]*, whereas malaria can only be transferred through host mosquitoes *[WHO, World Malaria Report]*. Viruses and bacterium cause respiratory diseases *[Al Bari MAA, (2017); Scaccabarozzi et. al. (2019)]*. However, plasmodium parasites cause malaria *[WHO, Malaria Fact Sheet]*. These two diseases are not related to each other. Therefore, the claims are spurious, baseless and frivolous in nature.

### 2. RESPONDENT NO. 1 did not know of the claim nor could have been aware of it

**125.** Even if the Tribunal accepts that the present claim is valid, it must be proved that the seller of the goods had knowledge or could have known of the claim to be liable under Art. 42 *[CISG, Art. 42]*. The PCLA has amended the position of Art. 42 to only hold RESPONDENT NO. 1 liable for actual knowledge and non-disclosure of a claim. In consideration of this threshold, RESPONDENT NO. 1 did not have knowledge of the claim raised by Ross **[2.1]**. In any case, RESPONDENT NO. 1 could not have been aware of the claim raised by Ross **[2.2]**.

#### 2.1. RESPONDENT NO. 1 had no actual knowledge of the Ross claim

**126.** A seller may be held liable under Art. 42 of the CISG if he has positive knowledge of the claim raised *[CISG, Art. 42]*. The parties to the PCLA have amended the application of Art. 42 to the PCLA so as to hold RESPONDENT NO. 1 liable if it had knowledge a claim *[PCLA, cl. 11.1.3 & 11.1.4]*. This amendment of provision was done under the Warranties clause of the PCLA.

**127.** The German Supreme Court has held that warranty provisions hold precedence over the provisions of the CISG as they are a conscious amendment in application to the provisions of the CISG *[Zimmerman, p. 320; Printing Systems and Software Case, 1996 (Ger.)]*. Such deliberate deviations are permitted under Art. 6 of the CISG. Since the parties have consciously decided to amend the application of Art. 42 of the CISG, their conduct must be governed based on the warranty clause.

**128.** CLAIMANT incorrectly argues that RESPONDENT NO. 1 is liable because Mr. Peter Doherty knew about the claim *[Cl. Memorandum, ¶38]*. The e-mail will reflect that the claim was made to Mr. Doherty in the capacity of an employee of RESPONDENT NO. 2. The alleged claim was sent to Mr. Doherty on the 6 December 2018 *[Res. Ex. R 4]*. Hence it would be incorrect to assume that Mr. Doherty knew about the claim in the capacity of a representative of RESPONDENT NO. 1.

#### 2.2. In any case, RESPONDENT NO. 1 could not have been aware of the Ross Claim

**129.** CLAIMANT alternatively proposes that RESPONDENT NO. 1 could not have been unaware of these claims raised by Ross *[Cl. Memorandum, ¶39]*. However, CLAIMANT is misguided in its understanding for the following reasons:

**130.** *First,* the claims were not registered as patent claims, which are publicly available. They were claims over contractual licenses which were raised in closed door negotiations and private e-mails between only two parties - RESPONDENT NO. 2 and Ross.

**131.** *Second,* RESPONDENT NO. 1 was never party to any such negotiations between Ross and RESPONDENT NO. 2 prior to the execution of the PCLA. Therefore, it was not in a unique position to know of the claim. Any negotiation which RESPONDENT NO. 2 engages in does not connote a responsibility over RESPONDENT NO. 1 to be aware of the alleged claim as it is a legally independent entity *[PO2, ¶1]*. Therefore, RESPONDENT NO. 1, the seller, could not have been aware of such a claim at the time of conclusion of the sale.

**132.** *Third,* RESPONDENT NO. 1 had no responsibility to investigate the Ross claim. Art. 42 of the CISG connotes a responsibility over the seller to make itself aware of a claim by investigating, within a reasonable proximity *[SA Tachon v. Marshoes SL, 2002 (Fra.); SA HM v. AG K, 2002 (Fra.); Shinn p. 126; Zeller, p. 305]*. A seller would be liable to know about any information reflecting the existence of a claim, if it is reasonably proximate to the seller *[R.A.S v. S.A.T, 1992 (Fra.); Andersen/Schroeter, p. 213-215]*.

