EIGHTEENTH ANNUAL

WILLEM C. VIS (EAST) INTERNATIONAL COMMERCIAL ARBITRATION MOOT

14 TO 21 MARCH 2021

MEMORANDUM FOR RESPONDENTS

LUDWIG-MAXIMILIANS-UNIVERSITÄT MÜNCHEN

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

COUNSEL:

Katharina Bauer · Viktoria Filipczuk · Aaron Haas

Teresa Swienty · Giulia Wolff · Timmo Ziegler

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LIST OF ABBREVIATIONS

€	Euro(s)
§(§)	paragraph(s)
%	percent
AC	Advisory Council
Answ. Not. Arb.	Answer to the Notice of Arbitration
a.o.	and others
App.	Appendix
Arg.	Argument
Art(s).	Article(s)
BGH	Bundesgerichtshof
cf.	confer
CFO	Chief Financial Officer
Ch.	Chapter
Cl.	Claimant
COVID	Coronavirus
ed.	edition
e.g.	exempli gratia
et al.	et alia/et aliae/et alii
et seq(q).	et sequentia/sequentes
Exh.	Exhibit
Fn.	footnote
FS	Festschrift
GorAdCam	Gorilla Adenovirus of CamVir
HEK-cells	Human Embryonic Kidney Cells
HGB	Handelsgesetzbuch
HGer	Handelsgericht
ibid.	ibidem
i.e.	id est
IP	Intellectual Property
Iss.	Issue
LG	Landgericht
Ltd	Limited

Memo.	Memorandum
Mr.	Mister
Ms.	Miss
No.	Number
Not. Arb.	Notice of Arbitration
NY	New York
NYC	New York Convention
Off. Rec.	Official Records
OGH	Oberster Gerichtshof
OLG	Oberlandesgericht
Op.	Opinion
p(p).	page(s)
plc	Public Limited Company
PO	Procedural Order
Resp.	Respondent
Sec.	Section
UN	United Nations
v.	versus
Vol.	Volume
WHO	World Health Organization

STATEMENT OF FACTS

The parties to this arbitration are RespiVac plc (hereinafter "**CLAIMANT**"), CamVir Ltd (hereinafter "**RESPONDENT NO. 1**") and VectorVir Ltd (hereinafter "**RESPONDENT NO. 2**", collectively "**the Parties**"). The party to be joined is Ross Pharmaceuticals (hereinafter "**ROSS**").

CLAIMANT is a former start-up incorporated in Mediterraneo. It is specialized in research and development of vaccines for respiratory diseases.

RESPONDENT NO. 1 is a contract manufacturing organization incorporated in Equatoriana. It provides pharmaceutical base materials for vaccine production. In particular, it grants the licenses and transfers the know-how necessary to use these materials.

RESPONDENT NO. 2 is a former start-up incorporated in Equatoriana. It commercializes and further develops patents for the use of viral vectors, i.e. genetically modified harmless viruses used for the development of vaccines. It is the patent holder for the GorAdCam viral vector.

RESPONDENT NO. 1 and RESPONDENT NO. 2 (collectively "**RESPONDENTS**") are subsidiaries of Roctis AG, the holding company of the Roctis Group.

ROSS is a life-science company incorporated in Danubia. It is engaged in the research of innovative immune therapy, especially in the field of malaria.

15 June 2014	RESPONDENT NO. 2 and ROSS conclude the "Collaboration and License Agreement" (hereinafter "**Ross Agreement**"). It grants Ross an exclusive license for the use of the GorAdCam viral vector in the field of "malaria and related infectious diseases".
Summer 2018	ROSS' attempts to acquire RESPONDENT NO. 2 and its patents.
10 September 2018	RESPONDENT NO. 2 and RESPONDENT NO. 1 conclude a license agreement. It grants RESPONDENT NO. 1 an exclusive license *inter alia* for the sublicensing of the GorAdCam viral vector for all applications relating to respiratory diseases.
1 January 2019	CLAIMANT and RESPONDENT NO. 1 conclude the "Purchase, Collaboration and License Agreement" (hereinafter "**Agreement**"). It grants CLAIMANT a license for the use of GorAdCam viral vectors in the field of infectious and non-infectious respiratory diseases.

April 2020	CLAIMANT is acquired by Khorana Lifescience.
2 May 2020	CLAIMANT contacts RESPONDENT NO. 1 alleging a breach of contract.
15 July 2020	CLAIMANT submits the Notice of Arbitration to the SCAI.
14 August 2020	RESPONDENTS submit their Answer to the Notice of Arbitration, including a request to join ROSS to the Arbitral Proceedings.
4 September 2020	The Arbitral Tribunal proposes to conduct hearings of witnesses and experts remotely.

SUMMARY OF ARGUMENT

After RESPONDENTS decided to monetize their know-how in vaccine research, CLAIMANT was granted a license for the research and vaccine production in the field of respiratory diseases with the GorAdCam viral vector. As CLAIMANT – back then only a small start-up – did not have the resources to produce a finished vaccine entirely by itself, it most happily accepted RESPONDENT NO. 1's offer to provide it with the necessary base materials. However, after being acquired by Khorana Lifescience, CLAIMANT's satisfaction turned into greed. With a leading life-science company in its back, CLAIMANT now attempts to renegotiate a contract which no longer seems to be favorable. This being said, the initiated Arbitral Proceeding is merely an effort to gain better standing.

Although CLAIMANT bases its submission that RESPONDENT NO. 1 breached the contract on ROSS' claim of an opposing IP-right, it incomprehensibly objects to join ROSS to the Proceedings. This is contradictory to its previous general acceptance of joinder by submitting itself to institutional rules which explicitly allow for joinder. To conclusively settle the dispute, joining ROSS is essential (**Issue I**).

Witness hearings have to be conducted in line with procedural standards. Even the COVID-19 pandemic cannot change this. The reduction of witness hearings and cross-examination to a perpetual "Can you hear me?" can only be avoided by sticking to in-person hearings. This is not only the most efficient way to conduct the proceedings, but the only way of complying with the Arbitration Agreement underlying these Proceedings (**Issue II**).

When CLAIMANT invoked a breach of contract under Art. 42(1) CISG, RESPONDENT NO. 1 was utterly surprised. An Agreement with the main purpose of providing a license cannot possibly be governed by the CISG – the Convention regulating the International Sale of Goods (**Issue III**).

Even if the CISG was applicable to the Agreement, RESPONDENT NO. 1 fulfilled its contractual duty to deliver conforming goods under Art. 42(1) CISG. ROSS' claim is frivolous and was never directly asserted against CLAIMANT. This far-fetched allegation cannot suffice to render the goods non-conforming (**Issue IV**).

ARGUMENT

I. ROSS SHOULD BE JOINED TO THE ARBITRATION PROCEEDINGS

1 In January 2019, RESPONDENT NO. 1 and CLAIMANT entered into the Agreement concerning a license for the use of the GorAdCam viral vector (*Cl. Exh. C 3*). It contains an Arbitration Agreement establishing the Tribunal's jurisdiction for these Proceedings under the Swiss Rules (*ibid., § 14.1*). CLAIMANT initiated Proceedings against RESPONDENTS, alleging that RESPONDENT NO. 1 breached the contract as ROSS claims to have been granted a conflicting exclusive license by RESPONDENT NO. 2. In order to conclusively determine that ROSS' license has no impact on the duly performance of the Agreement, joining ROSS is vital (*cf. Answ. Not. Arb., §§ 21 et seq.*).

2 The Arbitral Tribunal is respectfully requested to order the joinder of ROSS. The Tribunal has the power to join ROSS under Art. 4(2) Swiss Rules (**A.**) Considering all relevant circumstances of the case, the Tribunal should exercise this power by joining ROSS (**B.**).

A. THE TRIBUNAL HAS THE POWER TO ORDER ROSS' JOINDER

3 The Tribunal is empowered to order the joinder of ROSS under Art. 4(2) Swiss Rules.

4 Art. 4(2) Swiss Rules allows the Tribunal to order ROSS' joinder without consent (**1.**). Even if consent was required for joinder under this provision, all parties affected have consented (**2.**).

1. Consent is no prerequisite for ROSS' joinder under Art. 4(2) Swiss Rules

5 Contrary to CLAIMANT's allegations (*Cl. Memo., Arg. § 3*), Art. 4(2) Swiss Rules does not require consent for joining ROSS.

6 CLAIMANT's submission that joinder requires consent of all parties involved (*ibid.*), ignores the clear wording of Art. 4(2) Swiss Rules. The provision stipulates that upon request, the arbitral tribunal shall decide on the joinder of a third person "after consulting with all parties, including the person or persons to be joined, taking into account all relevant circumstances". Art. 4(2) Swiss Rules does not stipulate consent as a requirement (*GILLIÉRON/PITTET in: Zuberbühler 2005, Art. 4 § 11; SMITH, pp. 179 et seq.; MEIER, p. 105; PALAY/LANDON, p. 16*).

7 In contrast, numerous other arbitration rules explicitly require consent for joinder (*e.g., Art. 27.1(b) HKIAC Rules; Art. 21.1(a) KCAB Rules; Art. 7.1(b) SIAC Rules; Art. 46 WIPO Rules; Art. 22.1(x) LCIA Rules; Rule 9.1 AIAC Rules*). If the authors of the Swiss Rules had wanted consent to be a prerequisite to join third parties under Art. 4(2) Swiss Rules, they would have

expressly indicated such motivation in the provision's wording. Instead, they granted the tribunal broad flexibility when deciding on joinder requests (*BÄRTSCH/PETTI in: Zuberbühler, Art. 4 § 44; VOSER, p. 396; PETER, p. 60*). Requiring consent for joinder under Art. 4(2) Swiss Rules would restrict this flexibility and circumvent the authors' intentions.

8 Further, contrary to CLAIMANT's submission (*cf. Cl. Memo., Arg. § 5*), the Parties and ROSS accepted the possibility of joinder by submitting to the Swiss Rules.

9 CLAIMANT invokes that "like consummated romance, arbitration rests on consent" (*Cl. Memo., Arg. § 3 quoting PARK, p. 1*). However, like in a romance, the parties must respect and abide by each other's promises. Such promises are made by providing for the applicability of certain arbitration rules to govern the proceedings. Parties who submit to the Swiss Rules already accept the possibility of joinder (*PALAY/LANDON, pp. 15, 17; BÄRTSCH/PETTI in: Zuberbühler, Art. 4 § 21; GILLIÉRON/PITTET in: Zuberbühler 2005, Art. 4 § 12; LEW/MISTELIS/KRÖLL, § 16-42; PLATTE 2002, p. 69; POUDRET/BESSON, § 241*).

10 CLAIMANT and RESPONDENT NO. 1 as well as ROSS and RESPONDENT NO. 2 deliberately agreed that potential disputes should be "resolved by arbitration in accordance with the Swiss Rules" (*Cl. Exh. C 3, § 14.1; Resp. Exh. R 3, § 14.1*). As a result, the Parties and ROSS provided for the application of Art. 4(2) Swiss Rules and therefore accepted the possibility of joinder.

11 Joinder of ROSS under Art. 4(2) Swiss Rules does not require consent of all parties affected.

2. Even if consent was required for joinder under Art. 4(2) Swiss Rules, all parties affected have consented to join ROSS

12 Even if consent was a prerequisite for joinder under Art. 4(2) Swiss Rules, all parties affected gave their consent to joinder.

13 As CLAIMANT admits, consent can be implied where "there are multiple **related contracts** containing **identical (or compatible) arbitration agreements** which all refer to the Swiss Rules" (*Cl. Memo., Arg. § 8 referring to BÄRTSCH/PETTI in: Zuberbühler, Art. 4 § 47 (emphasis added)*).

