18TH ANNUAL WILLEM C. VIS (EAST) INTERNATIONAL COMMERCIAL ARBITRATION MOOT,
HONG KONG, MARCH 14-21, 2021

NATIONAL LAW UNIVERSITY, JODHPUR

MEMORANDUM FOR CLAIMANT

CASE NO.: 300610-2020

RespiVac plc *Rue Whittle 9* *Capital City* *Mediterraneo* (**CLAIMANT**)	**CamVir Ltd** *112 Rue L. Pasteur* *Oceanside* *Equatoriana* (**RESPONDENT 1**) & **VectorVir Ltd** *67 Wallace Rowe Drive* *Oceanside* *Equatoriana* (**RESPONDENT 2**)

COUNSELS

ABHINAV | ADITYA BAMB | ARYAN YASHPAL | BHAVYAKIRTI SINGH

DEVIKA SREEKUMAR | JEHAN JHAVERI | MALAIKA SHIVALKAR

MAULIK KHURANA | NAMRATA JEPH | RISHIKA ARYA

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ABBREVIATIONS

Abbreviation	Full Name
€	Euro
¶	Paragraph
%	Percentage
§	Section
AAA	American Arbitration Association
ACICA	Australian Centre for International Commercial Arbitration
Answer	Answer to Notice of Arbitration
Appx.	Appendix attached to Procedural Order 2 ¶7
art./arts.	Article/Articles
ASA	Swiss Arbitration Association
Bn	Billion
CAC vector	ChAdCam viral vector
CISG	United Nations Convention on Contracts for the International Sale of Goods
Cl. Ex.	CLAIMANT'S exhibit
CLAIMANT	RespiVac Plc.
CLOUT	Case Law on UNCITRAL Texts
Co.	Company
Corp.	Corporation
COVID-19	Corona Virus Disease 2019

DAL	Danubian Arbitration Law
Ed./Eds.	Editors(s)
ECJ	The European Court of Justice
GAC vector	GorAdCam viral vector
HKIAC	Hong Kong International Arbitration Centre
IBA	International Bar Association
IBA Rules	IBA Rules on the Taking of Evidence in International Arbitration
ICC	International Chamber of Commerce
ICC Rules	ICC Arbitration Rules (2017)
ICCA	International Council for Commercial Arbitration
ICDR	International Centre for Dispute Resolution
ICSID	International Centre for Settlement of Investment Disputes
In casu	In this case
Id.	Idem
Inc.	Incorporated
IP	Intellectual Property
IT	Information Technology
Letter SCAI, Sept. 1	Letter by Swiss Chambers on September 1, 2020
Letter Prof. Sinoussi, Sept. 4	Letter by Prof. Sinoussi, Presiding Arbitrator, on September 4, 2020
Letter Fasttrack, Oct 2	Letter by Julia Fasttrack on October 2, 2020
LCIA	London Court of International Arbitration

LCIA Rules	LCIA Arbitration Rules 2014
Ltd.	Limited
MERS	Middle East Respiratory Syndrome
Mn	Million
Model Clause	Model Arbitration Clause as provided by the Swiss Chambers
Model Law	UNCITRAL Model Law on International Commercial Arbitration with the 2006 amendments and Art. 7, Option I
Mr.	Mister
Ms.	Miss
No.	Number
Notice	Notice of Arbitration
NYC	New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)
OGH	Oberster Gerichtshof (Supreme Court of Justice Austria)
p. /pp.	Page/Pages
Parties (s.c.)	Claimant and Respondents
PCLA	Agreement between Claimant and Respondent 1
Plc.	Public Limited Company
P.O. 1	Procedural Order 1dated October 9, 2020
P.O. 2	Procedural Order 2 dated November 7, 2020
Res. Ex.	RESPONDENT Exhibit
R&D	Research and Development
RESPONDENTS	CamVir Ltd. & VectorVir Ltd.

RESPONDENT 1	CamVir Ltd.
RESPONDENT 2	VectorVir Ltd.
Ross Agreement	Collaboration and Licence Agreement between Ross Pharmaceuticals and RESPONDENT 2
SCAI	Swiss Chambers' Arbitration Institution
SCC	Stockholm Chamber of Commerce
SFT	Swiss Federal Tribunal
Swiss Rules	Swiss Rules of International Arbitration, 2012
Tribunal	Tribunal as constituted by SCAI on September 1, 2020 with Prof. Francoise Sinoussi as Presiding Arbitrator and Mr. Ilja Ehrlich and Dr. Youtu You as Co-Arbitrators
UCC	Uniform Commercial Code
ULIS	Uniform Law of International Sales
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
v.	Versus
VIAC	Vienna International Arbitral Centre

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Antibiotic Strategies	Sujata M Bhavnani, Kevin M Krause, Paul G Ambrose, *Broken Antibiotic Market: Review of Strategies to Incentivize Drug Development*, 7(1) OPEN FORUM INFECTIOUS DISEASES (July 2020).	¶91
Aubrey	Aubrey L. Diamond, *The Right to Reject Future Goods*, 22(3) MODERN L. REV. 337 (1959). Available at: https://www.jstor.org/stable/1090914	¶82
Audit	Bernard Audit, *La Vente International De Marchandises: Convention des Nations-Unies du 11 avril 1980, 108.* Available at: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5813647/	¶124,128
Ayman Chit	Chit, Chit, Papadimitropoulos, Krahn, Parker & Grootendorst, *The opportunity cost of capital: development of new pharmaceuticals.* Available at: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5813647/	¶119
Bamforth/ Maidment	Richard Maidment, Katerina Maidment, *"All join in" or not? How well does international arbitration cater for disputes involving multiple parties or related claims*, 27 ASA BULLETIN 14 (2009).	¶24
Bateson	David Bateson, *Virtual Arbitration: The impact of COVID-19,*	¶64

9(1) INDIAN J. ARB. L. (2020).

Bassiri	Niuscha Bassiri, *Chapter 5: Conducting Remote Hearings: Issues of Planning, Preparation and Sample Procedural Orders*, IN Maxi Scherer, Niuscha Bassiri, et al. (eds.), *International Arbitration and the COVID-19 Revolution* (Kluwer Law International 2020).	¶56
Beckerman-Rodau	Prof. Andrew Beckerman-Rodau, *Computer Software: Does Article 2 of the Uniform Commercial Code Apply?,* 35 EMORY L. J. 853 (1986). Available at: http://www.lawprofessor.org/publications/articles.html&articlename=emory	¶100
Beisteiner	Lisa Beisteiner, *Chapter I: The Arbitration Agreement and Arbitrability, The (Perceived) Power of the Arbitrator to Revise a Contract – The Austrian Perspective*, in Christian Klausegger, Peter Klein et al. (eds.), *Austrian Yearbook on International Arbitration*, Vol. 2014 at 77 – 122, (Manz'sche Verlags- und Universitätsbuchhandlung, 2014).	¶59
Beline	Thomas M. Beline, *Legal Defect Protected by Article 42 of the CISG: A Wolf in Sheep's Clothing*, 7 UNIV. PITTSBURGH J. TECH. L & POL, 6 (Spring 2007). Available at: https://cisgw3.law.pace.edu/cisg/biblio/beline.html	¶113, 118,128
Bianca/Bonell	Bianca & Bonell, *Commentary on the International Sales Law* 322-323 (1987).	¶140

Bianca/Bonell- Sono	Sono, in Bianca & Bonell, *Commentary on the International Sales Law* 322-323 (1987). Available at: https://cisgw3.law.pace.edu/cisg/biblio/sono-bb43.html	¶¶138, 139
Binder	Peter Binder, *Article 26: Expert Appointed by Arbitral Tribunal,* IN *International Commercial Arbitration and Mediation in UNCITRAL Model Law Jurisdictions*, 4th ed., at 383 – 387, (Kluwer Law International 2019).	¶52
Blessing	Blessing, *Comparison of the Swiss Rules with the UNCITRAL Arbitration Rules and Others*, 22 ASA SPECIAL SERIES 17-65 (May 2004)	¶58
Bond	Bond, *Chapter 2: Depecage or Consolidation of the Disputes Resulting from Connected Agreements: The Role of the Arbitrator*, in Hanotiau and Schwartz (eds.), *Multiparty Arbitration* 41,43 (2010).	¶¶15,29
Born	Gary Born, *International Commercial Arbitration,* 2nd ed. (Kluwer Law International 2014).	¶¶4,5,14,21,34, 40,43, 45,47,48,57,61,64
Born II	Gary Born, *International Arbitration: Law and Practice,* 2nd ed. (Kluwer Law International 2015).	¶13

Brunner	Christoph Brunner, *The Swiss Rules of International Arbitration: An Overview for International Users*, SCHIEDSVZ GERMAN ARB. J. 251 (2010).	¶10
Burghardt	Lars Markert & Jan Burghardt, *Navigating the Digital Maze - Pertinent Issues in E-Arbitration,* 27(3) J. ARB. STUDIES 3-31 (Sept. 2017).	¶¶51,62,70
Choi	Dongdoo Choi, *Joinder in International Commercial Arbitration*, 35 ARB. INT'L 32 (2019).	¶34
CISG ACO 3	CISG Advisory Council Opinion No. 3: *Parol Evidence Rule, Plain Meaning Rule, Contractual Merger Clause and the CISG* ¶2.8. Available at: https://www.cisg.law.pace.edu/cisg/CISG-AC-op3.html	¶115
CISG ACO 4	CISG Advisory Council Opinion No. 4: *Contracts for the Sale of Goods to Be Manufactured or Produced and Mixed Contracts (Article 3 CISG)* ¶¶1.5, 2.3, 2.1, 2.14, 3.2. Available at: https://www.cisg.law.pace.edu/cisg/CISG-AC-op4.html	¶¶82,84,103
CISG ACO 13	CISG Advisory Council Opinion No. 13: *Inclusion of Standard Terms under the CISG.* Available at: https://www.cisg.law.pace.edu/cisg/CISG-AC-op13.html	¶92

Cuban Biotechnology	Judith Randal, *License to Test Cancer Vaccines in U.S. a Victory for Cuban Biotechnology*, 96(23) JOURNAL OF THE NATIONAL CANCER INSTITUTE 1740–1742 (Dec. 2004).	¶91
Darwazeh	Nadia Darwazeh, *Chapter 7: Is Efficiency an Arbitrator's Duty or Simply a Character Trait?,* in Patricia Louise Shaughnessy and Sherlin Tung (eds.), The Powers and Duties of an Arbitrator: Liber Amicorum Pierre A. Karrer at 57 – 64, (Kluwer Law International 2017).	¶48
De Berti/Welser	De Berti & Welser, *The Arbitrator and the Arbitration Procedure, Best Practices in Arbitration, A Selection of Established and Possible Future Best Practices*, IN Klausegger Christian & Klein Peter et al. (eds.), *Austrian Yearbook on International Arbitration*, Vol. 2010 at 79–101.	¶43
Desai/Gupta/Kanuga	Arjun Gupta, Sahil Kanuga & Vyapak Desai, *Blessed Unions in Arbitration: An Introduction to Joinder and Consolidation in Institutional Arbitration*, 4 IND. J. ARB. L .138 (2017).	¶31
Diedrich	Frank Diedrich, *The CISG and Computer Software Revisited*, 6 VINDOBONA J. OF INT'L. COM. L. ARB., SUPPLEMENT 55-75 (2002). Available at: https://www.cisg.law.pace.edu/cisg/biblio/diedrich1.html	¶¶97,97,102