**133.** Biopharma Science is an "investor-friendly" magazine and does not concern RESPONDENT NO. 1 which is primarily involved in vaccine development *[PO2, ¶8]*. Additionally, it is based out of Danubia *[Notice for Arbitration, ¶19]*. RESPONDENT NO. 1 is based out of Equitoriana, with no presence in Danubia. The journal had no proximity to the place of business of RESPONDENT NO. 1. Therefore, it was not within RESPONDENT NO. 1's professional capacity to be aware of a claim.

## II. IN ANY CASE, RESPONDENT NO. 1 WILL NOT BE LIABLE FOR BREACHING ART. 42

**134.** CLAIMANT asserts that RESPONDENT NO. 1 cannot exclude its liability to sell conforming goods under Art. 42 of the CISG *[Cl. Memorandum, ¶41]*. On the contrary, RESPONDENT NO. 1 can exclude its liability because CLAIMANT could have known about the Ross claim at the time of concluding the contract **[1]**. Additionally, CLAIMANT`s notice does not meet the requirements of Art. 43 of the CISG, thereby preventing CLAIMANT from relying on Art. 42 of the CISG **[2]**.

### 1. CLAIMANT could have known of the Ross Claim when the PCLA was concluded

**135.** Art. 42(2)(a) of the CISG discharges the seller from its liability to deliver conforming goods if the buyer "could not have been unaware" of the third party's claim *[CISG, Art. 42; Secretariat Commentary, Art. 40 ¶9; Lookofsky (2000), ¶203; Zeller, p. 298]*. CLAIMANT asserts that it could not have had knowledge of the Ross claim *[Cl. Memorandum, ¶43]*. However, contrary to its assertion, CLAIMANT could have known about the Ross Claim at the time of concluding the contract.

**136.** The words "could not have been unaware" have been assigned varying interpretations. The first interpretation imposes a lighter burden on the buyer "to keep their eyes open" and follow-up on

any indications of non-conforming goods *[Honnold, p. 260; Rauda/Etier, p. 56; Andersen/Schroeter p. 219; R.A.S. v. S.A. T, 2000 (Fra.)]*. Another interpretation suggests that the buyer should undertake due-diligence and actively investigate into third party claims *[Tachon v. Marshoes, 2002 (Fra.); SA HM v. AG K, 2002 (Fra.); Shinn, p. 126]*. CLAIMANT could have known for following reasons:

**137.** CLAIMANT could have known of the Ross Claim through the press release by RESPONDENT NO. 2 in 2014 *[Cl. Ex. C1]*. Applying the first interpretation, the press release reports that the scope of Ross license extended to "malaria and infectious diseases" instead of "malaria and *related* infectious diseases" *[Notice for Arbitration, ¶8; PO2, ¶22]*. Thus, at the time of conclusion of contract, the information available in public domain indicated Ross might have a claim over infectious respiratory diseases. Therefore, CLAIMANT could have been aware of the Ross Claim. Applying the second interpretation, CLAIMANT could have discovered the press release as RESPONDENT NO. 2 is the patent holder of the *GorAdCam* vector *[Notice for Arbitration, ¶3]*. Given the heavier burden imposed by Art. 42(2)(a) of the CISG, CLAIMANT should have investigated into it.

**138.** *Second*, CLAIMANT could have known of the Ross claim via the article published in Biopharma Science journal in December 2018 *[Cl. Ex. C4; PO2, ¶8]*. Applying the first interpretation, CLAIMANT could have known, as the article explicitly mentions the differences in interpretating the scope of Ross license *[PO2, ¶8]*. The journal publishes start-up related information and is popular in Mediterraneo, the place of business of CLAIMANT, a start-up company *[Notice for Arbitration, ¶8; PO2, ¶8]*. Therefore, Biopharma is relevant to CLAIMANT's field of business and accessible in its location. Applying the second interpretation, CLAIMANT would have discovered the 2018 article upon investigation. CLAIMANT is expected to know about Biopharma, as it is a former subscriber to the journal *[PO2, ¶8]*. Further, it is expected to refer to it for the above-mentioned reason. Therefore, CLAIMANT could have discovered the Ross Claim at the time of conclusion of contract.