14 CLAIMANT does not dispute (*Cl. Memo., Arg. §§ 8 et seqq.*) that the Agreement between CLAIMANT and RESPONDENT NO. 1 and the Ross Agreement between ROSS and RESPONDENT NO. 2 contain identical arbitration clauses (*cf. Cl. Exh. C 3, § 14.1; Resp. Exh. R 3, § 14.1*).

15 Further, contrary to CLAIMANT's allegations (*Cl. Memo., Arg. §§ 8, 10*), the Ross Agreement and the Agreement are related. Both contracts concern the granting of licenses for the use of the GorAdCam viral vector of which RESPONDENT NO. 2 is the patent owner (*Cl. Exh. C 3, § 5.2; Resp. Exh. R 3, § 5.2; Not. Arb., § 3*). An overlap of CLAIMANT's license and ROSS' exclusive license would lead to legal conflicts (*cf. PO 2, § 40*). The core issue in dispute is the demarcation

between the scopes of the two licenses. Therefore, the licenses granted in the Agreement and the Ross Agreement are interdependent. Thus, the contracts are related.

16 Ultimately, as the two related contracts contain identical arbitration clauses, all parties affected consented to joinder.

17 To conclude, the Tribunal has the power to join ROSS under Art. 4(2) Swiss Rules.

B. THE TRIBUNAL SHOULD EXERCISE ITS POWER TO JOIN ROSS

18 Considering all relevant circumstances, the Tribunal is respectfully requested to join ROSS to these Proceedings.

19 In line with Art. 4(2) Swiss Rules, the Tribunal is required to take into account the specific facts and individual aspects of the case after consulting with all parties (*BÄRTSCH/PETTI in: Zuberbühler, Art. 4 § 44*). It has to weigh the parties' interests against each other and should decide in a way that best satisfies all parties (*SCHRAMM in: Arroyo, Art. 4 §§ 60 et seqq.; VOSER, p. 396*). In the present case, all parties affected have been consulted pursuant to Art. 4(2) Swiss Rules (*cf. Letter by SCAI, p. 37; Letter by Langweiler, p. 48*).

20 Contrary to CLAIMANT's assertion (*cf. Cl. Memo., Arg. §§ 2 et seqq.*), the balance of interests weighs in favor of ROSS' joinder for the following reasons: First, joining ROSS increases procedural efficiency (**1.**). Second, ROSS' participation in these Proceedings does not risk a disclosure and unauthorized usage of confidential information (**2.**). Third, joining ROSS is necessary to avoid conflicting decisions (**3.**). Fourth, ROSS' joinder does not lead to a risk of non-recognition, unenforceability or setting aside of the award (**4.**).

1. Joining ROSS increases procedural efficiency

21 Contrary to CLAIMANT's submission (*Cl. Memo., Arg. § 12 et seqq.*), the joinder of ROSS leads to an increase in procedural efficiency.

22 Pursuant to Art. 15(7) Swiss Rules, all participants shall make every effort to avoid unnecessary costs and delays. The Tribunal is required to consider this principle of international arbitration when deciding on a joinder request (*cf. SMITH, p. 194*).

23 CLAIMANT alleges that it would be at risk of facing a lawsuit against ROSS later and that as a small start-up company it does not have the necessary resources to defend itself against IP-claims (*Cl. Memo., Arg. § 74; Cl. Exh. C 5*). Yet, a joint proceeding is more time- and cost-efficient than several separate proceedings (*BÄRTSCH/PETTI in: Zuberbühler, Art. 4 § 19; VOSER, p. 350; LEBOULANGER, p. 54; cf. POUDRET/BESSON, § 238; ICC Case No. 21950/RD/MK*). This is due to the fact that it prevents repetitive submissions, evidence and hearings (*BORN/PRASAD*). In case of

ROSS' joinder, the binding effect of the award will extend towards ROSS. This enables the Tribunal to resolve the dispute conclusively and avoid the need of subsequent proceedings (*cf. Answ. Not. Arb. § 22; SCHRAMM in: Arroyo, Art. 4 § 33*).

24 To conclude, the joinder of ROSS increases procedural efficiency.

2. ROSS' joinder does not lead to a disclosure of confidential information

25 Contrary to CLAIMANT's allegations (*Cl. Memo., Arg. §§ 16 et seqq.*), joining ROSS to the Proceedings does not risk disclosure of confidential information.

26 In order to decide on the merits of the case, it will not be necessary to elaborate on any confidential information regarding CLAIMANT's research with the GorAdCam viral vector (*see infra §§ 90 et seqq.*). At most, general explanations about the functioning and production of viral vectors will be necessary. ROSS is also conducting research with the GorAdCam viral vector and is familiar with these facts (*Not Arb., § 9; Answ. Not. Arb., § 15; Resp. Exh. R 5; PO 2, § 16*). Hence, there is no risk of disclosure of confidential information that ROSS is not already aware of regarding CLAIMANT's work with the GorAdCam viral vector.

27 Further, CLAIMANT does not have to fear any prejudice by disclosure of financial data. It is not unusual to publish this type of information: Major companies in the pharmaceutical market, for instance GSK and AstraZeneca, regularly publish information on, e.g., the phase of research and achieved milestones concerning specific products, book values of the major brands and largest individual items as well as the turnovers for each vaccine (*cf. GSK annual report 2019, pp. 197, 262 et seqq., 271 et seqq.; ASTRAZENECA annual report 2019, pp. 81 et seqq.; 238 et seqq.*). This leads to the conclusion that such information is not confidential and does not provide competitors with an advantage. CLAIMANT – a public limited company – might even be obliged to publish its annual reports as well (*cf. Sec. 386 et seqq., 854 et seqq. Companies Act 2006; https://www.gov.uk/government/organisations/companies-house; Company accounts guidance, § 4.1*).

28 Even if there was any confidential information at risk of being disclosed in the Proceedings, it could – contrary to CLAIMANT's submission (*Cl. Memo., Arg. §§ 20 et seq.*) – be protected against ROSS by a confidentiality order (*cf. BORN, § 20.05; PCA Case No. 2012-17; ICSID Case No. UNCT/15/2*). By setting up a confidentiality club, the access to highly confidential data can be limited to certain individuals, excluding, e.g., direct competitors from gaining knowledge (*COOK/GARCIA, p. 264 et seq.; BAIZEAU/RICHARD, pp. 57 et seqq.; cf. MEIER, p. 163; ICSID Case No. UNCT/15/2*). Other possible measures are the redaction of information (*BAIZEAU/RICHARD, pp. 55 et seqq.; COOK/GARCIA, p. 264; cf. ICSID Case No. UNCT/15/2*) or the involvement of an independent expert answering questions referring to the confidential information without disclosing it (*BAIZEAU/RICHARD, pp. 69 et seq.*).

29 In this way, contrary to CLAIMANT's allegations (*Cl. Memo., Arg. §§ 18 et seq.*), it is not necessary to disclose any confidential information to ROSS, ruling out a violation of Section 10 of the Agreement.

30 Thus, there is no risk of disclosure of confidential information by joining ROSS.

3. Joinder of ROSS is necessary to avoid conflicting decisions

31 Joinder of ROSS is required to prevent multiple diverging decisions.

32 When deciding on joinder under Art. 4(2) Swiss Rules, the Tribunal ought to take into account that joinder minimizes the risk of conflicting decisions (*BÄRTSCH/PETTI in: Zuberbühler, Art. 4 §§ 19, 50; VOSER, p. 350; POUDRET/BESSON, § 238; LEBOULANGER, pp. 54 et seq.; cf. ICC Case No. 21950/RD/MK*).

33 For the resolution of this dispute, it is of relevance whether ROSS' assertion regarding the scope of its license is substantiated (*Not. Arb., § 27; see infra §§ 138 et seqq.*). If ROSS is not joined, there is a risk that decisions in other proceedings in which the scope of ROSS' license is decisive might differ from this Tribunal's decision. RESPONDENT NO. 1 has already submitted that it will initiate separate proceedings against ROSS if need be (*Resp. Exh. R 5*). CLAIMANT worries that ROSS might initiate separate proceedings against it as well (*Cl. Memo., Arg. § 74*). The outcomes of these separate proceedings could lead to legal inconsistencies. Additionally, the parties' interests and possibilities regarding evidence might differ in subsequent proceedings, increasing the risk of diverging decisions. Joinder of ROSS guarantees legal certainty for all parties affected.

34 Thus, joining ROSS is necessary to avoid the risk of conflicting decisions.

4. Joining ROSS will not impede the recognition and enforceability or risk a setting aside of the award

35 Contrary to CLAIMANT's allegations (*cf. Cl. Memo., Arg. §§ 22 et seqq.*), ROSS' joinder will neither risk the award to be denied recognition and enforceability nor to be set aside.

36 An arbitral tribunal bears the duty to avoid rendering awards that can be denied recognition and enforceability or be set aside (*PLATTE 2003, pp. 312 et seq.; BLACKABY ET AL., § 9.100*). The reasons to refuse the recognition and enforcement of an arbitral award are stipulated in the New York Convention (*BORN, § 26.05[A]; cf. MOSES, p. 231*). The challenge of an award is governed by the *lex arbitri* (*cf. BLACKABY ET AL., § 10.04; MOSES, p. 216; RIVKIN, p. 277*). Since the parties chose Vindobona, Danubia as their seat of arbitration (*Cl. Exh. C 3, § 14.1*), the *lex arbitri* is the national arbitration law of Danubia, which is an adoption of the UNCITRAL Model Law (*PO 1, § III.3.*).

37 CLAIMANT invokes that a future award would not be rendered in accordance with the Arbitration Agreement pursuant to Art. V(1)(c) NYC and Art. 34(2)(a)(iii) Model Law (*Cl. Memo., Arg. §§ 23 et seq.*). However, the Parties and ROSS agreed to submit "any dispute […] in relation to this contract" to arbitration (*Cl. Exh. C 3, § 14.1, Resp. Exh. R 3, § 14.1*). The dispute at hand concerns the allegedly overlapping scope of the two licenses granted in the Agreement and the Ross Agreement and hence in relation to both agreements (*see supra §§ 12 et seqq.*). Thus, CLAIMANT's assumption that the licensing dispute between RESPONDENT NO. 2 and ROSS is an "issue […] not contemplated in the Agreement" (*Cl. Memo., Arg. § 23*) does not hold true. Further, contrary to CLAIMANT's submission (*Cl. Memo., Arg. § 24*), joinder is in line with the Arbitration Agreement (*see supra §§ 10, 12 et seqq.*).

38 ROSS' joinder will neither risk non-recognition and unenforceability nor a successful challenge of an award.

39 In conclusion, considering all relevant circumstances, the Tribunal is respectfully requested to join ROSS to these Proceedings under Art. 4(2) Swiss Rules.

Conclusion to the First Issue

ROSS should be joined to the Arbitration Proceedings. The Tribunal has the power to order ROSS' joinder under Art. 4(2) Swiss Rules. Considering all relevant circumstances, it is respectfully requested to exercise this power and join ROSS.

II. THE EXAMINATION OF WITNESSES SHOULD NOT BE CONDUCTED REMOTELY IF A HEARING IN PERSON IS NOT POSSIBLE OR CONSIDERED TO BE INAPPROPRIATE

40 The hearing of witnesses and experts (collectively "**witnesses**") is scheduled for 3 to 7 May 2021. Since the COVID-19 pandemic put an abrupt halt to in-person hearings, it is unclear if in-person hearings will then be possible and considered to be appropriate by the Arbitral Tribunal.

41 To ensure a fair Proceeding, the Tribunal should not conduct the witness hearings remotely but rather postpone them. First, it does not have the power to order remote hearings (**A.**). Second, even if it had such power, the Tribunal is respectfully requested to refrain from ordering remote witness hearings (**B.**).

A. THE TRIBUNAL DOES NOT HAVE THE POWER TO ORDER REMOTE WITNESS HEARINGS

42 Contrary to CLAIMANT's assertion (*Cl. Memo., Arg. §§ 27 et seq., 37*), the Arbitral Tribunal does not have the power to order remote witness hearings.