Draetta	Ugo Draetta, *Behind the Scenes in International Arbitration* at 64-67, (Juris 2011).	¶48
Ducret/Geisinger	Elliott Geisinger & Pierre Ducret, *Chapter 5: The Arbitral Procedure,* in Elliott Geisinger & Nathalie Voser (eds.), *International Arbitration in Switzerland: A Handbook for Practitioners, 2nd edition* at 73 – 106 (Kluwer Law International 2013).	¶39
E. Butler	Allison E. Butler, *A Practical Guide to the CISG: Negotiations Through Litigation,* Aspen Publishers (2007 Supplement 2). Available at: https://www.cisg.law.pace.edu/cisg/biblio/butler6-ch4.pdf	¶111
Flechtner	Harry M. Flechtner, *Conformity of Goods, Third Party Claims, and Buyer's Notice of Breach Under the United Nations Sales Convention with comments on the 'Mussels Case', the 'Stolen Automobile Case' and the 'Ugandan Used shoes Case'* Available at: https://law.bepress.com/cgi/viewcontent.cgi?article=1065&context=pittlwps	¶113
Fausing	Kristina Fausing Kylkjær, *The applicability of the CISG on transactions of software.*	¶¶94,97,100

Fakes	Arthur Fakes, *The Application of the United Nations Convention on Contracts for the International Sale of Goods to Computer, Software and Database Transactions,* 3 SOFTWARE L. J. 559, 582 (1990).	¶¶100
FDA vaccine	*Emergency Use Authorization for Vaccines Explained.* Available at: https://www.fda.gov/vaccines-blood-biologics/vaccines/emergency-use-authorization-vaccines-explained	¶120
Ferrari	Franco Ferrari, *Applicability and Applications of the 1980 United Nations Sales Convention.*	¶¶74,94
Fletcher/Khodykin/Mulcahy	Khodykin, Mulcahy and Fletcher, *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration,* (Kluwer International August 2019).	¶43
Fogt	Morten M. Fogt, *The Knowledge test under the CISG - A Global threefold distinction of negligence, gross negligence and de facto knowledge*, 35(1) J. LAW COM. 74. Available at: https://jlc.law.pitt.edu/ojs/index.php/jlc/article/view/98	¶¶121,125
Guandalini	Bruno Guandalini, *Chapter 5: The Rational Decision-Maker Arbitrator: Unveiling the Arbitrator's Utility Function,* in *Economic Analysis of the Arbitrator's Function*, International Arbitration Law Library, Volume 55 at 211 – 272,	¶48

(Kluwer Law International 2020).

Habeggar — Philipp Habeggar, *The Revised Swiss Rules of International Arbitration: An Overview of the Major Changes*, 30 ASA BULLETIN ¶¶279, 280 (2012). — ¶¶2,7,10,13,48

Hanotiau — Bernard Hanotiau, *Complex Arbitrations: Multi-party, Multi-contract, Multi-issue: A comparative study*, 2nd ed., (Kluwer Law International 2020). — ¶¶7,14

Hauser/Fiebinger — Rudolf Fiebinger and Christoph Hauser, *An Arbitrator's View: Can Party Autonomy Hinder Procedural Efficiency?*, IN Voser ed., *10 years of Swiss Rules of International Arbitration* at 180-182 (2014). — ¶¶29,48

Hodges — Paula Hodges, *Equality of Arms in International Arbitration: Who Is the Best Arbiter of Fairness in the Conduct of Proceedings?*, in Andrea Menaker (ed.), *International Arbitration and the Rule of Law: Contribution and Conformity*, ICCA Congress Series, Vol. 19 at 599-633 (ICCA & Kluwer Law International 2017). — ¶47

Holtzmann — Howard M. Holtzmann & Joseph Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* at 312, (Kluwer Law International 2013). — ¶¶41,65

Honnold — John O. Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention*, 3rd ed., (Kluwer Law International 1999). — ¶¶84,111,113, 115,128

Howard	Howard O. Hunter, *Modern Law of Contracts* § 9:12 (2016).	¶103
Huber/Mullis	Peter Huber & Alastair Mullis, *The CISG: A new textbook for students and practitioners*, In *The CISG: A new Textbook for Students and Practitioners* 176 (2007).	¶¶74,76,94,98, 128
Hubert	Hubert Bitan, *Droit des créations immatérielles*, ¶278 (2010) (France).	¶103
Hunter/Redfern	Blackaby Nigel Constantine Partasides et al., *Chapter 6: Conduct of the Proceedings,* in *Redfern and Hunter on International Arbitration*, 6th ed. ¶¶33, 91 at 353 – 414 (Kluwer Law International 2015).	¶¶2,4,39,43
Ike Silver	Ike Silver & Alex Shaw, *No Harm, Still Foul: Concerns About Reputation Drive Dislike of Harmless Plagiarizers* 42 Special Issue: Social and Moral Cognition.	¶119
J. Smythe	Donald J. Smythe, *Clearing the Clouds on the CISG'S warranty of title*, 36(3) NORTHWESTERN J. INT'L L. BUSINESS. Available at: https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1802&context=njilb	¶¶119,132

Janal	Ruth M Janal, Camilla B. Andersen & Ulrich G. Schroeter eds., *The Seller's Responsibility for Third Party Intellectual* In Property Rights under the Vienna Sales Convention, Sharing International Commercial Law across National Boundaries: Festschrift for Albert H. Kritzer on the Occasion of his Eightieth Birthday at 203-231, (Wildy, Simmonds & Hill Publishing 2008).	¶¶113,125,132 ,136
Jarvin	S. Jarvin, *Le lieu de l'arbitrage*, 7 ICC BULLETIN 2/1996.	¶59
Jiang	Allen and Overy, *Covid-19 coronavirus: how the APAC courts and arbitral institutions have adapted to the challenge.*	¶49
Jolles/Cediel	Alexander Jolles, Sonja Stark-Traeber & Maria Canals De Cediel, *Chapter 7: Confidentiality*, In Elliott Geisinger and Nathalie Voser (eds.) *International Arbitration in Switzerland: A Handbook for Practitioners* 2nd ed., at 146,147,148, (Kluwer Law International 2013).	¶¶26,27
Katzenberger	Paul Katzenberger, *Contractual Liability of the Seller Due to Third Parties Patents and other IP rights under German Law and UN Convention on Sales Contracts* in Patents and Technological Progress in a Globalised World at 581, (Springer 2009).	¶128
Kaufmann-Kohler	Gabrielle Kaufmann-Kohler, *Le lieu de l'arbitrage à l'aune de la mondialisation,*	¶45

REVUE DE L'ARBITRAGE 517 (1998).

Schulz	Gabriele Kaufmann-Kohler & Thomas Schulz, *The Use of Information Technology in Arbitration,* JusLetter ¶¶166-176 (Dec. 2005).	¶51
Khodykin	Mikhailovich Khodykin, Caroll Mulcahy et al., *Article 5 [Party-Appointed Experts], A Guide to the IBA Rules on the Taking of Evidence in International Arbitration*, (© Oxford University Press; Oxford University Press 2019) at 279 – 322, (Oxford University Press 2019).	¶¶43,50
Kirby	Jennifer Kirby, *Efficiency in International Arbitration: Whose Duty Is It?,* 32 J INT'L ARB 689, 694 (2015).	¶48
Kroll I	Stefan Kröll, Loukas Mistelis, & Pilar Perales Viscasillas (eds.), *UN Convention on Contracts for the International Sale of Goods (CISG): Commentary* at 529.	¶¶132,140
Kroll II	Stefan Kröll, Loukas A. Mistelis, P. Perales Viscasillas & V. Rogers, *The Arbitration Agreement in Enforcement Proceedings of Foreign Awards: Burden of Proof and the Legal Relevance of the Tribunal's Decision*, in *International Arbitration and International Commercial Law: Synergy, Convergence and Evolution* at p.323 (Kluwer Law International, 2011).	¶34

Lazopoulos	Michael Lazopoulos, *Chapter 3, Part II: Commentary on the Swiss Rules, Article 15 [General provisions]* at 445 - 455, 613 *& Article 16 [Seat of the arbitration]* at 617 – 624, in Manuel Arroyo (ed.), *Arbitration in Switzerland: The Practitioner's Guide*, 2nd ed., (Kluwer Law International 2018).	¶¶29,47,48,58
Leboulanger	Philip Leboulanger, *Multi-Contract Arbitration*, 13(4) J. INT'L ARB. 47,63,65 (1996).	¶¶15,26,31
Lew	Lew, Mistelis & Kroll, *Comparative International Commercial Arbitration* at 8,100,401, (Kluwer Law International, 2003).	¶¶4,26
Loo/Wright	Johannes C.M. van der Loo, J. Fraser Wright, *Progress and challenges in viral vector manufacturing*, 25(R1) HUMAN MOLECULAR GENETICS R42–R5215 (April 2016).	¶75
Lookofsky	John Lookofsky, *Cator Can't compete: Caveat Emptor under CISG Article 35(3)?* In Joseph Lookofsky & Mads Bryde Andersen (eds.), *The CISG Convention And Domestic Contract Law, Harmony, Cross-Inspiration Or Discord?* 131, 139 (2014).	¶¶115,122
Mehiz/Cole	Rocío Digón, Kamil Mehiz & Tony Cole, *Judicial Interpretation of Standard Clauses*, in Digón, R., Mehiz, K. & Cole, T., *The Cambridge Handbook of Judicial Control of Arbitral Awards* (2020).	¶23

Meier	Andrea Meier, *Joinder of Third Parties in International Arbitration*, in *Einbezug Dritter vor internationalen Schiedsgerichten*, Thesis 127 (2007).	¶13
Mowbray	Jacqueline Mowbray, *The Application of the United Nations Convention on Contracts for the International Sale of Goods to E-Commerce Transactions: The Implications for Asia,* 7 VINDOBONA J. OF INT'L COM. L. ARB. 121-150 (2003).	¶94
Nater-Bass/Pfisterer	Gabrielle Nater-Bass and Stefanie Pfisterer, *Chapter 3, Part II: Commentary on the Swiss Rules, Article 25 [Evidence and hearings, II],* in Manuel Arroyo (ed.), *Arbitration in Switzerland: The Practitioner's Guide,* 2nd ed. at 679, (Kluwer Law International 2018).	¶40
Neumayer/Ming	Karl H. Neumayer & Catherine Ming, *Convention de Vienne sur le contrats de vente internationale de marchandises: Commentaire, Lausanne,* art. 41 ¶4 (1993).	¶118
Niggemann	Friedrich Niggemann, *Die Pflichten des Verkäufers und die Rechtsbehelfe des Käufers*, in Hans Hoyer & Willibald Posch (Eds.), *Das Einheitliche Wiener Kaufrecht, Wien* 92 et seq. (1992).	¶115
Otto	Dirk Otto & Omaia Elwan, *Article V(2)*, in Herbert Kronke, Patricia Nacimiento et al. (eds.), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* at 345 – 414 (Kluwer Law International 2010).	¶64