### 2. CLAIMANT`s notice does not meet the requirements of Art. 43 of the CISG, thereby preventing it from relying on Art. 42 of the CISG

**139.** Art. 43(1) of the CISG mandates the buyer to send a notice to the seller specifying the nature of the third-party claim within a reasonable period of time, after it ought to have been aware of the claim *[CISG, Art. 43(1)]*. However, Art. 43(2) of the CISG discharges the buyer from the obligation of sending a notice if the seller had knowledge of the third-party claim *[CISG, Art. 43(2)]*.

**140.** CLAIMANT sent a notice of the Ross Claim to RESPONDENT NO. 1 on 2 May 2020 *[Cl. Ex. C5]*. CLAIMANT asserts that the said e-mail constitutes a valid notice *[Cl. Memorandum, ¶47]*. It further

asserts that RESPONDENT NO. 1 knew of the Ross Claim and thus cannot contend the validity of CLAIMANT`s notice *[Cl. Memorandum, ¶47]*. CLAIMANT is misguided as RESPONDENT NO. 1 lacked the necessary knowledge as mandated by Art. 43(1) of the CISG **[2.1]**. Further, CLAIMANT did not send a notice within a reasonable period of time as prescribed under Art. 43 of the CISG **[2.2]**.

### 2.1. RESPONDENT NO. 1 lacked the necessary knowledge under Art. 43(1)

**141.** CLAIMANT asserts that the exception set under Art. 43(2) of the CISG is met as RESPONDENT NO. 1 "knew" of the Ross claim through Mr. Doherty's attributable knowledge of the e-mail dated December 2018 *[Cl. Memorandum, ¶48]*. The language used in Art. 43(2) indicates that the seller cannot contend the validity of buyer's notice only if seller had positive knowledge of the claim i.e., "knew" *[CISG, Art. 43(2); Schlechtriem/Schwenzer, Art. 43, ¶9; Automoblie Case, 2006 (Ger.)]*.

**142.** CLAIMANT is erroneous in its assertion, as RESPONDENT NO. 1 did not positively know of the Ross claim *[PO2, ¶1]*. CLAIMANT's argument with regard to Mr. Doherty's attributable knowledge stands no ground *[Res. Memorandum, ¶128]*. Thus, RESPONDENT NO. 1 lacked the necessary knowledge, prescribed by Art. 43(2) and is entitled to contend validity of CLAIMANT's notice.

### 2.2. CLAIMANT`s did not send the notice within a reasonable period of time

**143.** Immediately after CLAIMANT's acquisition by Khorana in April 2020 *[Answer to Notice, p. ¶2]*, CLAIMANT sent a notice regarding the Ross claim through e-mail dated 2 May 2020 to RESPONDENT NO. 1 *[Cl. Ex. C5]*. CLAIMANT asserts that the said notice fulfills all the requirements under Art. 43(1) of the CISG *[Cl. Memorandum, ¶47]*. CLAIMANT is erroneous in its assertion as the notice was not sent within a reasonable period of time as prescribed by Art. 43(1) of the CISG.

**144.** The time period to give a notice of non-conformity commences when the buyer ought to have known of the claim after the delivery of goods *[Secretariat Commentary on Art. 37(1); Enderlein, p. 184; Schlectreim/Schwenzer, p. 1018]*. The phrase "*ought to have been aware*" places a heavy burden on the buyer to discover the third-party claim through investigation *[Honnold, p. 260]*.

**145.** CLAIMANT could have discovered the claim in December 2019 through the article published in Biopharma. The article explicitly confirms the Ross claim *[Cl. Ex. C4]*. It is within CLAIMANT's professional capacity to refer to the said journal *[Res. Memorandum, ¶138]*. Consequently, the commencement of time period to send the notice should be fixed at December 2019.

**146.** Art. 43(1) of the CISG does not define "reasonable time". Courts usually follow the rule of "noble month", affixing one month as the reasonable time to give notice to the buyer *[Schlechtriem/Schwenzer, Art. 39 ¶17; Automobile case, 2007 (Ger.); Plastic faceplates case, 2006 (Ger);*

*Machine for producing tissues, 1999 (Ger.) case]*. In exceptional circumstances, a period of two months has been held reasonable *[Paprika Case, 2004 (Ger.); Automobile case, 2006 (Ger.); Flechtner, p. 14]*.