43 The Arbitration Agreement precludes the Tribunal from conducting the examination of witnesses remotely (**1.**). Even if the Arbitration Agreement was silent on this issue, the Swiss Rules do not grant the Tribunal the power to order fully remote witness hearings (**2.**).

1. The Arbitration Agreement precludes the Tribunal from conducting remote witness hearings

44 Contrary to CLAIMANT's submission (*cf. Cl. Memo., Arg. § 37*), the Arbitration Agreement does not allow for the possibility of remote witness hearings.

45 The arbitration agreement is the basis for determining the tribunal's power (*BLACKABY ET AL., § 5.14; SCHERER, pp. 76 et seq.; cf. LAZOPOULOS in: Arroyo, Art. 15 § 7*). Whether or not an exclusion of remote hearings was agreed on is to be determined by an interpretation of the parties' arbitration agreement.

46 CLAIMANT and RESPONDENT NO. 1 decided that the Agreement and therefore the Arbitration Clause shall be construed in accordance with the laws of Danubia (*Cl. Exh. C 3, § 15.2; cf. Enka Insaat Ve Sanayi v. OOO Insurance Company Chubb (USA); BLACKABY ET AL., §§ 3.12 et seqq.*). As the CISG is not applicable to the Agreement (*see infra §§ 90 et seqq.*), the general contract law of Danubia, which is a verbatim adoption of the UNIDROIT Principles (UPICC) (*PO 1, III.3.*), is to be applied. Arts. 4.1, 4.3 of the Danubian UPICC-adoption set out the relevant interpretation standard.

47 Pursuant to Art. 4.1(1) UPICC, a contract is to be interpreted primarily according to the common intention of the parties. Thereby, all relevant circumstances have to be taken into account, Art. 4.3 UPICC. If no common intention of the parties can be established, the contract shall be interpreted according to the meaning a reasonable person of the same kind as the parties would give to it in the same circumstances pursuant to Art. 4.1(2) UPICC.

48 In their Arbitration Agreement, RESPONDENT NO. 1 and CLAIMANT not only agreed on a seat of arbitration but also that "[h]earings shall be held […] either in Vindobona or in the city where the Respondent has its place of business." (*Cl. Exh. C 3, § 14.1*). The seat of arbitration serves to determine the *lex arbitri* and is merely declaratory (*BORN, § 14.01; MOSES, pp. 72 et seq., 178*). Choosing a place for hearings, which is not even part of the SCAI Model Clause to which the Arbitration Clause is highly similar (*cf. https://www.swissarbitration.org/Arbitration/Arbitration-*

clauses), is only expedient if the hearings are held in person and on-site. This manifests the parties' common intention to hold the hearings in – and only in – the determined places. Using the word "shall" (*Cl. Exh. C 3, § 14.1*) underlines the intended mandatory character of the clause (*cf. JOWITT's Dictionary of English Law, "Shall"*).

49 In any case, a reasonable person in terms of Art. 4.1(2) UPICC would understand the appointment of a place for the hearings in the Arbitration Clause likewise.

50 To conclude, the Arbitration Agreement necessitates to hold in-person hearings in either Vindobona, Danubia or where the respondent has its place of business. It does not allow for remote hearings.

2. The Swiss Rules do not allow for fully remote witness hearings

51 Even if the Arbitration Agreement was silent on this issue, the Swiss Rules – contrary to CLAIMANT's assertion (*Cl. Memo., Arg. §§ 27 et seq.*) – do not grant the Tribunal the power to hear witnesses fully remotely.

52 Art. 25(4) Swiss Rules does not authorize the Tribunal to conduct fully remote witness hearings. In stating that "there is […] no question that the Tribunal has the authority to proceed remotely in this case" (*Cl. Memo., Arg. § 28*), CLAIMANT seems to only have given superficial regard to the provision. When taking a closer look at the exact wording of Art. 25(4) Swiss Rules, it becomes evident that the provision does not generally provide for a "fully remote hearing, i.e., a hearing in which all participants including witnesses and experts participate from different places" (*PO 2, § 42(a)*). Art. 25(4) Swiss Rules states that "[t]he arbitral tribunal may direct witnesses or expert witnesses be examined through means that do not require their physical presence at the hearing (including by videoconference)". It solely allows for the examination of witnesses to be conducted without the witnesses' physical presence in the hearing room (*cf. NATER-BASS/ROUVINEZ in: Zuberbühler, Art. 25 § 31; NATER-BASS/PFISTERER in: Arroyo, Art. 25 § 56*). In contrast, the arbitrators and the parties are required to be physically present. Thus, the provision only allows for hybrid, but does not allow for fully remote hearings.

53 Contrary to CLAIMANT's allegation (*Cl. Memo., Arg. § 28*), Art. 15(1) Swiss Rules does not provide a legal basis for fully remote hearings either. It is a general provision which endows the Tribunal with broad discretion (*JERMINI/GAMBA in: Zuberbühler, Art. 15 §§ 2 et seq.*). However, this discretion is restricted by other, more specific rules in Section III of the Swiss Rules (*ibid., Art. 15 § 4*). Regarding the conduct of remote hearings, Art. 25(4) Swiss Rules is *lex specialis*. Thus, Art. 15(1) Swiss Rules cannot serve as a legal basis either.

54 CLAIMANT invokes that there have been a variety of amendments to other arbitration rules such as Art. 19.2 LCIA Rules or Art. 26(1) ICC Rules and supplemental guidelines such as the

HKIAC Guidelines for Virtual Hearings, that provide for remote hearings (*Cl. Memo., Arg. §§ 30 et seq.*). This, however, does not support CLAIMANT's position – it rather strengthens RESPONDENTS' case: There have not been any comparable amendments or guidelines for the Swiss Rules (*KREINDLER ET AL, p. 6*). The absence of any additional rules – particularly in comparison with other arbitral institutions – emphasizes that the Swiss Rules do not provide for fully remote hearings.

55 To conclude, the Tribunal does not have the power to conduct the witness hearings fully remotely.

B. IN ANY CASE, THE ARBITRAL TRIBUNAL SHOULD NOT CONDUCT THE WITNESS HEARINGS REMOTELY

56 Even if the Tribunal considered that it had the power, it is respectfully requested to refrain from ordering remote witness hearings.

57 First, remote witness hearings violate the Parties' procedural rights (**1.**). Second, conducting remote hearings risks data security breaches (**2.**). Third, remote witness hearings do not increase procedural efficiency (**3.**). Fourth, a hearing in person does not interfere with CLAIMANT's vaccine development (**4.**). Fifth, an award based on a remote hearing will risk non-recognition, unenforceability and being set aside (**5.**).

1. Remote witness hearings infringe the Parties' procedural rights

58 Contrary to CLAIMANT's allegation (*Cl. Memo., Arg. §§ 34 et seq.*), remote witness hearings violate the minimum procedural standards.

59 The tribunal must respect the parties' right to be heard and to be treated equally pursuant to Art. 15(1) Swiss Rules. Remote hearings do not only violate the Parties' right to be heard (**a.**) but also their right to be treated equally (**b.**).

(a) Conducting the hearings remotely violates the Parties' right to be heard

60 Contrary to CLAIMANT's assertion (*Cl. Memo., Arg. §§ 34 et seq.*), remote hearings infringe the Parties' right to be heard.

61 The right to be heard under Art. 15(1) Swiss Rules requires that the parties are given reasonable opportunities to meaningfully present their case (*JERMINI/GAMBA in: Zuberbühler, Art. 15 § 10*).

62 In remote hearings, the parties are prevented from meaningfully presenting their case (*cf. PO 2, § 38*). A hearing for the taking of evidence is more difficult in a remote fashion

(*FOERSTER*). Technical issues are an everyday hazard occurring during videoconferences. Especially connectivity issues, delayed sound transmissions and time lags might interrupt the examination of witnesses. If these difficulties cannot be resolved immediately, they might significantly prolong the hearing. The inability to assess the witnesses' credibility due to a diminished visibility of non-verbal cues intensifies this problem (*SCHERER, p. 84; cf. Dorajay v. Aristocrat (Australia)*). Especially during witness examinations, technical difficulties have a profound impact making a fluent and efficient cross-examination impossible (*Bachmeer v. Ong Chih Ching (Singapore); Campaign Master v. Forty Two (Australia); Dorajay v. Aristocrat (Australia)*). In case of interruptions, it might be unclear if there is a technical problem or if the intermission is caused by the witness' evasiveness (*SCHERER, p. 87*).

63 The separation of a witness and other participants through a screen leads to a loss of gravity of the situation. This may not only aggravate analyzing the witness' demeanor, but also leads to a loss of concentration on both sides, resulting in difficulties for the parties to present their case (*cf. BALLANTYNE; Campaign Master v. Forty Two (Australia)*). It is the same distance that makes virtual hearings susceptible to coaching or other forms of unduly influence (*BALLANTYNE; SCHERER, p. 86; cf. Capic v. Ford Motor (Australia)*).

64 To argue that remote hearings do not infringe the right to be heard, CLAIMANT relies on the *Alberta Central Airways v. Progressive Air Services* case, evaluating virtual cross-examination as not ineffective and not unfair (*Cl. Memo., Arg. § 39 referring to Alberta Central Airways v. Progressive Air Services (Canada)*). In this case the Alberta Court of Appeal found that the party opposing remote hearings did not comply with the standard of proof regarding the inappropriateness of remote hearings. However, as shown above, there are considerable grounds to refuse virtual witness hearings.

65 Further, CLAIMANT relies on the *Capic v. Ford Motor* case in which the judge acknowledges that there is an "unsatisfactory nature of cross-examination by video-link" (*Cl. Memo., Arg. §§ 31, 39 referring to Capic v. Ford Motor (Australia)*). One of the judge's reasons for ordering remote hearings nonetheless was the fact that the case had a "tortured procedural history and has already been set down for trial twice". Therefore, the initial circumstances of the case are distinct from the present Proceedings that have only been initiated recently (*cf. Not. Arb.*). This is even more underscored by other decisions denying remote hearings due to the "significant limitations" (*Campaign Master v. Forty Two (Australia); Haiye Developments v. The Commercial Business (Australia)*). Thus, the cases CLAIMANT relies on do not suffice to support its argument.

66 Moreover, the "issues of contractual interpretation" relevant for deciding the case are not at all "straightforward" (*contrary to Cl. Memo., Arg. § 34*). Instead, to precisely demarcate the scope of

CLAIMANT's and ROSS' license, a medical and pharmaceutical comparison is to be carried out (*see infra § 152*). Such complex examinations are better to be made in person.

67 Thus, conducting witness hearings remotely violates the Parties' right to be heard.

(b) Remote witness hearings result in a violation of the Parties' right to equal treatment

68 Contrary to CLAIMANT's submission (*Cl. Memo., Arg. §§ 34 et seq.*), remote hearings infringe the Parties' right to be treated equally.

69 The right to be treated equally pursuant to Art. 15(1) Swiss Rules requires the Tribunal to treat comparable situations equally and different situations unequally (*JERMINI/GAMBA in: Zuberbühler, Art. 15 § 8*).

70 A violation of the Parties' right to be treated equally can result from time zone differences (*cf. KREINDLER ET AL, p. 5*). CLAIMANT admits that "a remote hearing would be complicated by the time zone difference between the parties' geographical locations" (*Cl. Memo., Arg. § 36*). Equatoriana, where RESPONDENTS' places of business are located, has an eight-hour time difference to Vindobona, Danubia, which is the seat of arbitration (*Letter by Sinoussi, p. 47; PO 2, § 36*). Since there is a further time difference of three hours between Danubia and Mediterraneo, CLAIMANT's seat of business, the time difference amounts to eleven hours in total (*ibid.*). Due to the possibility of long witness hearing sessions (*cf. SCC Institute, Hearings*), at least one of the Parties will always be required to participate in a remote hearing at unreasonable office hours. This results in a decrease of vigilance and concentration, affecting the arbitration (*ibid.*). These disadvantages can easily be prevented – as agreed upon – by conducting the witness hearings in person.