Paulsson	Jan Paulsson & Georgios Petrochilos, *UNCITRAL Arbitration Rules, Section III, Article 17 [General provisions]*, In UNCITRAL Arbitration at 140, (Kluwer Law International 2017).	¶13
Pharmaceutical Development	Dr. Robert Handfield, *Risk Management in Contract Pharmaceutical Development: Contract Research Part 2*, Supply Chain Resource Cooperative. Available at: https://scm.ncsu.edu/scm-articles/article/contract-management-research-part-ii-risk-management-in-contract-pharmaceutical-development	¶91
Pierre	Pierre Lalive, *On the Transfer of Seat in International Arbitration,* in *Law and Justice in a Multistate World, Essays in Honor of Arthur T. von Mehren*, 515 (2002).	¶¶57,58
Primak	S. Primak, *Computer Software: Should the U.N. Convention on Contracts for the International Sale of Goods Apply? A Contextual Approach to the Question* 11 COMP. L. J. 197, 217 (1991).	¶100
RAC's Online System	Russian Arbitration Centre's Online System of Arbitration Available at: https://my.centerarbitr.ru/landing/?locale=en	¶69
Rauda	Christian Rauda and Guillaume Etier, *Warranty for Intellectual Property Rights in the International Sale of Goods.* Available at:	¶¶115,118,121 ,128

	https://www.cisg.law.pace.edu/cisg/biblio/raudaetier2.html#36	
Ritz	Philipp Ritz, *Privacy and Confidentiality Obligation on Parties in Arbitration under Swiss Law*, 27 J. INT'L ARB. 239-240 (2010).	¶26
Sanche S	S. Sanche, Y. Lin, C. Xu, E. Romero-Severson, N. Hengartner & R. Ke, *High Contagiousness and Rapid Spread of Severe Acute Respiratory Syndrome Coronavirus 2*, 26(7) EMERGING INFECTIOUS DISEASES 1470-1477 (2020). Available at: https://wwwnc.cdc.gov/eid/article/26/7/20-0282_article	¶120
SCC Platform	SCC's Case management platform for arbitration. Available at: https://sccinstitute.com/media/1736163/scc-platform-guidelines.pdf	¶69
Schramm	Dorothee Schramm, *Chapter 3, Part II: Commentary on the Swiss Rules, Article 4 (Consolidation and joinder)*, in Arroyo (ed.), *Arbitration in Switzerland: The Practitioner's Guide,* 2nd ed. at 492, 494, 496, 497, 498, 499 & 500 (Jan 2018).	¶¶2,7,9,10,11, 24,31
Scherer	Prof. Dr. Maxi Scherer, *Remote Hearings in International Arbitration: An Analytical Framework,* 37(4) J. INT'L ARB. 2020.	¶¶62,64

Schlechtriem	Peter Schlechtriem, *Requirements of Application and Sphere of Applicability of the CISG,* 2005(4) Victoria University of Wellington Law Review 781-794 (2005). Available at: https://www.cisg.law.pace.edu/cisg/biblio/schlechtriem9.html#iii	¶¶118, 124, 128, 132
Schlechtriem/ Schwenzer	Peter Schlechtriem & Ingeborg Schwenzer, *Commentary on the UN Convention on the International Sale of Goods,* (Oxford University Press Publishing 2010).	¶¶74, 76, 78, 82, 87, 89, 92, 94, 98, 102, 103, 111, 118, 124, 131, 132, 140
Schroeter	Ulrich G. Schroeter, *Vienna Sales Convention: Applicability to "Mixed Contracts" and Interaction with the 1968 Brussels Convention,* 5 VINDOBONA J. INT'L COM. L. ARB. 74-86 (2001). Available at: https://www.cisg.law.pace.edu/cisg/biblio/schroeter1.html	¶¶84,103
Schwenzer/Tafur	Dr. Ingeborg Schwenzer, Julian Ranetunge & Fernando Tafur, *Service Contracts and the CISG*, 10 INDIAN J. INT'L ECO. L. 178. Available at: http://docs.manupatra.in/newsline/articles/Upload/0ae992cb-6e31-4692-8636-aa2f2b334644.pdf	¶103
Schwerha	Joseph J. Schwerha IV, *Warranties against Infringement in the Sale of Goods: A Comparison of U.C.C. § 2-312(3) and*	¶¶113,118

	Article 42 of the U.N. Convention on Contracts for the International Sale of Goods, 16 MICHIGAN J. INT'L L. 441-483 (1995). Available at: https://www.cisg.law.pace.edu/cisg/biblio/schwerha.html	
Seoul Protocol	Seoul Protocol on Video Conferencing in International Arbitration. Available at: http://www.kcabinternational.or.kr/user/Board/comm_notice_view.do?BBS_NO=548&BD_NO=169&CURRENT_MENU_CODE=MENU0025&TOP_MENU_CODE=MENU0024	¶54
Shackleton	R. Shackleton, *The Place or 'Seat' of Arbitration (Possibility, and/or Sometimes Necessity of its Transfer?) – Some Remarks on the Award in ICC Arbitration n° 10'623*, 21 ASA BULLETIN 1/2003 (MARS).	¶59
Shinn	Allen Shinn, *Liabilities Under Article 42 of the U.N. Convention on the International Sale of Goods,* 2 MINNESOTA J. GLOBAL TRADE 115-142 (1993). Available at: https://www.cisg.law.pace.edu/cisg/biblio/shinn.html	¶128
Smith	Gordon Smith, *Comparative Analysis of Joinder and Consolidation Provisions Under Leading Arbitral Rules in Journal of International Arbitration*, 35 J. INT'L ARB. 179 (2018).	¶31

Sono	Hiroo Sono, *The Applicability and Non-Applicability of the CISG to Software Transactions* in Camilla B. Andersen & Ulrich G. Schroeter (eds.), *Sharing International Commercial Law across National Boundaries: Festschrift for Albert H. Kritzer on the Occasion of his Eightieth Birthday* at 512-526, (Wildy, Simmonds & Hill Publishing 2008). Available at: https://www.cisg.law.pace.edu/cisg/biblio/sono6.html	¶98
Staudinger/Magnus	U Magnus, *Julius von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen: Wiener UN-Kaufrecht (CISG)*, (Sellier/de Gruyter, Berlin 1999).	¶¶74,78,84,87, 118
Strong	SI Strong, *Intervention and Joinder As of Right in International Arbitration: An Infringement of Individual Contract Rights or A Proper Equitable Measure?*, 31 VAND. J. TRANSNAT'L L. 317 (1998).	¶4
Trakman	Leon Trakman, *Confidentiality in International Commercial Arbitration*, 18 ARB. INT'L 11,12 (2002).	¶26
Vida	Vida, *Garantie du vendeur et propriété industrielle: les 'vices juridiques' dans la vente internationale de marchandises (convention de Vienne)*, REVUE TRIMESTRIELLE DE DROIT COMMERCIAL ET DE DROIT ÉCONOMIQUE 21-36 (1994).	¶115

VanDuzer	Anthony VanDuzer, *A seller's Responsibility for Third-Party Intellectual Property Claims: Are the UN Sales Convention Rules Better?,* 4 CAN. INT'L LAWYER 187, 192 (2001).	¶125
Voser	Nathalie Voser, *Multi-Party Disputes and Joinder of Third Parties*, in *Fifty Years of the New York Convention: ICCA International Arbitration Conference* at 349, 350, 372, 373, 396, (Kluwer Law International, 2009).	¶¶7,10,24,34
Wahab	Mohamed S. Abdel Wahab, *ODR and e-Arbitration - Trends & Challenges*, in Mohamed Abdel Wahab/Ethan Katsh/Daniel Rainey (eds.), *Online Dispute Resolution Theory and Practice*, at 399-441, (International Eleven Publishing 2012).	¶62
Waincymer I	Jeffrey M. Waincymer, *Online Arbitration* 9(1) INDIAN J. ARB. L. (2020).	¶¶41,42,58
Waincymer II	Jeffrey M. Waincymer, *Part II: The Process of an Arbitration, Chapter 6: Establishing the Procedural Framework*, at 383-493 and *Chapter 13: Procedure and Evidence in Choice of Law and Interpretation*, at 977-1094, in *Procedure and Evidence in International Arbitration*, (Kluwer Law International 2012).	¶¶57,58
Wharton Feb 10, 2011	*Profits and Social Responsibility: Chastened Drug Makers Step Up Efforts to Bring Affordable Medicines to Poor Countries,*	¶120

	The Wharton School, University of Pennsylvania, Feb.10, 2011. Available at: https://knowledge.wharton.upenn.edu/article/profits-and-social-responsibility-chastened-drug-makers-step-up-efforts-to-bring-affordable-medicines-to-poor-countries/	
Summers	James White & Robert S. Summers, *Uniform Commercial Code*, 2nd ed., at 363 (1980).	¶125
WHO Int'l	Accelerating a safe and effective COVID-19 vaccine. Available at: https://www.who.int/emergencies/diseases/novel-coronavirus-2019/global-research-on-novel-coronavirus-2019-ncov/accelerating-a-safe-and-effective-covid-19-vaccine	¶120
Wilske	Stephan Wilske, *Arbitration Guerrillas at the Gate: Preserving the Civility of Arbitral Proceedings when the Going Gets (Extremely) Tough*, in Nikolaus Pitkowitz, Alexandre Petsche et al. (eds.), *Austrian Yearbook on International Arbitration 2011*, at 315-334, (Manz'sche Verlags- und Universitätsbuchhandlung 2011).	¶70
WIPO e-ADR Docket	WIPO eADR online docket system Available at: https://www.wipo.int/amc/en/eadr/index.html	¶69

Zamir	Eyal Zamir, *Toward a General Concept of Conformity in the Performance of Contracts*, 52 LOUISIANA L. REV. 77 (1991). Available at: https://digitalcommons.law.lsu.edu/cgi/viewcontent.cgi?article=5332&context=lalrev	¶134
Zeller	Bruno Zeller, *Intellectual Property Rights & The CISG Article 42.*	¶121
Zuberbüehler I	Tobias Zuberbühler, Christoph M Müller & Philipp A Habeggar, *Swiss Arbitration Rules: A commentary, Introductory Rules: Consolidation of Arbitral Proceedings (Joinder), Participation of Third Parties (Art. 4)*, in *Swiss Rules of International Arbitration: Commentary*, 2nd ed. at 42, 44, 331 (2005), (Kluwer Law International 2005).	¶¶7,29,31
Zuberbüehler II	Tobias Zuberbuehler, *Arbitral Proceedings: Seat of the Arbitration (Art. 16)*, in Tobias Zuberbuehler , Klaus Muller et al., *Swiss Rules of International Arbitration: Commentary*, at 151-158, (Kluwer Law International 2005).	¶58