**147.** CLAIMANT ought to have been aware of the Ross claim by December 2019 *[Res. Memorandum, ¶145]*. In accordance with the law cited, the reasonable time to give notice to RESPONDENT NO. 1 lapsed by February 2020. Thus, the notice CLAIMANT gave, does not fulfill the requirements of Art. 43(1) of the CISG. Resultantly, RESPONDENT NO. 1 is not liable under Art. 42 of the CISG.

### CONCLUSION

**148.** The Ross Claim, due to its spurious, frivolous and baseless nature, does not constitute a claim under Art. 42 of the CISG. Moreover, RESPONDENT NO. 1, the alleged seller, did not have knowledge, nor could have been aware of the claim. Additionally, RESPONDENT NO. 1 is exempted from liability under Art. 42 as CLAIMANT could have been aware of the claim.

## REQUEST FOR RELIEF

On the basis of the foregoing arguments, RESPONDENTS respectfully request the Tribunal, while dismissing all contrary requests and submissions by CLAIMANT, to declare:

1. That Ross Pharmaceuticals should be joined to the Arbitral Proceedings.
2. That the examination of witnesses and experts in the second hearing should not be conducted remotely.
3. That the CISG is not applicable to the "Purchase, Collaboration and License Agreement" concluded between CLAIMANT and RESPONDENT NO. 1.
4. That RESPONDENT NO. 1 has not breached its obligations under Article 42 of the CISG.

Gujarat, Republic of India, 28 January 2021

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| **Libananco v. Turkey, 2011 (ICSID)** | *Libananco Holdings Co. Limited v. Republic of Turkey*<br>International Centre for Settlement of Investment Disputes<br>*Case no.* ARB/06/8<br>2 September 2011 | ¶61 |

**ICTR**

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| **Prosecutor v. Zigiranyirazo, 2008 (ICTR)** | *The Prosecutor v. Protais Zigiranyirazo*<br>International Criminal Tribunal for Rwanda; Trial Chamber III | ¶66 |

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## CONVENTIONS, LEGAL INSTRUMENTS AND RULES

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| **CISG** | United Nations Convention on Contracts for the International Sale of Goods<br>1980<br>United Nations Commission on International Trade Law | ¶¶80, 86, 90, 93, 99, 108, 115, 118, 125, 126, 135, 140, 141 |
| **Directive 2004/18/EC** | Co-ordination of procedures for the award of publicworks contracts, public supply contracts and public service contracts<br>31 March 2014<br>European Parliament<br>*Cited As: EC Directive 2004/18* | ¶88 |
| **English Act** | English Arbitration Act<br>17 June 1996<br>United Kingdom | ¶51 |

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| **French CPC** | Code of Civil Procedure<br>14 May 1981<br>France | ¶51 |
| **HKIAC Rules** | Hong Kong International Arbitration Centre Rules<br>1 November 2018<br>Hong Kong International Arbitration Centre | ¶7 |
| **IBA Guidelines** | IBA Guidelines on Party Representation in International Arbitration<br>25 May 2013<br>IBA Council | ¶68 |
| **IBA Rules** | IBA Rules on Taking Evidence in International Arbitration<br>29 May 2010<br>IBA Council | ¶¶61, 68 |
| **ICDR Rules** | International Dispute Resolution Procedures (Including Arbitration and Mediation Rules)<br>2014<br>International Centre for Dispute Resolution | ¶7 |

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|---|---|---|
| **Model Law** | UNCITRAL Model Law on International Commercial Arbitration<br><br>1985<br><br>United Nations Commission on International Trade Law | ¶¶8, 54, 56, 57 |
| **NY Convention** | Convention on the Recognition and Enforcement of Foreign Arbitral Awards<br><br>7 June 1959<br><br>United Nations Commission on International Trade Law | ¶¶51, 53 |
| **OECD Brief 19** | Brief 19: Public Procurement, Framework Agreements<br><br>August 2011<br><br>Organization for Economic Co-operation and Development<br><br>*Cited as: OECD Brief 19* | ¶88 |
| **Secretariat Commentary on Art. 37 (1)** | Uniform Law on International Sales Secretariat Commentary on Art. 40.<br><br>1978 ULIS<br><br>*Cited as: Secretariat Commentary, Art. 37 (1)* | ¶144 |