71 CLAIMANT relies on an Austrian Supreme Court decision to argue the opposite (*Cl. Memo., Arg. § 36 referring to OGH, 23 July 2020 (Austria)*). However, this case cannot serve as precedent since the circumstances of the decision were different. Not only did all parties of the Austrian Supreme Court case already agree to hold a part of the witness hearings remotely, but there was also a smaller time zone difference between the participants.

72 In addition, CLAIMANT has better equipment than RESPONDENTS (*Cl. Memo., Arg. § 40; PO 2, § 38*) and will therefore face fewer technical difficulties than RESPONDENTS. Due to the inequality of arms, RESPONDENTS are in a more disadvantageous position.

73 In light of the considerable differences in time-zones and technical equipment between the Parties, holding remote hearings violates the Parties' right to equal treatment.

2. Remote hearings risk data security breaches

74 Contrary to CLAIMANT's submission (*Cl. Memo., Arg. §§ 38, 40*), RESPONDENTS' concern of considerable data security breaches is justified. There is the risk that third parties may interfere, virtually access the hearing and obtain sensitive information illegally (*GIELEN/WAHNSCHAFFE, p. 261; SCHERER, p. 93; PO 2, §§ 35, 38*). While there is a variety of adequate measures to ensure confidentiality in case of a joinder (*see supra § 28*), no such measures exist to protect data from third party interference in case of virtual hearings (*cf. PO 2, § 35*). This risk can only be eliminated by conducting an in-person hearing.

3. Conducting hearings remotely does not increase procedural efficiency

75 Contrary to CLAIMANT's submission (*Cl. Memo., Arg. §§ 32 et seq.*), a remote hearing is less efficient than an in-person hearing.

76 Art. 15(7) Swiss Rules requires a time- and cost-efficient conduct of the proceedings (*see supra § 22*). The Tribunal shall consider this principle when deciding on the modalities of the proceedings (*cf. ICC Case No. 20XXX/EMT; ICSID Case No. ARB/09/16*).

77 Contrary to CLAIMANT's submission (*Cl. Memo., Arg. § 33*), the costs for a remote hearing would not be significantly less, but rather even higher (*PO 2, § 35*). The installation of modern videoconferencing tools which are necessary to participate in a remote hearing will require the Parties to invest a considerable amount of money (*cf. SCHERER, p. 89; Capic v. Ford Motor (Australia)*).

78 CLAIMANT quotes the *Midland Resources v. Shtaif* case which encourages remote hearings as a way of reducing costs (*Cl. Memo., Arg. § 39 referring to Midland Resources v. Shtaif (Canada)*). CLAIMANT neglects the fact that this decision is – from the point of cost-efficiency – in no way comparable to the current proceedings. Even in the *Midland Resources v. Shtaif* case it is acknowledged that „each case should be decided on its own facts". In the case at hand, remote hearings would not reduce costs. Further, the decision whether the hearings should take place remotely or in person was left to the parties. Under these circumstances the *Midland Resources v. Shtaif* case cannot serve as precedent.

79 Moreover, time-efficiency does not benefit from remote hearings either. Virtual hearings require an exhaustive preparation (*GIELEN/WAHNSCHAFFE, pp. 262 et seq.; cf. ICCA-NAC Bar-CPR Cybersecurity Protocol, pp. 34 et seqq.; SCHERER, pp. 93 et seq.; BORN, § 15.08[Z][2]*) such as previously conducted test-sessions to assure connectivity (*SCHERER, p. 94; BORN, § 15.08[Z][2]*). The time spent on these preparatory measures outweighs the time saved by refraining from travelling. Further prolongations compared to an in-person hearing might result from technical

interruptions and difficulties in fluently conducting the examinations (*Haiye Developments v. The Commercial Business (Australia)*).

80 Contrary to CLAIMANT's allegation (*Cl. Memo., Arg. § 32*), a postponed hearing in person is no unnecessary delay in the sense of Art. 15(7) Swiss Rules. Instead, it is required to guarantee the compliance with the minimum procedural standards (*see supra §§ 58 et seqq.*).

81 Thus, a remote hearing is less efficient than an in-person hearing.

4. A postponement of the witness hearings does not interfere with CLAIMANT's vaccine development

82 There is no evidence to support CLAIMANT's allegation (*Cl. Memo., Arg. § 26*) that postponing the witness hearings will unduly prejudice CLAIMANT's business interest.

83 If the Tribunal postpones the examination of witnesses, CLAIMANT will still be able to proceed with its research and development of a vaccine as anticipated. This is supported by the fact that CLAIMANT continued its research after submitting the Notice of Arbitration on 15 July 2020 and even started a Phase III trial in December 2020 (*PO 2, § 16*). Back then, it did not interrupt its research and development processes. The mere postponement of the witness examinations does not unduly prejudice CLAIMANT's business interests.

84 Thus, CLAIMANT will not experience any disadvantages regarding its vaccine development if the witness hearings are postponed.

5. An award based on remote hearings risks non-recognition, unenforceability and being set aside

85 Contrary to CLAIMANT's submission (*cf. Cl. Memo., Arg. § 41*), a remote examination of witnesses results in a risk of the award being non-recognizable, unenforceable or being set aside.

86 Art. V(1)(b) NYC, Art. 34(2)(a)(ii) Model Law stipulate that recognition and enforcement of an award may be refused and the award may be set aside if a party's right to be heard or their right to be treated equally was infringed (*cf. BORN, § 11.04[A][3][d]*). The same applies pursuant to Art. V(1)(d) NYC, Art. 34(2)(a)(iv) Model Law if the arbitral procedure did not comply with the parties' arbitration agreement.

87 Conducting remote hearings would violate the Parties' right to be heard and to be treated equally (*see supra §§ 58 et seqq.*). Moreover, the Arbitration Agreement underlying these Proceedings only provides for the conduct of hearings in person (*see supra §§ 44 et seqq.*). As a result, conducting the whole witness examination remotely would lead to an Arbitral Proceeding not in accordance with the Arbitration Agreement and the Parties' procedural rights in terms of Art. V(1)(b), (d) NYC and Art. 34(2)(a)(ii), (iv) Model Law.

88 To conclude, conducting the witness hearings remotely would risk non-recognition, unenforceability and the award being set aside.

89 Therefore, the Tribunal is respectfully requested to refrain from conducting remote witness hearings.

Conclusion to the Second Issue

The examination of witnesses should not be conducted remotely. The Arbitral Tribunal does not have the power to conduct fully remote witness hearings. Even if it found itself to have such power, the Tribunal should not hear witnesses remotely.

III. THE AGREEMENT IS NOT GOVERNED BY THE CISG

90 CLAIMANT and RESPONDENT NO. 1 entered into an agreement concerning the granting of a license for the use of the GorAdCam viral vector in the field of respiratory diseases (*Cl. Exh. C 3*). Now, CLAIMANT alleges that RESPONDENT NO. 1 breached its contractual obligations pursuant to Art. 42(1) CISG (*Not. Arb., § 25*). However, contrary to CLAIMANT's allegations (*Cl. Memo., Arg. §§ 42 et seqq.*), the CISG is not applicable to the Agreement.

91 The Agreement does not constitute a contract for the sale of goods in the sense of Art. 1(1) CISG (**A.**). In any case, the Convention's applicability is precluded by Art. 3(2) CISG (**B.**).

A. THE AGREEMENT DOES NOT CONSTITUTE A CONTRACT FOR THE SALE OF GOODS UNDER ART. 1(1) CISG

92 Contrary to CLAIMANT's submission (*Cl. Memo., Arg. §§ 43 et seqq.*), the license agreement concluded between CLAIMANT and RESPONDENT NO. 1 is not a contract for the sale of goods pursuant to Art. 1(1) CISG.

93 The contractual obligations do not constitute a sale of goods in terms of Art. 1(1) CISG (**1.**). Moreover, the exceptional treatment of certain software license contracts cannot be applied to the Agreement (**2.**).

1. The contractual obligations do not fall under the definition of a sale of goods according to Art. 1(1) CISG

94 Contrary to CLAIMANT's allegation (*Cl. Memo., Arg. §§ 43 et seqq.*), the definition of a sale of goods pursuant to Art. 1(1) CISG does not cover the obligations provided for in the Agreement.

95 The CISG does not define the term "contract of sale". An autonomous definition can be derived from the rights and obligations of the parties provided in Arts. 30 and 53 CISG

(MOWBRAY, p. 122; SCHWENZER/HACHEM in: Schlechtriem/Schwenzer, Art. 1 § 8). Within a contract of sale, the seller is obligated to deliver the goods and transfer the property. In exchange, the buyer must pay the price for the goods and accept their delivery (*UNCITRAL Working Group, § 27; HUBER in: Huber/Mullis, p. 43; Rechtbank Rotterdam, 22 May 2013 (Netherlands); Tribunal Cantonal Vaud, 11 March 1996 (Switzerland)*). In essence, a "contract of sale" is the exchange of goods for money (*SCHLECHTRIEM/SCHROETER, § 61; DIEDRICH, Applicability CISG*).

96 The term "goods" is also not defined within the Convention (*MALEY, p. 84; MUÑOZ, p. 284; MISTELIS in: Kröll et al., Art. 1 § 36; HONNOLD/FLECHTNER, §56; DIEDRICH, Software Revisited, p. 57*). An interpretation following the international character of the Convention according to Art. 7(1) CISG stipulates that goods are items which are both moveable and tangible in the moment of delivery (*CZERWENKA, p. 147; SCHWENZER/HACHEM in: Schlechtriem/Schwenzer, Art. 1 § 16; HUBER in: Säcker et al., Art. 1 CISG § 13; HONNOLD/FLECHTNER, § 56; GILLETTE/WALT, p. 52*). Intellectual property and know-how are intangible objects and cannot qualify as goods under the CISG (*MISTELIS in: Kröll et al., Art. 1 § 38; OLG Köln, 26 August 1994 (Germany); SCHWENZER/HACHEM in: Schlechtriem/Schwenzer, Art. 1 § 19; BRUNNER/MEIER/STACHER in: Brunner/Gottlieb, Art. 2 § 3; HUBER in: Huber/Mullis, p. 42).* Rights, such as licenses, are excluded from the scope of application of the Convention (*MAGNUS, p. 184; HUBER in: Säcker et al., Art. 1 CISG § 16; SCHWENZER/HACHEM in: Schlechtriem/Schwenzer, Art. 1 § 22; FERRARI, p. 303; cf. HCCI Case No. Vb/92205; EGGEN, p. 232; SAENGER in: Ferrari et al., Art. 1 CISG §§ 4, 6 et seq.*).

97 The core element of the Agreement is the granting of a non-exclusive license to use the GorAdCam viral vector in the field of infectious and non-infectious respiratory diseases (*Cl. Exh. C 3, §§ 1.3, 5.2*). This license is no movable, physical item and there is no property to be transferred. Hence, neither the definition of "goods" nor the definition of a "sale" under Art. 1(1) CISG are fulfilled.

98 CLAIMANT invokes that the only clause related to know-how in the Agreement is Section 11.1.1, which does not even impose an obligation on RESPONDENT NO. 1 (*Cl. Memo., Arg. § 55*). Thereby, CLAIMANT fails to notice that the parties included a whole Section concerning the grant of a license, namely Section 5, in the Agreement (*Cl. Exh. C 3, § 5*).