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ICC 3879/1984	1984 ICC Case No. 3879 (Interim Award) in Yearbook Commercial Arbitration 1986 - Volume XI pp.127-134	¶14
ICC 7920/1993	1993 ICC Case No. 7920 (Partial Award) in Yearbook Commercial Arbitration 1998 - Volume XXIII pp.80-85	¶21
ICC 7331/1994	1994 ICC Case No. 7331 Available at: https://cisgw3.law.pace.edu/cases/947331i1.html	¶115
ICC 7453/1994	1994 ICC case No. 7453 Final Award in ICC Case No.7453 of 1994 (unpublished) Collection of ICC Arbitral Awards, 1996-2000, p.94 Available at: https://jusmundi.com/en/document/decision/en-m-c-corporation-v-erwin-behr-bmbh-company-kg-and-dr-heinz-etzel-award-tuesday-1st-march-1994	¶34
ICC 7660/1994	1994 ICC Case No. 7660 Available at: https://cisgw3.law.pace.edu/cases/947660i1.html	¶82
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ICC 7929/1995	1995 ICC Case No. 7929 (Interim Award) in Yearbook Commercial Arbitration 2000 - Volume XXV pp.312-323	¶4
ICC 10623/2001	2001 ICC Case No. 10623/AER/ACS Salini Costruttori S.P.A. v. The Federal Democratic Republic of Ethiopia, Addis Ababa Water and Sewerage Authority Available at: https://jusmundi.com/en/document/decision/en-salini-costruttori-s-p-a-v-the-federal-democratic-republic-of-ethiopia-addis-ababa-water-and-sewerage-authority-award-friday-7th-december-2001	¶58
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	https://www.italaw.com/sites/default/files/case-documents/ita0378.pdf	
ICSID ARB/07/29 Award	2012 SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay Available at: https://www.italaw.com/sites/default/files/case-documents/italaw1525.pdf	¶49

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PCA 2018-39	The Estate of Julio Miguel Orlandini-Agreda and Compañía Minera Orlandini Ltda. v. Bolivia, PCA Case No. 2018-39	¶55

Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry

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	Himpurna California Energy Ltd. v. Republic of Indonesia (Interim Award and Final Award) in Yearbook Commercial Arbitration 2000 - Volume XXV pp. 109-215	

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	https://jade.io/article/725897	
Capic Case	2020 Capic v. Ford Motor Company of Australia Limited (Adjournment), [2020] FCA 486 at ¶27 Available at: https://jade.io/article/725605	¶55
Esso Case	1995 Esso Australia Resources Ltd. v. Plowman, [1995] HCA 19 In Expert Report of Dr. Julian D.M. Lew at 285	¶26
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Chaval Case	2006 Chaval v. Liebherr Recurso Especial No. 653.733-RJ 2004/0102276-0	¶15

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	Available at: http://www.newyorkconvention.org/11165/web/files/document/1/6/16827.pdf	
Rhéaume Case	2010 Rhéaume v. Société d'Investissements L'Excellence Inc. [2010] QCCA 2269 (Québec Ct. App.), at ¶61 Available at: https://www.mcgill.ca/arbitration/files/arbitration/RheaumeCA.pdf	¶45

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Footware Case	2002 Société T diffusion v. Société M SL Cour de Cassation, Case No. T 00-14.414, Arrêt no. 526 F-P Available at: https://cisgw3.law.pace.edu/cases/020319f1.html	¶¶132,134
Stave Case	2009 Société Anthon GmbH & Co. v. SA Tonnellerie Ludonnaise Cour de Cassation Case No: Pourvoi no. T 08-12.399 Available at: https://cisgw3.law.pace.edu/cases/091103f1.html	¶78

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Shoes Case	1991 Oberlandesgericht Frankfurt No. 5 U 164/90	¶84

	Available at: https://cisgw3.law.pace.edu/cases/910917g1.html	
Société Case	2000 Société Ma... R.A.S. v. S.A. T... Diffusion Courd'appel Rouen Case No. 1998/710 Available at: https://cisgw3.law.pace.edu/cases/000217f1.html	¶136
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Axis Bank Case	2017 Axis Bank Ltd. v M/S NiccoUco Alliance Credit Ltd. Madras High Court O.P. No. 470/2017 Available at: https://www.casemine.com/judgement/in/5acdea2918a6816040127d30	¶49
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Glencore Case	2003 Glencore Grain Limited (UK) v. Sociedad Ibérica de Molturación, S.A. (Spain) Tribunal Supremo (Supreme Court) Case No. 16508/2003	¶34
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	Available at: https://cisgw3.law.pace.edu/cases/010727u1.html	
Empresa Case	2000 Empresa Constructora Contex Limitada v. Iseki 106 F. Supp. 2d 1020, 1026 (S.D.Cal.2000) Available at: https://law.justia.com/cases/federal/district-courts/FSupp2/106/1020/2510700/	¶45
Gasoline Case	2003 BP International, Ltd. and BP Exploration & Oil, Inc. v. Empresa Estatal Petroleos de Ecuador and Saybolt, Inc. Available at: https://cisgw3.law.pace.edu/cases/030611u1.html	¶¶76,78
Generica Ltd. Case	1997 Generica Ltd v. Pharm. Basics, Inc. 125 F.3d 1123, 1129-30 (7th Cir. 1997)	¶64
Grundstad Case	1997 Grundstad v. Ritt, 106 F.3d 201	¶15
Headwear Case	2007 Guang Dong Light Headgear Factory Co., Ltd. v. ACI International, Inc. Available at: https://cisgw3.law.pace.edu/cases/070928u2.html	¶87
Intertec Case	2001 Intertec Contracting A/S v. Turner Steiner Int'l SA, 2000 WL 709004 (S.D.N.Y.)	¶15
Medinol Case	2004	¶82

	Medinol Ltd. v. Boston Scientific Corp., 346 F. Supp. 2d 575 (S.D.N.Y. 2004) Available at: https://casetext.com/case/medinol-ltd-v-boston-scientific-corp	
Naptha Case	2005 Valero Marketing & Supply Company v. Greeni Oy & Greeni Trading Oy Available at: https://cisgw3.law.pace.edu/cases/050615u1.html	¶78
Pennzoil Case	1998 Pennzoil Exploration & Prod. Co. v. Ramco Energy Ltd, 139 F.3d 1061, 1068 (5th Cir. 1998)	¶23
Pharmaceutical Ingredients Case	2005 Genpharm Inc. v. Pliva-Lachema A.S., Pliva d. Available at: https://cisgw3.law.pace.edu/cases/050319u1.html	¶¶74,82
R&D Case	2016 *Research & Dev. Ctr. "Teploenergetika," LLC v. EP Int'l, LLC*, 182 F. Supp. 3d 556, (E.D. Va. 2016) Available at: https://casetext.com/case/research-dev-ctr-teploenergetika-llc-v-ep-intl-llc	¶49
Skivolocki case	1974 Skivolocki v. East Ohio Gas Co., 38 Ohio St. 2d 244, 313 N.E.2d 374 Available at: https://casetext.com/case/skivolocki-v-east-ohio-gas-co	¶57

Sunwear Case	2008 Pac. Sunwear of Cal, Inc. v. Olaes Enterprises, Inc. 167 Cal. App. 4th 466 (2008), p. 478 Available at: https://casetext.com/case/pacific-sunwear-v-olaes-enterprises/case-details?PHONE_NUMBER_GROUP=C	¶132
Toluene Case	2011 Hanwha Corporation v. Cedar Petrochemicals, Inc., U.S. District Court, Southern District of New York Case No:09 Civ. 10559 (AKH) Available at: https://cisgw3.law.pace.edu/cases/110118u1.html	¶87,89
Tracy Case	1822 Tracy v. Wood, United States Circuit Court for the District of Rhode Island, 24 F. Cas. 117, 3 Mason 132, Case No. 14,130. Available at: https://cite.case.law/f-cas/24/117/	¶125
Williams Case	2012 Williams v. Nat'l Football League, WL 2366636 (D. Colo.) aff'd, 2012 WL 3642839 (10th Cir.)	¶45

INDEX OF LEGAL SOURCES AND INSTITUTIONAL MATERIALS

ABBREVIATION	CITATION
A/CN.9/216	Report of the Working Group on the International Contract Practices on the Work of its Third Session, United Nations Commission on International Trade Law Fifteenth Session (1982) U.N. Doc. A/CN.9/216 ¶37
A/CN.9/264	Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration (1985) U.N. Doc. A/CN.9/264
A/CN.9/619	Report of the Working Group on Arbitration and Conciliation on the work of its forty-sixth session (2007) U.N. Doc. A/CN.9/619 ¶122
A/CN.9/669	UNCITRAL Report of Working Group II (Arbitration and Conciliation) on the work of its fiftieth session (2009) U.N. Doc. A/CN.9/669
ACICA Guidance Note	Australian Centre for International Commercial Arbitration Online Arbitration Guidance Note. Available at: https://acica.org.au/wp-content/uploads/2020/05/ACICA-Online-Arbitration-Guidance-Note.pdf
Africa Protocol	CIArb Guidance Note on Remote Dispute Resolution Proceedings (CIArb Guidance Note) Africa Arbitration Academy Protocol on Virtual Hearings in Africa Available at: https://www.ciarb.org/media/8967/remote-hearings-guidance-note.pdf

ALI/UNIDROIT P-3A	ALI/UNIDROIT Transnational Civil Procedure (2004), Comment P-3A
Hague Conference	The Hague Conference guide to good practice on the use of video-link under the 1970 Hague Evidence Convention (April 16, 2020) Available at: https://assets.hcch.net/docs/569cfb46-9bb2-45e0-b240-ec02645ac20d.pdf
HKIAC Guidance	HKIAC Guidance for Virtual Hearings Available at: https://www.hkiac.org/sites/default/files/ck_filebrowser/HKIAC%20Guidelines%20for%20Virtual%20Hearings_3.pdf
IBA Commentary	Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration 1999 IBA Working Party & 2010 IBA Rules of Evidence Review Subcommittee Available at: https://www.ibanet.org/Document/Default.aspx?DocumentUid=DD240932-0E08-40D4-9866-309A635487C0
ICC Commission Report	ICC Commission Report on Information Technology in International Arbitration, (2017) p.4 §1.2 Commission on Arbitration and ADR Available at: https://iccwbo.org/content/uploads/sites/3/2017/03/icc-information-technology-in-international-arbitration-icc-arbitration-adr-commission.pdf
ICC Guidance Note	ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic (April 9 2020) Available at: Https://iccwbo.org/publication/icc-guidance-note-on-possible-measures-aimed-at-mitigating-the-effects-of-the-covid-19-pandemic/