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| **Secretariat Commentary on Art. 40** | Uniform Law on International Sales Secretariat Commentary on Art. 40.<br>1978<br>ULIS<br>*Cited as: Secretariat Commentary, Art. 40* | ¶135 |
| **SIAC Rules** | Arbitration Rules of the Singapore International Arbitration Centre<br>2016<br>Singapore International Arbitration Centre | ¶¶7, 14 |
| **Swiss Rules** | Swiss Rules of International Arbitration<br>2012<br>Swiss Chambers' Arbitration Institution | ¶¶7, 29, 32, 39, 52, 63 |
| **UNCITRAL Rules** | UNCITRAL Arbitration Rules<br>2013<br>United Nations Commission on International Trade Law | ¶61 |
| **PICC** | UNIDROIT Principles of International Commercial Contracts<br>2016<br>The International Institute for the Unification of Private Law | ¶¶90, 97, 98, 112, 118 |

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| **Vienna Protocol** | The Vienna Protocol: A Practical Checklist for Remote hearings<br>June 2020<br>Vienna International Arbitration Centre | ¶51 |
| **WIPO Rules** | WIPO Arbitration Rules<br>1 January 2020<br>World Intellectual Property Organization | ¶61 |

**REPORTS**

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| **FRIEDLAN,** PAUL (Auth.) | 2018 International Arbitration Survey: The Evolution of International Arbitration<br>Available at:<br>https://www.whitecase.com/sites/whitecase/files/files/download/publications/qmul-international-arbitration-survey-2018-19.pdf<br>White & Case-Queen Mary University of London<br>June 2018<br>*Cited as: White & Case Survey* | ¶65 |
| **Licensing Guide WIPO, 2004** | WIPO Guide: Licensing of Copy Rights and related rights<br>2004<br>World Intellectual Property Organization | ¶73 |
| **U.N. Doc. A/CN.9/246** | UNCITRAL Report of the Working Group on International Contract Practices on the Work of Its Seventh Session<br>U.N. Doc. A/CN.9/246 | ¶57 |

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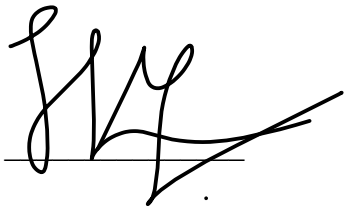
| **U.N. Doc. A/CN.9/264** | UNCITRAL Report of the Secretary-General on the Analytical Commentary on Draft Text of A Model Law on International Commercial Arbitration<br>U.N. Doc. A/CN.9/264<br>1985<br>UNCITRAL | ¶54 |
| **UNCITRAL's Digest of Case Law (2016)** | UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods<br>2016<br>UNCITRAL | ¶102 |
| **WHO Malaria Fact Sheet** | Malaria: Fact Sheet for Europe<br>2014<br>World Health Organization, Europe Office | ¶124 |
| **WHO World Malaria Report** | WHO World Malaria Report<br>4 December, 2019<br>World Health Organization | ¶124 |
| **WHO's MERS Fact Sheet (2017)** | WHO MERS-CoV Global Summary and Assessment of Risk<br>21 July 2017<br>World Health Organization | ¶124 |

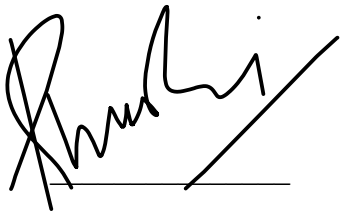
## CERTIFICATE

We hereby confirm that this Memorandum was written only by the persons whose names are listed below and who signed this certificate. We also confirm that we did not receive any assistance during the writing process from any person who is not a member of the team.

ANANYA MOHAPATRA



HRITVIK MOHAN



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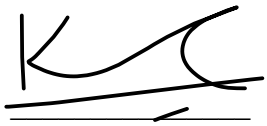

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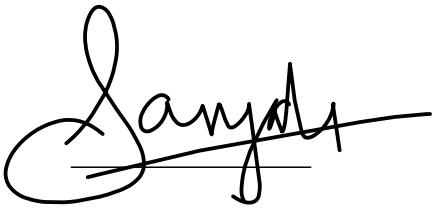
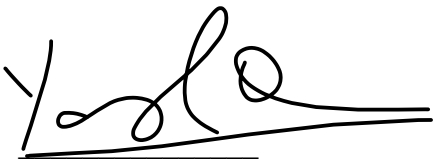


SANJALI RUPNAWAR



YASH KHANNA