99 CLAIMANT omits this central aspect when it quotes that Section 9 of the Agreement only refers to "the delivery of the first batch of GorAdCam vectors" (*Cl. Memo., Arg. § 45*). Much rather, Section 9.2 also provides for RESPONDENT NO. 1 to grant "non-exclusive access to Licensor's Licensed Technology" (*Cl. Exh. C 3, § 9.2*). The delivery of the first batch of GorAdCam viral vectors mentioned by CLAIMANT (*Cl. Memo., Arg. § 45*) is only an accessory to the granting of the license and does not constitute an independent obligation. As CLAIMANT sets

forth in the Notice of Arbitration, a collaboration and license agreement commonly includes the delivery of a batch of the licensed goods (*Not. Arb., § 14*). When the parties included the delivery in the Agreement, they merely followed the "prevailing practice" of the industry (*ibid.*). Further, when concluding the Agreement, CLAIMANT was not able to produce the GorAdCam viral vectors by itself (*PO 2, § 4*). The delivery is by consequence a necessary, intermediate step in order for the license to fulfil its purpose. It does not constitute an independent obligation.

100 As the conditional obligations in Section 16 of the Agreement are dependent on the commercialization of a vaccine (*Cl. Exh. C 3, § 16*), they are subject to high scientific uncertainties (*cf. MACPHERSON ET AL., pp. 1 et seqq.; PRONKER ET AL., p. 1; BEREZOW; HAUG*). In the course of the different stages of vaccine production, only few initial candidates reach the final stage of commercialization (*ibid.*). The obligation in Section 16 depends on a condition whose occurrence was unpredictable and unlikely at the time of the conclusion of the contract. Thus, contrary to CLAIMANT's allegation (*Cl. Memo., Arg. § 46*), Section 16 cannot be decisive for the qualification of the Agreement.

101 The obligations in the Agreement do not constitute a sale of goods pursuant to Art. 1(1) CISG.

2. The legal treatment of software cannot be applied to the Agreement

102 CLAIMANT's assertion that the Agreement is comparable to the exceptional cases in which software license contracts have been found to fall under the scope of the CISG (*Cl. Memo., Arg. §§ 49 et seqq.*) is not persuasive.

103 CLAIMANT relies on three sources according to which software license contracts may be governed by the CISG (*Cl. Memo., Arg. §§ 50 et seqq. referring to SCHLECHTRIEM/BUTLER, § 32b; Corporate Web Solutions v. Dutch company and Vendorlink B.V. (Netherlands); Usedsoft GmbH v. Oracle International Corp (EU)*). It assumes that this legal consequence can be transferred to the Agreement (*Cl. Memo., Arg. §§ 49 et seqq.*). However, these sources cannot be of any guidance in the present case as the particularities of software licensing contracts are fundamentally different from those of the Agreement (*cf. MOWBRAY, pp. 123 et seq.; LARSON, p. 465; KYLKJAER, pp. 18 et seq.; VUJINOVIĆ, pp. 541 et seqq.; COX, pp. 3 et seqq.; Usedsoft GmbH v. Oracle International Corp (EU); Corporate Web Solutions v. Dutch company and Vendorlink B.V. (Netherlands); Southwark v. IBM (UK); OGH, 21 June 2005 (Austria); HGer, 17 February 2000 (Switzerland); LG München, 8 February 1995 (Germany)*).

104 CLAIMANT cites the *Corporate Web Solutions* case and *SCHLECHTRIEM/BUTLER* (*Cl. Memo., §§ 50, 52 referring to Corporate Web Solutions v. Dutch company and Vendorlink B.V. (Netherlands); SCHLECHTRIEM/BUTLER, § 32b*). Both stipulate that software can be considered a sold good in

the sense of Art. 1(1) CISG if there is a one-time payment in exchange for the permanent transfer of the software license. In the present case, CLAIMANT must make quarterly research plan payments (*Cl. Exh. C 3, § 9.1*), an upfront payment (*ibid., § 9.2*), multiple milestone payments (*ibid., §§ 9.3 et seq.*) as well as annual royalty payments (*ibid., § 9.5*). Additionally, CLAIMANT neglects the fact that the granted IP-right is subject to expiration (*Cl. Memo., § 53; cf. PO 2, § 29*) and that the Agreement entails an option for termination (*Cl. Exh. C 3, § 13.1*). Neither the requirement of a one-time payment nor that of the perpetual transfer of the license is met. The legal sources are not comparable to the case at hand.

105 The same holds true for the *Usedsoft* case which CLAIMANT relies on (*Cl. Memo., Arg. §§ 51, 54 referring to Usedsoft GmbH v. Oracle International Corp (EU)*). The Court set out the same above-mentioned standards – prerequisites which are not fulfilled in the case at hand. CLAIMANT further submits that the case considers the digital copy of the software and the license to be an "indivisible whole" and as such, it constitutes a "sale" (*Cl. Memo., Arg. § 54 referring to Usedsoft GmbH v. Oracle International Corp (EU)*). CLAIMANT argues that the license is transferrable and sub-licensable but does not further justify as to why this leads to the conclusion that it is to be considered one entity with the batch of viral vectors (*Cl. Memo., Arg. § 54*). The batch of GorAdCam viral vectors and the license for the research in the field of respiratory diseases do not form an indivisible whole. The license is not embodied in the batch of GorAdCam viral vectors. While a software license covers all functions of the respective software, the license for the GorAdCam viral vector only covers a selected field of all possible usages (*Cl. Exh. C 3, §§ 1.3, 5.2*). Thus, they do not form an indivisible whole, in contrast to the digital copy of a software program with its license. In addition, the case concerns the scope of Art. 4(2) of Directive 2009/24/EC and not the scope of application of the CISG. Consequently, this decision cannot be used as guidance in the present case.

106 CLAIMANT did not provide persuasive authority to support its assertion. Instead, multiple other decisions held that licenses agreements do not constitute a sale of goods in the sense of Art. 1(1) CISG (*MUÑOZ, p. 285; cf. OLG Köln, 26 August 1994 (Germany); Southwark v. IBM (UK); Evolution Online Sys. v. Koninklijke Nederland (USA); Cöperatieve Centrale Raiffeisen-Boerenleenbank BA v. Viveo Cognitive Systems NV (Netherlands)*).

107 The legal treatment of software cannot be transferred to the Agreement.

108 To conclude, the Agreement does not constitute a sale of goods in the sense of Art. 1(1) CISG.

B. IN ANY CASE, ART. 3(2) CISG PRECLUDES THE APPLICATION OF THE CISG

109 In any case, contrary to CLAIMANT's assertions (*Cl. Memo., Arg. §§ 56 et seqq.*), the applicability of the Convention to the Agreement is precluded by Art. 3(2) CISG.

110 According to Art. 3(2) CISG, the Convention does not apply to contracts in which the preponderant part of the obligation of the party who furnishes the goods consists in the supply of labor or other services. The provision applies accordingly to all kinds of mixed contracts (*BRUNNER/FEIT in: Brunner/Gottlieb, Art. 3 § 3; MAGNUS in: Staudinger, Art. 3 CISG § 30; SCHWENZER/HACHEM in: Schlechtriem/Schwenzer, Art. 3 § 22; CZERWENKA, p. 146; HONNOLD/FLECHTNER, § 60.4*). To determine the preponderant part of the obligations pursuant to Art. 3(2) CISG, a hybrid approach considering the economic value of the obligations as well as the parties' intentions is to be applied (*SCHWENZER/HACHEM in: Schlechtriem/Schwenzer, Art. 3 §§ 19 et seq.; CZERWENKA, p. 144; BGH, 7 December 2017 (Germany); DIEDRICH, Software Revisited, p. 66*).

111 A comparison of the economic values (**1.**) and an assessment of the parties' intentions (**2.**) qualify the non-sale components as being preponderant.

1. The economic value of the non-sale obligations is preponderant

112 Contrary to CLAIMANT's submission (*Cl. Memo., Arg. §§ 57 et seqq.*), when taking into account all possible scenarios, the economic value of the non-sale elements exceeds that of the sales elements in the Agreement.

113 The values of the different duties are reflected by the price paid in return (*SCHLECHTRIEM, p. 17; HUBER in: Säcker et al., Art. 3 CISG § 13; cf. Tribunale di Padova, 10 January 2006 (Italy)*). They are to be weighed against each other (*MAGNUS in: Staudinger, Art. 3 CISG § 21*). The economic value of the obligations other than a sale must exceed 50 % to be qualified as preponderant (*CISG-AC Op. No. 4, § 3.4; Tribunale di Forli, 16 February 2009 (Italy); SCHWENZER/HACHEM in: Schlechtriem/Schwenzer, Art. 3 § 20; MISTELIS in: Kröll et al., Art. 3 § 18; cf. SCHROETER, p. 77*). The relevant time for determining the proportions of the economic values is the time of the conclusion of the contract (*HACHEM in: Schlechtriem/Schwenzer, Art. 3, § 19; BRUNNER/FEIT in: Brunner/Gottlieb, Art. 3 § 8; MAGNUS in: Staudinger, Art. 3 CISG § 25*).

114 In regard to the Agreement, three different scenarios have to be distinguished when comparing the economic values of the different obligations.

115 Scenario 1: CLAIMANT does not successfully develop a vaccine. In vaccine research and development, only few initial candidates are able to get regulatory approval and reach the final

step of commercialization (*cf. MACPHERSON ET AL., pp. 1 et seqq.; PRONKER ET AL., p. 1; BEREZOW; HAUG*). If no vaccine is commercialized, which is most probable, the only payments accruing are the upfront payment (*Cl. Exh. C 3, § 9.3*), the research plan payments (*ibid., § 9.1*) and at most three milestone payments (*ibid., §§ 9.3 et seq.*). RESPONDENTS concur with CLAIMANT that none of these payments are related to a sale (*cf. Cl. Memo., Arg. § 58*).

116 Scenario 2: CLAIMANT successfully develops a vaccine and makes use of the production option under Section 16.2 of the Agreement. In this scenario, RESPONDENT NO. 1 produces the vaccine "using the **purchased** HEK-294 cells and cell culture medium" (*Cl. Exh. C 3, § 16.2 (emphasis added)*). Contrary to CLAIMANT's submission (*Cl. Memo., Arg. §§ 58 et seq.*), pursuant to Art. 3(1) CISG the production option in Section 16.2 does not qualify as a sales obligation. Art. 3(1) CISG stipulates that manufacturing or production contracts fall under the material scope of the Convention, unless "the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production". A definition of the term "substantial part" is not provided within the Convention. It rather has to be decided on a case to case basis whether a part is substantial or not (*BRUNNER/FEIT, in: Brunner/Gottlieb, Art. 3 § 3; SCHWENZER/HACHEM in: Schlechtriem/Schwenzer, Art. 3 § 6; HUBER in: Säcker et al., Art. 3 CISG § 7*). As shown by the wording of Section 16.2, CLAIMANT provides RESPONDENT NO. 1 with the purchased HEK-294 cells and cell culture medium used for the production of the vaccine. Since the HEK-294 cells and the cell culture medium are vital to reproduce the viral vectors for the vaccine production (*PO 2, § 4; Not. Arb., § 5*), these base materials make up the substantial part of the materials. CLAIMANT also provides RESPONDENT NO. 1 with the instructions concerning the vaccine production developed in the course of its research with the GorAdCam viral vector. Such know-how is also considered when determining the substantial part pursuant to Art. 3(1) CISG (*cf. Cour d'appel de Chambéry, 25 May 1993 (France); Tribunal de Première Instance de Genève, 30 March 2015 (Switzerland)*). Therefore, CLAIMANT supplies a substantial part for the production of the vaccine – the latter being RESPONDENT NO. 1's sole obligation. Section 16.2. is therefore excluded from the scope of the Convention pursuant to Art. 3(1) CISG.