ICC Note	ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration (January 1 2019) p. 12, ¶77 Available at: https://iccwbo.org/content/uploads/sites/3/2017/03/icc-note-to-parties-and-arbitral-tribunals-on-the-conduct-of-arbitration.pdf
ICCA-NYC Protocol	ICCA-NYC Bar-CPR Cybersecurity Protocol for International Arbitration (2020) Available at: http://documents.nycbar.org/files/ICCA-NYC-Bar-CPR-Cybersecurity-Protocol-for-International-Arbitration-Electronic-Version.pdf
LegalTech Adoption Protocol	Protocol for Online Case Management in International Arbitration By the Working Group on LegalTech Adoption in International Arbitration (November 2020) Available at: https://www.lw.com/thoughtLeadership/protocol-online-case-management-international-arbitration
PICC Commentary	International Institute for the Unification of Private Law (UNIDROIT), Official Comments on Articles of the 2016 UNIDROIT Principles Available at: https://www.unidroit.org/english/principles/contracts/principles2016/principles2016-e.pdf
SCAI Rules	Swiss Rules of International Arbitration (2012)
SCAI Flyer	Available at: Https://www.swissarbitration.org/files/436/Flyers/SCAI_flyer_englisch_A5_27-05-2016_web.pdf

Secretariat Commentary	Commentary on the Draft Convention on Contracts for the International Sales of Goods, prepared by CISG Secretariat (1978)
Secretariat Note (38th session)	Possible future work in the field of electronic contracting: an analysis of the United Nations Convention on Contracts for the International Sale of Goods 38th Session (March 12-23, 2001). U.N. Doc. A/CN.9/WG.IV/WP.91
Secretariat Report (39th session)	Report of the UNCITRAL Working Group on Electronic Commerce 39th session, (March11-15, 2002) U.N. Doc. A/CN.9/509, ¶21
Trans-Lex Principles	Principles on Transnational Law, No. IV.5.4 Available at: https://www.trans-lex.org/926000
UNCITRAL Digest	Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods (2012)
UNCITRAL Records	United Nations Conference on Contracts for the International Sale of Goods, Vienna (March 10- April 11 1980) Official Records, Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committee, 1981 p.17 Available at: https://www.uncitral.org/pdf/english/texts/sales/cisg/a-conf-97-19-ocred-e.pdf
UNCTAD	5.2 The Arbitration Agreement, Dispute Settlement (2005), p. 16 United Nations Conference on Trade and Development Available at: Https://unctad.org/system/files/official-document/edmmisc232add39_en.pdf

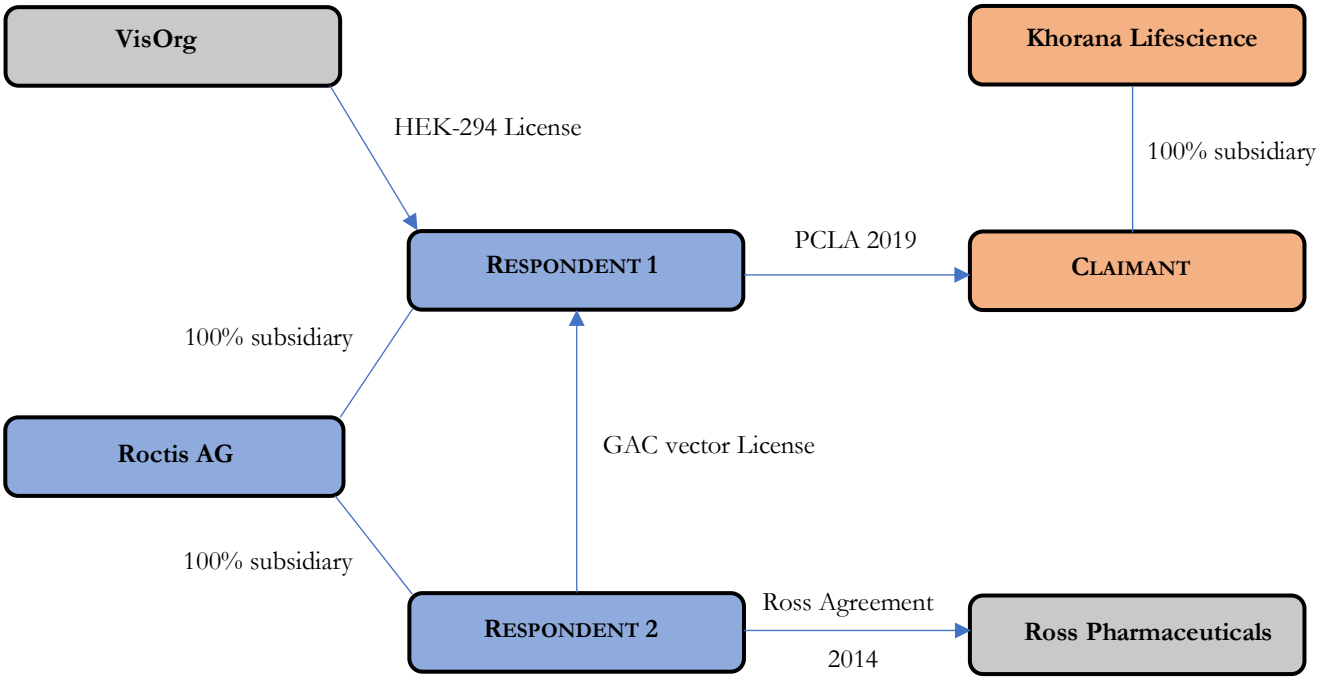
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts 2010
Yearbook	Yearbook, United Nations Commission on International Trade Law Volume XII: 1981 (1983), p. 78 ¶17 U.N. Doc. A/eN. 9/SER.A/ 1981

STATEMENT OF FACTS

RespiVac Plc ["**CLAIMANT**"] is a start-up biopharmaceutical company engaged in the development of vaccines for respiratory diseases caused by viruses. CamVir Ltd ["**RESPONDENT 1**"] is the contract manufacturing organization of the Roctis Group engaged in the production of pharmaceutical base materials for various vaccines and drugs. VectorVir Ltd ["**RESPONDENT 2**"], founded in 2012 as a small start-up and acquired by Roctis AG on August 25, 2018 is the owner of the patent for GorAdCam viral vector ["**GAC vector**"] and ChAdCam vector ["**CAC vector**"]. RESPONDENT 1 and RESPONDENT 2 are both 100% subsidiaries of Roctis AG.

Aug. 2018	RESPONDENT 2, owner of patents for GAC and CAC vectors, is acquired by Roctis AG. RESPONDENT 1 and RESPONDENT 2, both, become 100% subsidiaries of Roctis AG.
June 15, 2014	RESPONDENT 2 enters into the Collaboration and License Agreement ["**Ross Agreement**"] for the grant of an exclusive license for the use of GAC vector for the production and development of vaccine in the field of "malaria and related infectious diseases".
Aug. 2018	RESPONDENT 1 and RESPONDENT 2 ["**RESPONDENTS**"] enter into an agreement for exclusive license for the production, sale and sub-licensing of GAC vector for all applications with the exception of malaria.
End of 2018	RESPONDENT 1 and Ross Pharmaceuticals acquire license for the production of HEK-294 cells from VisOrg and proceeds to develop a growth medium necessary for the proliferation of cell lines.
Jan. 1, 2019	PARTIES enter into PCLA for the delivery and the use of GAC vectors in the research, development and subsequent production of a vaccine against respiratory diseases.
Feb. 2020	CLAIMANT concentrates its further research on COVID-19.
May 1, 2020	CLAIMANT is informed of the dispute between Ross Pharmaceuticals and RESPONDENT 2 as to the scope of the Ross Agreement and their divergent interpretations with regard to Ross Pharmaceuticals' right to conduct research into vaccines against COVID-19.
May 2, 2020	CLAIMANT contacts RESPONDENT 1 to clarify the situation
May 4, 2020	RESPONDENT 1 claims that the Ross Agreement is limited to the use of GAC vector for research into malaria.

June 2020	CLAIMANT discovers that discussions between RESPONDENTS and Ross Pharmaceuticals about the scope of the licence is ongoing.
June 15, 2020	CLAIMANT submits Notice of Arbitration, requesting a declaration of RESPONDENTS breach of contractual obligations.
Aug. 14, 2020	RESPONDENTS submit the Answer to the Notice of Arbitration, additionally requesting for the joinder of Ross Pharmaceuticals to the present arbitral proceedings.
Sept. 4, 2020	The duly constituted Tribunal informs the PARTIES of Ross Pharmaceuticals' unwillingness to join the arbitral proceedings. Further, the Tribunal requests PARTIES to inform of any objections against the virtual conduct of hearings.
Oct. 2, 2020	CLAIMANT objects to Ross Pharmaceuticals' joinder and agrees to the conduct of virtual hearings. RESPONDENTS object to the conduct of hearings virtually, especially if they involve the taking of evidence.
Oct. 9, 2020	The Tribunal issues P.O.1, framing the issues to be addressed in the forthcoming hearings between March 14, 2021 and March 20, 2021.



ARGUMENTS ADVANCED

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

1. The present arbitration arises under §14 of PCLA between CLAIMANT and RESPONDENT 1. Under art. 4(2) Swiss Rules, RESPONDENTS have requested for joinder of a third person, Ross Pharmaceuticals, to the proceedings, to conclusively deal with the issues contended herein [*Answer ¶22*]. RESPONDENTS contend that Ross Pharmaceuticals should be joined due to identical arbitration clauses in PCLA and Ross Agreement [*Id.*]. Additionally, RESPONDENTS contend that PARTIES have consented to a joinder by their agreement to arbitrate under the Swiss Rules [*Id.*].

2. The tribunal may permit a joinder after taking into consideration, the "relevant circumstances" and consultation with all the parties, particularly the one to be joined [*Habeggar p.279*; *Schramm p.492*]. These relevant circumstances include, *inter alia*, the objection of the third party to the proposed joinder, the legitimate interests of signatory parties, the likelihood of separate proceedings and need for procedural efficiency [*Schramm p.500*]. Additionally, on consultation, the tribunal must reconsider the joinder on the objection of the non-requesting party [*Hunter/Redfern p.91; Schramm p.499*] and the third person [*Schramm pp.497-498*]. In light of the objection of the third person, any joinder must be effectuated only if they have consented to the agreement as a signatory or as a non-signatory [*Id. p.497*]. Considering the non-requesting party's objection, the legitimate interests of signatory parties must be considered, and a joinder may be permitted where the balance of interests is clearly in favour of the joinder [*Id. pp.499-500*].

3. *In casu*, owing to objections of CLAIMANT and Ross Pharmaceuticals, CLAIMANT submits that the proposed joinder is inconsistent with the principle of consent in arbitration **[A]**. Further, the presence of identical arbitration clauses in PCLA and Ross Agreement do not qualify as consent to the joinder **[B]**. Additionally, the balance of legitimate interests of PARTIES is not in favour of joinder **[C]**. Consequently, the joinder can render the Tribunal's award unenforceable **[D]**.

A. PARTIES have not consented to arbitrate with Ross Pharmaceuticals

4. Arbitration is a creature of contract and derives its mandate and scope from the arbitration agreement to which the parties have consented [*Lew p.100; Born p.226; ICC 7929/1995 ¶15; Strong p.917; Nejapa Power Co. Case ¶3(a)*]. Consent to the execution of an agreement from a contractual party can be express or implied through their conduct or non-explicit declarations [*Born p.1427; Hunter/Redfern ¶91*]. In the present matter, the Tribunal should not permit joinder as PARTIES did not expressly **[1]** or implicitly **[2]** consent to add a third party to PCLA or any dispute thereunder.