117 When choosing the production option in Section 16.2, only CLAIMANT's purchase of the base materials qualifies as a sale. The price for one batch of HEK-294 cells was agreed to be "reflecting the price generally charged at the time of the conclusion of the contract" (*Cl. Exh C 3, § 16.2*). One batch of HEK-294 cells under Section 16.1 was priced € 2 million, which was above the average market price (*Resp. Exh. R 2, § 14*). Hence, the price for one batch of HEK-294 cells under Section 16.2 is less than € 2 million (*cf. Cl. Exh C 3, § 16.2*). Consequently, the sale obligations amount to less than € 2 million per batch.

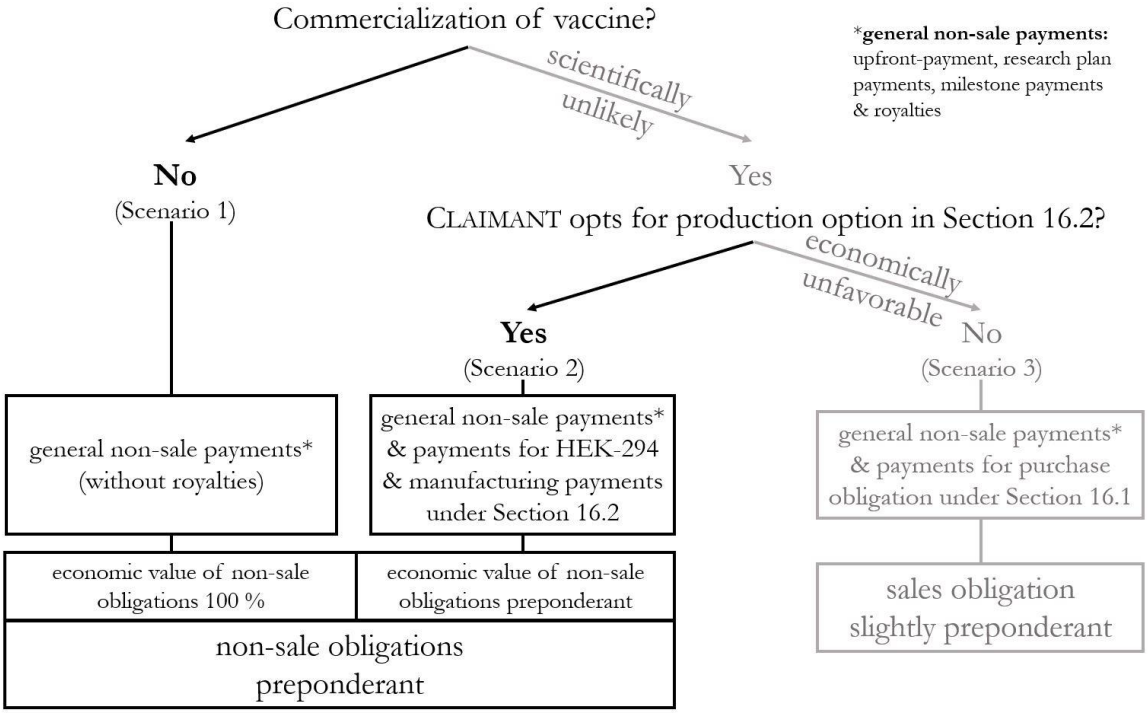
118 The payment in return for RESPONDENT NO. 1's production of the vaccine amounts to more than € 2 million per batch. RESPONDENT NO. 1 charges € 4 million in total for one batch of the finished vaccine under Section 16.2 (*PO 2, § 7, App. 1*). Subtracting the purchase price for the base materials of less than € 2 million, this results in a payment of more than € 2 million for RESPONDENT NO. 1's work regarding the vaccine production.

119 To sum it up, the payments relating to non-sale obligations are: the production costs under Section 16.2 of more than € 2 million per batch, the upfront payment, the research plan payments, the royalties as well as the milestone payments. The payments relating to the sale obligation are solely the payments for the base materials of less than € 2 million per batch. This results in the non-sale obligations clearly outweighing the sales obligations by more than 50 % in Scenario 2.

120 Scenario 3: CLAIMANT successfully develops a vaccine and produces it itself acquiring its need of HEK-294 cells and cell culture medium under the purchase obligation in Section 16.1. This Section – which depends on a condition subject to the scientific uncertainty of vaccine development (*see supra § 100*) – is the only obligation under the Agreement potentially weighing in favor of the sales obligation. However, at the time of the conclusion of the Agreement, the internal calculations showed that Section 16.2 was more economically suitable – to both CLAIMANT and RESPONDENT NO. 1 (*cf. ibid.*). Under Section 16.1, CLAIMANT would have generated only € 232,75 million as a maximum annual profit per 20 batches (*PO 2, § 7, App. 1*). Making use of the production option in Section 16.2, it would generate € 245,45 million as a maximum annual profit per 20 batches (*ibid.*). Given that CLAIMANT would otherwise let slip profits of € 13 million per 20 batches, it is very likely for it to choose the production option in Section 16.2. The realization of Section 16.1 is therefore scientifically unlikely and economically unfavorable, rendering it the most improbable scenario. It cannot be used to determine the economic values at the moment of contract conclusion.

121 To conclude, there is only one scientifically realistic scenario when determining the economic values at the time of the conclusion of the contract (Scenario 1). This scenario only contains payments due for non-sale obligations. Even if Claimant successfully develops a vaccine, the only economically favorable option is to choose the production option in Section 16.2 (Scenario 2). This also results in the non-sale obligations being the preponderant part.

122 Possible scenarios under the Agreement



123 The value of the non-sale components outweighs the value of the sales component in the sense of Art. 3(2) CISG.

2. The intentions of the parties to the Agreement preponderantly lie on the non-sale obligations

124 Contrary to CLAIMANT's submission (*Cl. Memo., Arg. §§ 60 et seqq.*), the parties intended the preponderant part of the obligations pursuant to Art. 3(2) CISG to lie on the obligations not relating to a sale of goods.

125 The interpretation standard set out in Art. 8 CISG requires the applicability of the CISG (*ZUPPI in: Kröll et al., Art. 8 § 1; MAGNUS in: Staudinger, Art. 8 CISG § 7*). As this has not yet been established, it cannot serve to determine the parties' intentions under Art. 3(2) CISG. Instead, both the contractual documents and the circumstances surrounding the formation of the contract are decisive (*cf. CISG-AC Op. No. 4, § 3.4.; MISTELIS/RAYMOND in: Kröll et al., Art. 3 § 19; FERRARI in: Schlechtriem/Schwenzer/Schroeter, Art. 3 § 14; LG Mainz, 26 November 1998 (Germany)*).

126 First and foremost, the Agreement refers to CLAIMANT and RESPONDENT NO. 1 as "Licensee" and "Licensor" (*Cl. Exh. C 3*). Additionally, the Agreement is characterized by numerous obligations common in license agreements: the license grant (*ibid., § 5*), milestone payments (*ibid., §§ 9.3 et seq.*), royalties (*ibid., § 9.5*) as well as the remuneration for the licensor's work under the research plan (*ibid., § 9.1*). In contrast, the delivery of the batch of GorAdCam

viral vectors and the obligations under Section 16 are only accessory and conditional (*see supra §§ 99 et seq.*). This highlights the nature of the Agreement in its function as a license agreement.

127 Contrary to CLAIMANT's submission (*cf. Cl. Memo., Arg. § 44 referring to Cl. Exh. C 3, Recitals*), the description of RESPONDENT NO. 1 as "a contract manufacturing organization that produces and sells base materials" does not reflect the parties' intentions. RESPONDENT NO. 1's description merely assesses its general area of expertise. It has no implications on RESPONDENT NO. 1's ability to enter into a license contract. The Agreement concluded between CLAIMANT and RESPONDENT NO. 1 concerning the GorAdCam viral vectors was new to RESPONDENT NO. 1's practice and deviated from its earlier contracts which focused on contract manufacturing (*Answ. Not. Arb., § 10; Resp. Exh. R 2, §§ 7 et seqq.; PO 2, § 24*). This is underlined by the fact that the contracting department of RESPONDENT NO. 1 had not yet developed a suitable template for this new kind of contract (*ibid.*).

128 CLAIMANT's argument that the "commercial activity and behaviour" of RESPONDENT NO. 1 indicate the parties' intentions ought to be rejected by the Tribunal (*cf. Cl. Memo., Arg. §§ 62 et seqq.*). The circumstances surrounding the formation of the Agreement evidence that the parties laid a particular focus on intellectual property. RESPONDENT NO. 1 prepared a new draft for the Agreement after CLAIMANT was of the opinion that the previous draft "would not sufficiently take into account the IP-element involved" (*Resp. Exh. R 2, § 7*) and was therefore "unacceptable for Claimant" (*Not. Arb., § 12*). By declining this type of contract for the lack of its IP-element, CLAIMANT made exceptionally clear that the know-how element constitutes the most important part of the contract.

129 According to the intentions of CLAIMANT and RESPONDENT NO. 1, the elements not relating to a sale of goods are preponderant in the sense of Art. 3(2) CISG.

130 Considering the economic values of the contractual duties and the parties' intentions, the non-sale obligations are the preponderant part of the Agreement.

131 To conclude, the applicability of the CISG to the Agreement is precluded by Art. 3(2) CISG.

Conclusion to the Third Issue

The CISG is not applicable to the Agreement. The contractual obligations do not qualify as a sale of goods pursuant to Art. 1(1) CISG. In any case, Art. 3(2) CISG precludes the applicability of the CISG.

IV. RESPONDENT NO. 1 FULFILLED ITS CONTRACTUAL DUTY TO DELIVER CONFORMING GOODS UNDER ART. 42(1) CISG

132 Even if the Tribunal finds that the CISG was applicable to the Agreement, RESPONDENT NO. 1 has not breached its contractual obligations to deliver conforming goods pursuant to Art. 42(1) CISG.

133 In April 2020 – three months before submitting the Notice of Arbitration – CLAIMANT was acquired by Khorana Lifescience, a leading life-science company in Danubia (*Resp. Exh. R 1; Answ. Not. Arb., § 2*). Through its new parent company, CLAIMANT now has the know-how, equipment and financial means to produce a vaccine itself at a considerably lower price and no longer requires RESPONDENT NO. 1's delivery of the necessary base materials according to Section 16 of the Agreement (*Answ. Not. Arb., §§ 2 et seq.; Resp. Exh. R 1; cf. Resp. Exh. R 2, § 14*). For this reason, CLAIMANT initiated Arbitral Proceedings against RESPONDENTS and targeted declaratory relief. It alleges that its use of the GorAdCam viral vectors in the field of respiratory diseases is compromised by ROSS' claim of an opposing exclusive license (*Cl. Memo., Arg. § 94*). This seems to be an effort to gain better standing when renegotiating the Agreement, which CLAIMANT deems no longer favorable.

134 Contrary to CLAIMANT's submission (*Cl. Memo., Arg. §§ 65 et seqq.*), RESPONDENT NO. 1 delivered goods which are free from any right or claim of a third party based on intellectual property in the sense of Art. 42(1) CISG. ROSS' allegation of an opposing IP-right does not suffice to constitute a breach of contract under Art. 42(1) CISG (**A.**). Even if ROSS had asserted a claim to suffice the requirements of Art. 42(1) CISG, CLAIMANT is expelled from relying on the provision (**B.**).

A. ROSS' CLAIM IS NOT SUFFICIENT TO RENDER THE GOODS NON-CONFORMING PURSUANT TO ART. 42(1) CISG

135 Contrary to CLAIMANT'S allegation (*Cl. Memo., Arg. §§ 68 et seqq.*), ROSS' claim is not sufficient to justify a breach of contract under Art. 42(1) CISG.

136 According to Art. 42(1) CISG, the seller must deliver goods not only free from any third-party right, but also free from any third-party claim based on intellectual property. However, the seller cannot be held responsible every time a frivolous third-party claim arises (*SECRETARIAT COMMENTARY, Art. 40 § 2, Art. 39 § 4*; *HERBER/CZERWENKA, Art. 42 § 2, Art. 41 § 6; cf. ACHILLES, Art. 42 § 3, Art. 41 § 3*). This is due to the fact that the buyer's interest to enjoy "quiet […] possession of the goods" (*Cl. Memo., Arg. § 68*) has to be balanced with the seller's equally legitimate interest in limiting the scope of its liability to foreseeable cases (*SCHWENZER in:*

Schlechtriem/Schwenzer/Schroeter, Art. 42 § 2; KRÖLL in: Kröll et al., Art. 42 § 1). The legislative history of Art. 42 CISG suggests that the seller's liability should be interpreted narrowly (*cf. Off. Rec., p. 326; SMYTHE, p. 523*). In order to ensure this principle, two prerequisites have to be met: Firstly, the claim must meet a minimum standard of seriousness and cannot be completely baseless (*SECRETARIAT COMMENTARY, Art. 40 § 2, Art. 39 § 4; ACHILLES in: FS Schwenzer, pp. 7 et seq.; cf. HERBER/CZERWENKA, Art. 42 § 2, Art. 41 § 6; NEUMAYER/MING, Art. 41 § 3 Fn. 10*). Secondly, the buyer has to be detained by a third party from its unrestricted ability to use the goods (*cf. SCHLECHTRIEM, p. 72; OGH, 12 September 2006 (Austria); SECRETARIAT COMMENTARY, Art. 40 § 2, Art. 39 § 3*).

137 ROSS' claim of an opposing IP-right is completely unfounded (**1.**). This fictitious claim does not affect CLAIMANT's ability to use the goods (**2.**).

1. ROSS' claim lacks legal foundation

138 Contrary to CLAIMANT's submission (*Cl. Memo., Arg. § 72*), ROSS' claim is completely baseless.

139 ROSS asserts that the exclusive license for the GorAdCam viral vector which it was granted by RESPONDENT NO. 2 in the Ross Agreement extends to the field of "infectious respiratory diseases" (*Cl. Exh. C 4; Resp. Exh. R 4*). Such exclusive license would overlap and oppose CLAIMANT's license to use the GorAdCam viral vector in the field of "infectious and non-infectious respiratory diseases" (*Cl. Exh. C 3, §§ 1.3, 5.2*). However, ROSS' license does not extend to infectious respiratory diseases. Its claim is without legal basis.

140 To determine the scope of ROSS' license, an interpretation under the law governing the Ross Agreement is required (*cf. OLG Hamburg, 5 October 1998 (Germany); OLG Köln, 3 April 2006 (Germany)*).

141 ROSS and RESPONDENT NO. 2 chose Danubian law as the law governing the Ross Agreement (*Resp. Exh. R 3, § 15.2*). Danubian contract law is a verbatim adoption of the UNIDROIT Principles (UPICC) and also includes the CISG (*PO 1, § III.3; PO 2, § 39*). As the Ross Agreement concerns a license grant, it does not constitute a sale of goods pursuant to Art. 1(1) CISG (*see supra § 96*). Thus, it is to be interpreted according to the Danubian UPICC-adoption. The interpretation standards are set out in Art. 4.1-4.3 UPICC.

142 Following the subjective interpretation standard pursuant to Art. 4.1(1) UPICC, ROSS and RESPONDENT NO. 2 had no common intention to extend the scope of the license to the field of infectious respiratory diseases (**a**). In any case, an interpretation according to the understanding of a reasonable person under Art. 4.1(2) UPICC leads to the same result (**b**).

(a) The parties to the Ross Agreement had no common intention to include the field of infectious respiratory diseases in the scope of the license

143 ROSS and RESPONDENT NO. 2 did not intend to include the field of infectious respiratory diseases in the scope of the license for "malaria and related infectious diseases" (*Resp. Exh. R 3, §§ 1.3, 5.2*).

144 Art. 4.1(1) UPICC stipulates that a contract shall be construed in accordance with the common intention of the parties at the time of the conclusion of the contract (*Official Commentary on the UPICC, Art. 4.1 § 1; VOGENAUER, Art. 4.1 § 3; BONELL, p. 1; cf. Tribunal Supremo, 29 February 2012 (Spain); Svenska v. Lithuania (UK)*). Art. 4.3(a), (c) UPICC states that all relevant circumstances, *inter alia* the prior negotiations as well as the subsequent conduct of the parties, have to be considered (*Official Commentary on the UPICC, Art. 4.3 § 1; VOGENAUER, Art. 4.1 § 4; BONELL, p. 6*).

145 RESPONDENT NO. 2 made clear that the phrase "malaria and related infectious diseases" in the Ross Agreement (*Resp. Exh. R 3, § 5.2*) was not meant to include respiratory diseases. Prior to the conclusion of the Ross Agreement, RESPONDENT NO. 2 developed a new twofold business strategy. On the one hand, it wanted to focus its own research on vaccines against respiratory diseases (*Cl. Exh. C 1; Not. Arb., § 7*). On the other hand, as it was presumed to be best suited in the field of malaria, the GorAdCam viral vector was commercialized in the form of an exclusive license (*Not. Arb., § 6; Resp. Exh. R 2, § 3; Answ. Not. Arb., § 4; Cl. Exh. C 7, § 4*). Mr. Peter Doherty (Director Legal at RESPONDENT NO. 2 until December 2018, *Resp. Exh. R 2, § 1*) as well as Roctis AG (RESPONDENTS' parent company, *Not. Arb., § 2*) confirmed that there never was an intention to give ROSS a license relating to respiratory diseases (*Resp. Exh. R 2, § 5*; *Resp. Exh. R 5*).

146 As a market leader in malaria research, ROSS was primarily interested in procuring a viral vector adequate for a vaccine in this field (*Cl. Exh. C 1; Resp. Exh. R 2, §§ 2 et seq.; Cl. Exh. C 4, §§ 4 et seq.)*). This is further shown by ROSS' company logo – a mosquito commonly associated with the transmission of malaria (*Resp. Exh. R 4*). The GorAdCam viral vector was developed in the context of a research project which was limited to malaria in developing countries. Consequently, it was seen to provide a suitable base for a malaria vaccine (*PO 2, § 20; Answ. Not. Arb., § 4; Not. Arb., § 6; Cl. Exh. C 7, § 4*). Accordingly, ROSS wanted to acquire an exclusive license to use the GorAdCam viral vector in the field of malaria (*Cl. Exh. C 7, §§ 4 et seq.; Resp. Exh. R 2, §§ 2 et seq.; cf. Answ. Not. Arb., §§ 5 et seq.*). When concluding the Ross Agreement, ROSS had no intention to conduct research in the field of respiratory diseases.

147 During the negotiations with RESPONDENT NO. 2 regarding the acquisition of a license for the GorAdCam viral vector, ROSS sought the extension "malaria and related infectious diseases" (*Resp. Exh. R 2, § 5*). This extension was meant to cover similar diseases found in developing countries in the sense of mirroring the original research context of the GorAdCam viral vector (*cf. PO 2, § 20*). Even CLAIMANT's witness, Ms. Rosaly Hübner (CLAIMANT's CFO), who was part of the Ross Agreement's negotiation, testified that the focus of the negotiations was "clearly upon the use of the [GorAdCam viral vector] for the malaria vaccine" (*Cl. Exh. C 7, § 6*; *Cl. Memo., Arg. § 88*).

148 The subsequent conduct of both parties confirms their common intention to not include respiratory diseases in the license: For a duration of four years, ROSS solely conducted research on a vaccine for malaria. In 2018, after the GorAdCam viral vector had been discovered to be best suited for respiratory diseases and ROSS had abandoned its malaria research, it attempted to acquire RESPONDENT NO. 2 again (*Answ. Not. Arb., §§ 6 et seq.*) – a fact CLAIMANT concedes (*Cl. Memo., Arg. § 7*0). Further, ROSS even offered to settle the divergence in interpretation against the grant of a non-exclusive license for the use of the GorAdCam viral vector (*Resp. Exh. R 4; Answ. Not. Arb., § 13*). If ROSS truly believed to have been granted the respective IP-right under the Ross Agreement, it would neither have offered to acquire RESPONDENT NO. 2 nor to settle for a non-exclusive license for respiratory diseases. RESPONDENT NO. 2, on the other hand, granted RESPONDENT NO. 1 an exclusive license for the use of the GorAdCam viral vector for all applications relating to respiratory diseases after the conclusion of the Ross Agreement (*Answ. Not. Arb., § 8; cf. Not. Arb., § 10; Cl. Exh. C 2*). If RESPONDENT NO. 2 had already granted ROSS an exclusive license in that field, it would not have been entitled to do so (*cf. PO 2, § 40*).

149 To conclude, ROSS and RESPONDENT NO. 2 did not intend to include the field of infectious respiratory diseases in the Ross Agreement.

(b) In any case, a reasonable person would not understand the Ross Agreement to include a license in the field of infectious respiratory diseases

150 In any case, a reasonable person in the shoes of the parties would not understand the clause "malaria and related infectious diseases" in the Ross Agreement to extend to infectious respiratory diseases.

151 Pursuant to Art. 4.1(2) UPICC, if a common intention of the contracting parties cannot be established, the interpretation is to be conducted in accordance with the understanding of a reasonable person of the same kind as the parties, i.e., with the same knowledge, skill and business experience (*Official Commentary on the UPICC, Art. 4.1 § 2; VOGENAUER, Art. 4.1 § 5; BONELL, p. 4; ICC Case No. 11880/2004; ICC Case No. 9651/2000*). Both RESPONDENT NO. 2 as

well as ROSS are pharmaceutical companies (*Not. Arb., §§ 2, 8*). Their background knowledge in the medical field should therefore be taken into account.

152 A reasonable person with pharmaceutical knowledge would analyze the diseases in question from a medical point of view in order to interpret the term "malaria and related infectious diseases". Infectious respiratory diseases are not related to malaria. The infection path, the prevention, the geographical occurrences as well as the symptoms are different: Malaria is a parasitic disease transmitted by mosquitoes (*WHO, Guidelines on the treatment of malaria, p. 24*; *DI GENNARO ET AL., p. 1*). Infectious respiratory diseases, on the other hand, are most frequently caused by bacteria or viruses and are transmitted by respiratory droplets (*DASARAJU/LIU; DI GENNARO ET AL., p. 2*). For example, COVID-19 is a virally transmitted infectious respiratory disease (*PO 2, § 23*). As for the prevention methods, malaria demands for chemoprophylaxis and protection against mosquito bites, while COVID-19 is prevented by sanitation and avoidance of human contacts (*DI GENNARO ET AL., pp. 2 et seq.; cf. WHO, Malaria fact sheet; CDC, COVID-19*). Moreover, 94 % of the world's malaria cases occur in Africa (*WHO, Malaria fact sheet; DI GENNARO ET AL., p. 2; cf. ECDC, Factsheet about malaria*). In contrast, respiratory diseases are not limited to Africa, but rather spread worldwide (*cf. WHO, COVID-19 Dashboard*). Additionally, the symptoms of malaria and respiratory diseases do not converge. While the latter symptoms are of respiratory nature, a malaria infection typically results in non-respiratory, neurological symptoms (*DI GENNARO ET AL., p. 3; cf. CDC, About Malaria*). To assume that infectious respiratory diseases are related to malaria is untenable.

153 Further, a reasonable person with the same business experience as the parties would consider the marginal sum paid for the extension of the license for malaria to a license for malaria and "related infectious diseases": The upfront payment for the exclusive license to use the GorAdCam viral vector for "malaria and related infectious diseases" was USD 3 million (*Cl. Exh. C 1*). As CLAIMANT stated (*Cl. Memo., Arg. § 70*), € 600,000 were paid to add the expression "and related infectious diseases". This comparably small additional payment cannot extend the license to the whole field of infectious respiratory diseases.

154 A reasonable person in the shoes of the parties pursuant to Art. 4.1(2) UPICC would not understand the license granted under the Ross Agreement to extend to infectious respiratory diseases.