1. PARTIES did not expressly consent to add Ross Pharmaceuticals to PCLA

5. The parties to an arbitration agreement are those that formally sign and execute the agreement, which can also be evidenced from the recitals [*Born p.1410*]. In the present matter, PARTIES did not intend to add Ross Pharmaceuticals to PCLA, as evidenced from its language [*Cl. Ex. C3 §2*]. Hence, PARTIES never expressly consented to adding Ross Pharmaceuticals as a party to PCLA.

2. PARTIES did not implicitly consent to add Ross Pharmaceuticals to PCLA

6. CLAIMANT submits that PARTIES did not consent to add any third party to PCLA, evident from their conduct **[a]**. Further, they have not consented to add a third party to a dispute arising from PCLA by agreeing to arbitrate under the Swiss Rules **[b]**.

a. PARTIES did not implicitly consent to add Ross Pharmaceuticals to PCLA through conduct

7. Under art. 4(2) Swiss Rules, a joinder can be permitted on the request of either party [*Schramm p.494*]. However, if the third person objects, they should be joined only if they are a formal signatory or if the agreement can be extended to them as a non-signatory [*Id. pp.497-498; Habeggar p.280*], through their implicit consent to be bound by the agreement [*FSC 2001; FSC 2003; Titan Unity Case; Zuberbühler I p.42*]. In this regard, implicit consent is evidenced through their conduct vis-à-vis their predominant role in the conclusion and/or performance of the contract [*Hanotiau ¶195-196; Voser p.372-3; FSC 2003; Zuberbühler I p.42*]. This can be read from the context and the objective circumstances, i.e. through the documents and communication exchanged between the parties [*Titan Unity Case ¶35; International Research Corp Case; Amkor Technology Case*].

8. *In casu*, Ross Pharmaceuticals has objected to joinder [*Letter Prof. Sinoussi, Sept. 4*]. Besides not having signed the arbitration agreement [*Cl. Ex. C3*], it did not take part in the negotiations between PARTIES or in the performance of PCLA. In fact, its interests are diametrically opposite to that of CLAIMANT'S, as evident from the inclusion of Purchase Obligation in PCLA [*Cl. Ex. C3 §16*]. Hence, PARTIES never implicitly consented to adding Ross Pharmaceuticals to PCLA.

b. PARTIES did not implicitly consent to add Ross Pharmaceuticals by agreeing to arbitrate under the Swiss Rules

9. RESPONDENTS assert that agreeing to arbitrate under the Swiss Rules is tantamount to giving implicit consent to the proposed joinder [*Answer ¶22; Schramm p.497*]. Contrarily, in light of CLAIMANT's objection, the Tribunal must not deem this as *ex ante* consent to a joinder as it would result in a forced joinder **[i]** and such a forced joinder is not permitted under the Swiss Rules **[ii]**.

i. Enforcing *ex ante* consent to joinder would result in a forced joinder

10. Contrary to RESPONDENTS' assertion [*Answer ¶22*], CLAIMANT contends that the wide discretion of a tribunal to join third persons [*Swiss Rules art.4; Brunner p.251; Schramm p.497*] is a procedural

power to effect joinder as per the consent of the parties and not a default jurisdictional basis over a third person [*Astro case* ¶*170; Habeggar p.280; Schramm p.496*]. Where the tribunal uses this discretion to join a third person against the will of the parties, it would amount to a forced joinder [*Astro case* ¶*176; Habeggar p.280; Voser p.396*]. In the present case, in light of CLAIMANT'S objection [*Letter Joseph Langweiler, Oct. 2*], joining Ross Pharmaceuticals would amount to a forced joinder.

11. In any event, the tribunal's discretion can be exercised, in light of an objection, *only* if the non-requesting party could have foreseen the requesting party's potential interest in joining a third person for the resolution of the subject of the dispute at the time of contracting [*Schramm p.*499].

12. CLAIMANT was not aware of Ross Agreement or Ross Pharmaceuticals' claim at the time of contracting. CLAIMANT could not have known of the dealings of Ross Pharmaceuticals as PCLA was concluded with RESPONDENT 1 and CLAIMANT never had any direct business dealings with Ross Pharmaceuticals [*P.O.2* ¶*13*]. Further, the Biopharma Science article mentioning Ross Pharmaceuticals' claim was brought to the notice of CLAIMANT only in 2020 [*Cl. Ex. C5; Infra IV(C)(1)*]. Hence, enforcing *ex ante* consent would amount to a forced joinder, violative of consent.

ii. A forced joinder is not permitted under the Swiss Rules

13. A tribunal may permit a forced joinder *only* if the rules unambiguously and explicitly provide for it, as it otherwise violates consent [*Astro case* ¶*177; Born II p.235; Meier p.127*]. SCAI, in 2012, specifically included the word "consultation" with *all* the parties before joining a third person to the proceedings. This signifies the intention to consider and give weight to any objections by the parties or presents ambiguity vis-à-vis the extent of this consultation [*Habeggar p.279*]. Further, the UNCITRAL Rules, as amended in 2010, which serve as the basis for the Swiss Rules, do not provide for the joining of non-parties to the agreement as it would run counter to the "fundamental principle of consent of parties in arbitration" [*A/CN.9/619* ¶*122; Paulsson p.140*]. Hence, the Swiss Rules do not explicitly and unambiguously permit a forced joinder.

B. The presence of identical arbitration clauses in PCLA and Ross Agreement do not qualify as consent to joinder

14. RESPONDENTS contend that due to identical arbitration clauses in PCLA and Ross Agreement, Ross Pharmaceuticals should be joined [*Answer* ¶*22*]. On the contrary, CLAIMANT submits that the mere existence of identical arbitration clauses is not sufficient to justify a joinder [*Milan Chamber Award; ICC 7893/1994* ¶*47-48; Born p.1374*]. Rather, parties must intend to make an indivisible and whole transaction [*American Centennial Insurance Co. Case p.108; ICC 3879/1984; Hanotiau* ¶*204-5*]. Accordingly, PARTIES did not intend to enter into a single economic transaction **[1]**, and this cannot be overcome by relying on the standard arbitration clause in the relevant agreements **[2]**.

1. There was no intention to conclude a single economic transaction

15. Intention to enter into a single economic transaction is read from the relationships between, *first*, the agreements and, *second*, the parties involved [*Bond p.41*]. The agreements should constitute a "single multilateral contract" and to that end, they must be "connected" and intertwined with a "common subject matter" [*Milan Chamber Award; SFT 2008 ¶¶8-9; Chaval Case*]. The agreements would be connected if it is clear from the terms that they constitute the whole agreement between the parties [*Pertamina Case; Grundstad Case; Intertec Case*], and they have interdependent and reciprocal obligations [*Leboulanger p.47; International Research Corp Case*]. The obligations are reciprocal where the non-performance by one party could entail the suspension or termination of obligation by the other party [*Leboulanger p.48*].

16. Presently, the obligations arising out of PCLA and Ross Agreement are not connected as they are not intended to constitute a single contract between PARTIES. From the text, it is clear that they are intended to be two different transactions, i.e. PCLA is for infectious and non-infectious respiratory diseases between CLAIMANT and RESPONDENT 1[*Cl. Ex. C3 §2*] and Ross Agreement is for malaria and related infectious diseases between Ross Pharmaceuticals and RESPONDENT 2 [*Res. Ex. R3 §2*]. Accordingly, the agreements are not aimed at a common subject matter. Additionally, PCLA encloses a Purchase Obligation [*Cl. Ex. C3 §16*] for commercialization of the vaccine unlike Ross Agreement, pointing to latter being for research collaboration.

17. Further, the parties to PCLA do not hold any obligations or derive benefits from Ross Agreement and vice versa. There have been no references made in either agreement towards the other and moreover, they were entered into five years apart. Further, Respondent 2 had entered into Ross Agreement to fund its research on respiratory diseases using CAC vector [*Cl. Ex. C1*] while PCLA was concluded for CLAIMANT's research on respiratory diseases using GAC vector [*Cl. Ex. C3*]. Accordingly, the attending circumstances of the two agreements were also different.

18. In the *Milan Chamber Case*, the Tribunal noted that to constitute a single contract, the agreements should ideally be entered into by the same parties [*Milan Chamber Case pp.192-193*] and alternatively, there must exist a valid arbitration agreement between at least one of the parties to the contract and the third party to permit a joinder [*Id. p.193*]. In fact, SCAI has also ordered consolidation of proceedings only in cases where the parties were the same and where different, they all belonged to the same group of companies on each side [*SCAI Newsletter -1/2015 p.2*].

19. In the instant case, PCLA and Ross Agreement have been entered into by different parties [*Res. Ex. R3; Cl. Ex. C3*] and neither of the parties to PCLA have an agreement with Ross Pharmaceuticals. RESPONDENT 2 has been joined in light of its licensing agreement with RESPONDENT 1 [*Notice ¶¶10,24*]. Further, RESPONDENT 2 has used the "template" of Ross

Agreement on various other occasions [*P.O.2 ¶18*] indicating the prevalence of a similar clause in other agreements in the pharmaceutical industry. If this joinder request is allowed, the parties of the aforementioned agreements could also be joined, at RESPONDENTS' insistence, which would be impractical. Therefore, there was no intention on part of the parties involved to conclude a single economic transaction, and the Tribunal should not infer one in such circumstances.

2. The arbitration clause is a standard term which cannot be used to conclude intent of the PARTIES

20. The arbitration clause in PCLA provides that any dispute or claim "arising in relation to" the agreement could be resolved by an arbitration instituted pursuant to the clause [*Cl. Ex. C3, §14*]. RESPONDENTS may contend that this interpretation would include the IP claim raised by Ross Pharmaceuticals and therefore, it must be joined [*Answer ¶22*].

21. For the interpretation of arbitration clauses, contractual rules of interpretation are primarily employed to arrive at the scope [*ICC 7920/1993; Insigma Tech. Case; Born p.1320*]. To that end, standard terms are not attributed much weight internationally and instead negotiated, non-standard terms are utilized to conclude intent of the parties [*UNIDROIT Principles art. 2.1.21; Trans-Lex Principles no. IV.5.4; French Civil Code art.1110; Directiorate Case*]. The UNIDROIT Principles, the applicable contract law of Mediterraneo, Equatoriana and Danubia, defines standard terms as those repeatedly used terms which are introduced by one party and accepted by the other without any negotiations [*UNIDROIT Principles art. 2.1.19*].

22. In the present matter, Mr. Doherty, working for RESPONDENT 1, had prepared the template for PCLA and this very template had been used previously by RESPONDENT 2 on various other occasions [*P.O.2 ¶18*], one of which was for Ross Agreement [*Res. Ex. R2 ¶8; Answer ¶10*]. The parties did not engage in any discussions in relation to the present clause [*P.O.2 ¶¶24,31*]. This affirms that the clause is a standard-form clause used in the pharmaceutical industry and to interpret the extent of the clause, regard must be had to the negotiated provisions. Under PCLA, §2 delineates its scope which restricts the extent of disputes that can be arbitrated while the recitals serve to state the parties to PCLA [*Cl. Ex. C3*]. These are the terms which the parties negotiated on and they carry weight over the standard arbitration clause which has been worded very broadly.