155 In conclusion, ROSS' claim regarding the existence of an exclusive license for the GorAdCam viral vector in the field of infectious respiratory diseases is without legal basis.

2. ROSS' claim does not restrict CLAIMANT's ability to use the goods

156 Contrary to CLAIMANT's submission (*Cl. Memo., Arg. §§ 73 et seq.*), ROSS' claim does in no way restrict CLAIMANT from making use of the GorAdCam viral vector.

157 Under Art. 42(1) CISG it is relevant whether the buyer can be detained by a third party from its unrestricted ability to use the goods (*OGH, 12 September 2006 (Austria); cf. SECRETARIAT COMMENTARY, Art. 40 § 2, Art. 39 § 3; SCHLECHTRIEM, p. 72).* The use of the goods is only endangered when a claim is directly asserted against the buyer (*ACHILLES in: FS Schwenzer, pp. 5 et seq.*; *TEBEL in: Brunner/Gottlieb, Art. 42 § 4*; *cf. HERBER/CZERWENKA, Art. 42 § 2*, *Art. 41 § 6; BENICKE in: Schmidt/Ebke, Art. 41 CISG § 6; LÜDERITZ/SCHÜßLER-LANGEHEINE in: Soergel, Art. 41 § 7*). Unless such a claim is directly raised, it is completely hypothetical if the third party will ever enforce its alleged right (*TEBEL in: Brunner/Gottlieb, Art. 42 § 4; ACHILLES in: FS Schwenzer, pp. 5 et seq.*).

158 CLAIMANT relies on a Austrian Supreme Court decision to support its argument that it is irrelevant whether third-party intellectual property rights actually exist or are unrightfully claimed (*Cl. Memo., Arg. § 68 referring to OGH, 12 September 2006 (Austria)*). However, CLAIMANT omits that the Austrian Supreme Court found the seller only to be liable if an attempt was made to restrict the buyer in the use of the goods. As ROSS has not asserted its frivolous claim against CLAIMANT (*Answ. Not. Arb., § 20*), it has not attempted to restrict CLAIMANT's use of the delivered goods.

159 There is no indication that ROSS will deviate from this position in the future. As CLAIMANT already indicated, ROSS has a reputation of strictly enforcing its IP-rights as well as committing immense resources in IP-litigation (*Cl. Memo., Arg. § 74; PO 2, § 15*; *Cl. Exh. C 7, § 7*). If ROSS had an opposing IP-right, a settlement offer for a non-exclusive license would not have been made (*see supra § 148*). Much rather, it would have already initiated proceedings against CLAIMANT. ROSS itself is aware of the unfoundedness of its claim, merely using it as a pure negotiation tactic towards RESPONDENTS (*Cl. Exh. C 6; Answ. Not. Arb., §§ 12 et seq.*). This is corroborated by the fact that ROSS did not assert its claim against two other parties either, which have been granted similar licenses by RESPONDENT NO. 1 (*cf. PO 2, § 18*). Thus, there is no "threat of a lawsuit" (*contrary to Cl. Memo., Arg. § 74; Not. Arb., § 28*).

160 Contrary to CLAIMANT's submission, ROSS' claim of an opposing IP-right does not affect CLAIMANT's research (*Cl. Memo., Arg. §§ 26, 73*). CLAIMANT is still able to conduct its development of a vaccine using the GorAdCam viral vector and has not suffered any monetary loss (*PO 2, § 16; cf. Not. Arb., § 29*).

161 The fictitious claim of ROSS does not impede CLAIMANT's business in any way.

162 To conclude, ROSS' claim of an opposing IP-right does not suffice to render the goods non-conforming under Art. 42(1) CISG.

B. IN ANY CASE, CLAIMANT IS EXPELLED FROM RELYING ON ART. 42(1) CISG

163 Even if ROSS' claim was sufficient to render the goods non-conforming under Art. 42(1) CISG, CLAIMANT cannot rely on this provision.

164 First, CLAIMANT could not have been unaware of ROSS' alleged IP-right at the time of the conclusion of the Agreement (**1.**). Second, CLAIMANT did not comply with its obligation to notify RESPONDENT NO. 1 pursuant to Art. 43(1) CISG (**2.**). Third, RESPONDENT NO. 1 is not barred from relying on Art. 43(1) CISG pursuant to Art. 43(2) CISG (**3.**).

1. CLAIMANT could not have been unaware of ROSS' claim when concluding the Agreement

165 Contrary to its submission (*Cl. Memo., Arg. §§ 84 et seq.*), CLAIMANT could not have been unaware of the alleged claim in the means of Art. 42(2)(a) CISG.

166 According to Art. 42(2)(a) CISG, the seller is not liable if the buyer knew or could not have been unaware of the opposing IP-right or claim at the time of the conclusion of the contract. The buyer could not have been unaware if it had a duty to investigate whether the goods are encumbered by a third-party IP-right or claim (*cf. TEBEL in: Brunner/Gottlieb, Art. 42 § 21; KRÖLL in: Kröll et al., Art. 42 § 38*). Such duty depends on the buyer's professional capacity regarding the goods (*Cour de Cassation, 19 March 2002 (France)*; *Cour d'appel de Colmar, 13 November 2002 (France)*; *Tribunal de Grande Instance de Versailles, 23 November 2004 (France); Tribunal de Grande Instance de Paris, 21 November 2007 (France); cf. SHINN, p. 125*). This holds true in case of a lead in knowledge on the buyer's side concerning the condition and use of the sales object (*BACHER in: FS Schwenzer, pp. 125 et seq.; TEBEL in: Brunner/Gottlieb, Art. 42 § 21; cf. JANAL in: FS Kritzer, pp. 213 et seq.*).

167 CLAIMANT is a biopharmaceutical company engaged in the development of vaccines for respiratory diseases caused by viruses (*Not. Arb. § 1*; *Cl. Exh. C 3*). It has particular know-how and experience with viral vectors and is consequently a specialized player in the industry (*ibid.*). Moreover, it intended to focus its entire business activities on the development of a vaccine on the basis of the GorAdCam viral vector (*Cl. Memo., Arg. § 74; cf. Not. Arb. § 28*). In contrast, RESPONDENT NO. 1 does not conduct any research with the GorAdCam viral vector (*cf. Not. Arb. § 4*). Thus, it is CLAIMANT's duty as a professional to be aware of alleged infringements or recent market developments of the GorAdCam viral vector, especially if these are widely reported in the

news. Therefore, CLAIMANT could not have been unaware of the statements published in the Biopharma Science Journal which first mentioned ROSS' allegations on 14 December 2018 (*cf. Cl. Exh. C 4*) – weeks prior to the conclusion of the Agreement.

168 This holds even more true since the journal is a credible and popular source of information among start-ups in Equatoriana, Danubia and Mediterraneo (*PO 2, §§ 8 et seq.*). CLAIMANT's termination of the subscription of the Biopharma Science Journal is negligent and cannot be considered as an excuse for a professional (*contrary to Cl. Memo., Arg. § 85*).

169 CLAIMANT could not have been unaware of ROSS' claimed IP-right at the time of the conclusion of the contract pursuant to Art. 42(2)(a) CISG.

2. CLAIMANT failed to notify RESPONDENT NO. 1 in time pursuant to Art. 43(1) CISG

170 CLAIMANT did not give timely notice to RESPONDENT NO. 1 after it ought to have become aware of ROSS' claim according to Art. 43(1) CISG.

171 By virtue of Art. 43(1) CISG, the buyer is obligated to notify the seller within a reasonable time after he becomes aware or ought to have become aware of a conflicting right or claim. Otherwise, the buyer loses its right to rely on Art. 42(1) CISG (*FLECHTNER, p. 13; LOOKOFSKY, § 204, KRÖLL in: Kröll et al., Art. 43 § 1*). A reasonable time is a certain period in which the buyer can get a general picture of the legal situation (*ENDERLEIN, p. 184; BGH, 11 January 2006 (Germany)*). A notice period of one month is generally considered reasonable (*KRÖLL in: Kröll et al., Art. 43 § 20; BENICKE in: Schmidt/Ebke, Art. 43 CISG § 3*; *SCHWENZER in: Schlechtriem/Schwenzer, Art. 43 § 3; BGH, 11 January 2006 (Germany)*).

172 Contrary to CLAIMANT's submission (*Cl. Memo., Arg. § 87*), it ought to have become aware of ROSS' claim through the Biopharma Science Article published on 14 December 2018 (*see supra §§ 165 et seqq.; cf. Cl. Exh. C 4*) or at the latest through the Biopharma Science Article published on 19 December 2019 (*Cl. Exh. C 4*). CLAIMANT notified RESPONDENT NO. 1 almost six or even seventeen months later, namely on 2 May 2020 (*Cl. Exh. C 5*).

173 Thus, CLAIMANT did not notify RESPONDENT NO. 1 within a reasonable time after it ought to have become aware of the existence of ROSS' allegedly opposing IP-right. CLAIMANT lost its right to rely on Art. 42 CISG.

3. RESPONDENT NO. 1 is not expelled from relying on Art. 43(1) CISG

174 In addition, contrary to CLAIMANT's assumption (*Cl. Memo., Arg. § 89*), RESPONDENT NO. 1 had no knowledge of the IP-dispute.

175 Under Art. 43(2) CISG the seller is not entitled to rely on Art. 43(1) CISG if it knew of the IP-right or claim of the third party. It is not sufficient for Art. 43(2) CISG that the seller could

not have been unaware of the IP-right or claim (*KRÖLL in: Kröll et al., Art. 43 § 25; SCHWENZER in: Schlechtriem/Schwenzer, Art. 43 § 9; HONNOLD/FLECHTNER, § 271*). The buyer bears the burden of proof in this regard (*SCHWENZER: Schlechtriem/Schwenzer, Art. 43 § 12; KRÖLL in: Kröll et al., Art. 43 § 28*).

176 RESPONDENT NO. 1 was neither involved in the contractual negotiations between ROSS and RESPONDENT NO. 2 nor in their post-contractual discussions concerning the scope of the Ross Agreement (*PO 2, § 1*). It therefore had no knowledge of ROSS' alleged IP-right. CLAIMANT's allegation that RESPONDENT NO. 1 could not have been unaware of it is of no relevance for Art. 43(2) CISG (*Cl. Memo., Arg. §§ 76 et seqq., 89*).

177 Although CLAIMANT bears the burden of proof, it did not demonstrate any further evidence. As a result, RESPONDENT NO. 1 can rely on Art. 43(1) CISG.

178 In conclusion, CLAIMANT is expelled from relying on Art. 42(1) CISG.

Conclusion to the Fourth Issue

RESPONDENT NO. 1 did not breach its contractual obligations to deliver conforming goods in the sense of Art. 42 CISG. ROSS' claim of an opposing IP-right is not sufficient to render the batch of GorAdCam viral vectors non-conforming under Art. 42(1) CISG. Even if the vectors delivered by RESPONDENT NO. 1 are non-conforming in the sense of Art 42(1) CISG, CLAIMANT is expelled from relying on the provision.

REQUEST FOR RELIEF

In light of the submissions made above, RESPONDENTS respectfully request the Tribunal to find that:

I. Ross Pharmaceuticals should be joined to the Arbitration Proceedings.

II. The examination of witnesses and experts in the 2nd Hearing of 3 to 7 May 2021 should not be conducted remotely if a hearing in person is not possible or considered by the Arbitral Tribunal to be inappropriate.

III. The CISG is not applicable to the "Purchase, Collaboration and License Agreement" concluded between CLAIMANT and RESPONDENT NO. 1.

IV. RESPONDENT NO. 1 has not breached its contractual obligations to deliver conforming goods existing pursuant to Art. 42 CISG by providing CLAIMANT with the batches of GorAdCam viral vectors.

LUDWIG-MAXIMILIANS-UNIVERSITÄT MÜNCHEN

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

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