23. Alternatively, the wording of the clause encompasses all disputes that are related to the commercial relationship between the parties and does not include disputes from third-party agreements to which they are not a party to [*Wilson Case ¶¶45-46; Pennzoil Case; Mehiz/Cole*]. Presently, Ross Pharmaceuticals' dispute is related to Ross Agreement and neither CLAIMANT nor RESPONDENT 1 is a party to the same. Hence, this standard term should not be prioritized while interpreting the rights between PARTIES.

C. The balance of legitimate interests is not in favour of the joinder

24. In the event of a joinder, the tribunal must balance the legitimate interests of the requesting party and the non-requesting party and consequently, the balance of interests must *clearly* be in favour of the requesting party [*Schramm p.500; Bamforth/Maidment p.14; Voser I p.396*]. To this end, the tribunal must consider the factors that arise on both sides.

25. Presently, if the proposed joinder is allowed, it would damage the interests of CLAIMANT as it would violate confidentiality **[1]**. Further, it would result in unnecessary costs and delays **[2]**. On the contrary, RESPONDENTS' interests of procedural efficiency would not be affected **[3]**.

1. The proposed joinder violates the principle of confidentiality

26. The principle of confidentiality provides protection to the subject matter, the evidence and the documents that are prepared and exchanged in the arbitration, from third parties [*Lew p.8*]. A duty of confidentiality vests in the parties if it is explicitly stated in the arbitration clause or in a separate agreement and the institutional rules [*Esso Case; Dolling Meritt Case; Jolles/Cedial pp.146,148; Trakman pp.11-12*]. A confidentiality clause contained in the main contract can be extended to the arbitration provided the clause states the protected information that cannot be divulged to third parties [*Ritz ¶¶239-240*]. Additionally, in case of a joinder, the confidentiality concerns of other parties are extremely relevant, especially if the third party is a competitor or has adverse interests [*The Eastern Saga Case; Leboulanger p.65; Lew p.401*].

27. In the present matter, the duty of confidentiality is sourced not only from PCLA [*Cl. Ex. C3 §10*] but also from Swiss Rules art. 44 [*Art.44; Jolles/Cediel ¶147*], which require protection of, *inter alia*, know-how [*P.O.2 ¶30*]. Ross Pharmaceuticals is a direct competitor to CLAIMANT and Khorana Lifescience [*P.O.2 ¶13*], considering the nature of their field and the ongoing research to produce a vaccine for COVID-19 [*Answer ¶¶1,8*]. The first company to produce a successful vaccine would have massive returns due to the enormous market [*Answer ¶1*]. As the arbitration moves forward, there would be an exchange of technical know-how [*Letter Fasttrack, Oct.2*], which, if made accessible to Ross Pharmaceuticals, would be detrimental to CLAIMANT'S business. Hence, the proposed joinder should not be effectuated as it would violate the principle of confidentiality.

2. The proposed joinder would result in unnecessary costs and delays for CLAIMANT

28. RESPONDENTS reason that a joinder is more efficient to conclusively determine the issue with Ross Pharmaceuticals and CLAIMANT in a single proceeding [*Answer ¶22*]. In doing so, RESPONDENTS conveniently ignore that the joinder will lead to greater costs in terms of time and money to CLAIMANT, with no added benefit.

29. A joinder could prove disadvantageous to the parties involved where it results in raising the costs of the arbitration [*Hamburg Case pp.17-21*; *Bond p.43*] as well as unnecessarily extending the

proceedings [*Bond p.36*]. The tribunal shall decide on the apportionment of its costs between parties on basis of, *inter alia*, the time spent on the arbitration [*Swiss Rules art.39; Zuberbühler I p.331*]. Additionally, under art. 15(7) Swiss Rules, the tribunal as well as the parties have an obligation to prevent "unnecessary" costs and delays. They must abide by this in good faith to ensure the efficient conduct of proceedings [*Lazopoulos p.613; Hauser/Fiebinger/ pp. 180–182*].

30. In the present case, the proceedings would take an additional period of two months to accommodate Ross Pharmaceuticals' claim [*Swiss Rules art. 3*]. The adjudication would also result in an extension to the timetable due to the multiple claims involved. This extended time period would accordingly raise the costs of the proceedings as well as delay the arbitration. These costs and delays are unnecessary as Ross Pharmaceuticals' dispute is not related to and does not affect CLAIMANT'S interests [*Infra I(C)(3)*]. Given the unprecedented nature of the COVID-19 pandemic, and the public interest that is at stake, CLAIMANT submits that the present dispute must be resolved without undue delay and excess costs, which would result in case of a joinder.

3. The proposed joinder would not advance RESPONDENTS' purported interest of procedural efficiency

31. RESPONDENTS assert that joining Ross Pharmaceuticals' claim is necessary for a conclusive determination of the dispute. For a conclusive determination, a joinder is needed *only* if the issues are interrelated [*Zuberbühler I p. 44*; *Schramm p.500; Leboulanger p.63; Desai/Gupta/Kanuga p.138*]. In fact, a single proceeding instead of separate proceedings, for *unrelated* issues, would hamper procedural efficiency [*Leboulanger, p.63*]. Existence of common questions of law and fact or origin of relief claimed are *inter alia* determinative of the existence of link between the claims [*Smith p.179*].

32. In the instant case, RESPONDENTS' disputes with CLAIMANT and Ross Pharmaceuticals stem from two separate agreements and involve different claims. RESPONDENTS' potential dispute with Ross Pharmaceuticals pertains to determination of the extent of the license granted to the latter while the present case is concerned with whether RESPONDENT 1 breached its contractual obligations under PCLA [*Res. Ex. R3; Answer ¶22; Cl. Ex. C3*]. Consequently, for the present dispute, mere existence of a claim needs to be proved and does not require adjudication of said claim [*Infra IV(A)(1)*]. Additionally, the relief claimed by PARTIES is restricted to the fulfilment of contractual obligations under PCLA and does not relate to the claim of Ross Pharmaceuticals [*Notice ¶¶29-30*].

33. In sum, joinder is not required as the issues are not related, and Ross Pharmaceuticals' absence does not prevent the Tribunal from deciding the present dispute conclusively. Therefore, Ross Pharmaceuticals should not be joined to these proceedings, especially in view of the prejudice it would cause CLAIMANT while having no discernible benefit in terms of procedural efficiency.

D. Joinder of Ross Pharmaceuticals by the Tribunal risks the enforceability of an award rendered in these proceedings

34. An arbitral tribunal must strive to render a valid award which is recognizable and enforceable [*ICC 7453/1994; Voser pp. 349-350; Choi p. 32*]. Failure to comply with the procedure agreed between the parties is a ground for annulling an award [*NYC art. V(1)(d); Born p. 3261*]. Additionally, the party seeking to enforce an award against another party must prove that such enforcement is pursuant to an existing valid arbitration agreement between them [*NYC art. V(1)(a); Altain Case ¶139; Astro Case; Kroll II ¶¶323-332*]. To that end, it is not sufficient that a person has been made party to the proceedings but should be a party to the agreement [*Re. Javor Case; Glencore Case*]. Additionally, a forced joinder risks enforceability by virtue of lack of consent of parties to arbitration [*NYC art. V(1)(c); Titan Unity Case; O&Y Case; Port/Bowers p.278; Roos p.416*].

35. Considering Equatoriana, Mediterraneo and Danubia are all members to the NYC [*P.O. 1 §III(3)*], the resulting arbitral award from the present proceedings can be rendered unenforceable. Thus, to avoid the risk of unenforceability of any award rendered in these proceedings, the Tribunal must deny RESPONDENTS' request to join Ross Pharmaceuticals.

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36. **Conclusion**: Ross Pharmaceuticals should not be joined to the present proceedings as PARTIES have not consented to arbitrate with it. Additionally, it should not be joined despite the presence of identical arbitration clauses in PCLA and Ross Agreement. The balance of legitimate interests of PARTIES is not in favour of joinder and if permitted, it risks the enforceability of the award rendered in this arbitration.

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

37. The Tribunal's communication to PARTIES [*Letter Prof. Sinoussi, Sept. 4*] to discuss the further conduct of proceedings stressed upon the uncertainties surrounding the pandemic. Despite this, RESPONDENTS strongly object to remote examinations of witnesses and experts [*Letter Fasttrack, Oct. 2*]. *Per contra*, CLAIMANT asserts that the regulatory framework and PCLA allow for such remote examinations **[A]**, which should be conducted in view of fairness and efficiency **[B]**. Additionally, remote examinations do not impede the exercise of RESPONDENTS' right to due process **[C]** and the confidentiality of the proceedings **[D]**.

A. The Tribunal is empowered to conduct remote evidentiary examinations

38. CLAIMANT submits that the applicable laws and rules permit **[1]** and international arbitral practice encourages **[2]** the remote conduct of evidentiary examinations. Further, any award rendered by this Tribunal following the use of remote means will not be unenforceable **[3]**.

1. The applicable laws and rules permit examinations using remote means

39. PCLA, drafted by RESPONDENT 1, lacks any reference to the mode of examination of witnesses and experts. In the absence of such an agreement, reference must first be made to the *lex arbitri*, i.e. DAL and applicable institutional rules, *viz.* the Swiss Rules, both of which do not preclude remote examinations, and then to the instructions of the Tribunal [*Hunter/Redfern p.353; Ducret/Geisinger p.74*]. The conduct of remote examinations for the purpose of the present proceedings is consistent with the Swiss Rules **[a]** and the DAL **[b]**.

a. The Swiss Rules empower the Tribunal to conduct remote evidentiary examinations

40. Under the Swiss Rules, a tribunal retains discretionary powers to conduct proceedings in any appropriate manner [*Swiss Rules art. 15(1)*]. This is also evidenced in provisions such as art. 15(7) Swiss Rules, which omits the mention of any agreement, to reflect the "ultimate primacy of the tribunal's procedural authority" [*Brandeis Case ¶56; R.C. Pillar Case; Born p.2151*]. Contrary to RESPONDENTS' assertion that the Swiss Rules assume the conduct of in-person hearings [*Letter Fasttrack, Oct. 2*], the text of art. 25(4) Swiss Rules *clearly* mentions video-conferencing as a viable manner of examination and stresses upon the non-mandatory nature of witnesses' physical presence [*Swiss Rules art. 25(2); Nater-Bass/Pfisterer p.697*]. Consequently, there is no requirement for the Tribunal to acquiesce to RESPONDENTS' unreasonable insistence in given circumstances.

b. Remote examinations are permitted under the scheme of the DAL

41. The DAL echoes the position of the Swiss Rules as regards the wide discretion [*DAL art. 19(2); Anwar Siraj Case ¶¶41-42; Dongwoo Case ¶87*] and overarching freedom of the tribunal to determine the manner of evidentiary examinations [*A/CN.9/669*]. In particular, where matters, such as rules of evidence remain unaddressed by the agreement, the tribunal retains the authority to determine the procedure [*A/CN.9/264 ¶4 p.45; A/CN.9/216 ¶59; UNCITRAL Digest ¶7 p.101; Holtzmann p.565*] taking into account the peculiar circumstances of the case [*A/CN.9/264 ¶5 p.45*]. Following this, a tribunal may direct a change in favour of remote examinations [*Waincymer p.6*].

42. Presently, the Tribunal may exercise its discretion to allow virtual hearings owing to this gap in PCLA [*P.O.2 ¶32; Cl. Ex. C3 §14*]. RESPONDENTS' objection to remote examinations, despite the practical difficulties surrounding the conduct of in-person hearings [*Infra II(B)(2)*] is merely an expression of their preference. This cannot deprive the Tribunal of its powers, which are derived from the *lex arbitri*. Thus, the discretion of the Tribunal under art. 19(2), must advance the requisite efficient result [*Waincymer p.10*] and should be exercised to direct remote examinations.

2. Remote evidentiary examinations find support in international arbitral practice

43. CLAIMANT places reliance upon the IBA Rules, that evince the international best practice on the taking of evidence [*Born p.2347; Hunter/Redfern ¶6.95; De Berti/Welser p.80; Ahdab/Bouchenaki p. 98*],

and are relied upon [*Born p.2348*] even in the absence of express inclusion in the agreement [*VIAC Award no. 5243; ICC Award 16655/2011; Glamis Gold Award* ¶*206*]. The IBA Rules include within the definition of "Evidentiary Hearing", any hearing at which the tribunal receives evidence, even via remote means [*IBA Rules Definitions*]. While the IBA Rules recognise the conventional nature of in-person hearings [*Sunstate Case* ¶*6*], tribunals have the power to allow witnesses examinations through videoconference [*IBA Rules art. 8(1)*]. The only mandate is the consent of the tribunal [*Khodykin/p.397*], which must accord due recognition to the reasons for physical non-appearance as well as the principles of equality and fairness [*IBA Commentary p.17*].

44. Remote examinations are also supported in practices of prominent arbitral institutions [*LCIA Rules arts. 14.1,19.2; UNCITRAL Rules arts. 19,22 ,24,28(4); VIAC Rules art. 25(1); SIAC Rules arts. 7,8*]. An ICC Report further states that a tribunal is not obliged to adopt approaches advanced by parties and independently decides upon the use of IT [*ICC Commission Report §1.2 p.4; ICC Note* ¶*77 p.12*]. Here, the Tribunal is urged to adopt an approach similar to global best practice and direct remote examinations, especially in light of the "uncertain developments" of the pandemic [*Letter SCAI, Sept. 4*] that render the physical appearance of participants highly improbable [*Infra II(B)(2)*].

3. Remote examinations will not render an unenforceable award

45. Courts lay emphasis upon the materiality of procedural requirements as regards the enforceability of resulting awards [*Born p.3268*], and have not annulled awards unless deviations are extreme and prejudicial [*Williams Case; Rhéaume Case* ¶*61; Dan Case pp.501-502; SFT 2004; SFT 1991*]. The Tribunal must note that practical consequences do not ensue, as a change in mode of hearings has no impact on the outcome [*SFT 1997 pp.319-320; Kaufmann-Kohler P.517*]. The mode of examination does not determine the enforceability and recognition of a resulting award under the NYC [*NYC arts. V(1)(b), V(1)(d)*]. On the contrary, awards have been enforced in cases where in-person examinations have not been conducted, indicating the required willingness on the part of the courts [*Consorcio Rive* ¶*29*; *Empresa Case p.1026*].

46. *Sino Dragon* further indicates the trend of upholding awards even in case of technical difficulties during witness examinations [*Sino Dragon Case* ¶*154*]. This is because the physical absence of the witnesses is not tantamount to any "real practical injustice" in itself [*Id.*]. This is also practice in Equatoriana, RESPONDENTS' place of business, where remote hearings in court proceedings, even where all parties had not consented, has been allowed [*P.O.2* ¶*38*]. This trend in domestic disputes prevents RESPONDENTS from objecting, and indicates the unlikeliness of any decision in favour of the annulment of an award rendered post remote hearings by courts in Equatoriana.

B. Fairness and efficiency warrant the conduct of remote examinations

47. In determining procedural nuances of an arbitration, a tribunal must account for fairness and efficiency [*Lazopoulous p.448; Born p.2152; Waincymer II p.392; Hodges p.627*]. Presently, CLAIMANT stresses upon the Tribunal's efficiency obligations under art. 15(7) Swiss Rules **[1].** CLAIMANT also submits that the Tribunal will be able to arrive at a fair determination by accounting for prevailing uncertainties that may lead to an indefinite postponement of the proceedings **[2]**. Further, changed circumstances permit the Tribunal to conduct remote examinations **[3].**

1. Efficiency is an obligation under art. 15(7) Swiss Rules

48. CLAIMANT emphasises upon the expedient completion of proceedings. Efficiency is recognised as the *raison d'être* for the choice of arbitration [*Lufuno Case ¶197; Draetta pp.64-67; Kirby p.694*]. Art. 15(7) Swiss Rules also impresses the duty to ensure efficient proceedings [*Hauser/Fiebinger pp.180-182; Lazopoulous p.613*]. It stipulates that the participants "*shall*" make "*every effort*" to contribute to efficient proceedings and avoid unnecessary costs and delays. This lends it a status identical [*Born p.2150; Habegger p.128*] to due process and emphasises upon arbitrators' [*Guandalini p.250; SCS Case*], and parties' [*Darwazeh p.63*] *contractual* duty to act expeditiously and "do everything in [their] power" to fulfil the best-efforts obligation [*Akorn Case p.231*].

49. The practice of examining witnesses and experts through video-conferencing is not unprecedented [*ICSID ARB/07/29 Award ¶ 23; Paushok ¶61; Jiang et al.*]. Many courts have also heeded to similar considerations [*Polanski Case ¶13; McGlinn Case ¶¶4,19; Arconti Case ¶32; Grbich Case; R&D Case p.570; Garcin Case*] and concluded that remote hearings would "promote the fair and efficient" conduct of proceedings [*Cyberworks Audio ¶34*], were "highly effective" and that the non-contemporaneous presence of witnesses did not affect the outcome of the proceedings [*Jiangsu Guoxin ¶20*]. This is because there is nothing intricately peculiar about remote, as opposed to in-person hearings. In fact, the adoption of remote means in arbitration has been encouraged [*Axis Bank Case ¶¶6,7; Rategain Case ¶4; Saraf Case*]. Even legislature and courts at Danubia have allowed remote hearings in "public interest" [*P.O.2 ¶37*]. Accordingly, the Tribunal is also requested to consider the public interest in containing the spread of COVID-19.

50. Further, where the tribunal has sufficient technical knowledge (as in the present case), the significance of expert evidence is reduced [*Khodykin ¶8.21*]. RESPONDENT 1 had, in fact, included a specific stipulation in PCLA, requiring the arbitrators appointed to have "good knowledge" of IP and development of vaccines [*Cl. Ex. C3 §14*]. This indicates that RESPONDENTS *intended* to constitute a tribunal that would not require such "detailed explanation[s]" [*Letter Fasttrack, Oct. 2*]. CLAIMANT is confident that PARTIES made informed choices and that the arbitrators have more-than-sufficient expertise to decide this dispute.

51. RESPONDENTS also express apprehensions of loss of effectivity [*P.O.2 ¶38*] in the presentation of evidence. CLAIMANT admits that the right of parties to respond to their opponent's submissions is a key element of adversarial proceedings [*Burghardt p.15; Schulz ¶¶166-176*]. However, this right is not curtailed if participation takes place through video-conferencing, as is evidenced in practice.

52. CLAIMANT also requests the Tribunal to account for delays with the conduct of in-person hearings. The process, initiated in July 2020, can be concluded around the SCAI average of 11 months [*SCAI Flyer*], if virtual hearings are conducted. On the other hand, the dates for in-person hearings are undetermined [*P.O.1 §II*] and will remain so, in light of the pandemic. The Tribunal's duty under art. 15(7) Swiss Rules [*Binder p.386*] would, thus, be fulfilled through remote examinations.

2. Prevailing uncertainties and practical complications may lead to an indefinite postponement in the conduct of in-person examinations

53. Art. 24 DAL obligates the Tribunal to hold hearings at the request of one party. Therefore, RESPONDENTS request the Tribunal to conduct in-person examinations [*Letter Fasttrack p.50*] as opposed to the remote examinations proposed by the Tribunal [*Letter Prof. Sinoussi Sept. 4*].

54. Courts, which, as compared to tribunals, rely more heavily on adversarial instruments such as cross-examinations, have considered the viability of remote examinations and found them permissible on the condition of safeguarding "fairness and openness" [*CSFK v. HWH*]. In a decision of the Federal Court of Australia, for example, the conduct of remote cross-examinations was allowed in view of the inconveniences of physical examinations [*Tetra Pak Case ¶7*]. Further, several arbitral institutions have issued protocols and guidelines that may be adopted to minimise deviances from in-person evidentiary examinations [*Seoul Protocol; ACICA Guidance Note; HKIAC Guidance Note; AAA-ICDR Guide; Africa Protocol; ICC Guidance Note; CIArb Guidance Note*].

55. In recent cases, risks of, as well as national directives regarding COVID-19 have been considered by courts [*Capic Case ¶27; Australian Securities Case ¶28; Municipio Case ¶47; National Bank Case ¶6*; *Blackfriars Case ¶¶35,50*; *Anil Singh Gurm Case ¶¶76,86*] and arbitral tribunals [*PCA 2018-39*] in directing remote examinations, endorsing such processes as fair and just. CLAIMANT stresses upon the Tribunal's observation regarding the "uncertain developments" of the pandemic, that may make hearings in-person impossible [*P.O.1 §II; Letter Prof. Sinoussi, Sept. 4*].

56. Presently, prevailing uncertainties in the conduct of in-person hearings, such as the possibility of travel bans [*P.O.2 ¶34*], that may interfere with the smooth proceeding of an in-person hearing must be accounted for [*Niuscha Bassiri*]. Notwithstanding imposed restrictions, the conduct of hearings in-person is not only likely to exclude the participation of individuals who have expressed discomfort in travelling but is also impossible during the persistence of a pandemic [*P.O.2 ¶34*]. Owing to these difficulties, an indefinite postponement of in-person hearings is likely.

3. Changed circumstances due to the pandemic permit the Tribunal to conduct remote examinations

57. An arbitral agreement is not only subject to institutional rules and arbitral practices but also to general contractual principles [*UNCTAD p.16*], including emphasis upon *common* intention [*Andromeda Steamship Case p.752; Skivolocki Case ¶1; Born p.3574; Pierre p. 4; Amirfar/Prusac p.118*] and change in circumstances, or *rebus sic standibus* [*Waincymer II p.1008*]. Presently, RESPONDENTS' assumption of *de facto* in-person hearings [*Letter Fasttrack, Oct. 2*] is erroneous, since the mode of hearings find no mention in PCLA or any preceding discussions [*P.O.2 ¶32*]. Thus, it cannot be presumed that PARTIES intended to preclude the alternative of remote hearings.

58. A shift in arbitral *venue* may also be comparable to change in the mode of conduct of hearing [*Waincymer I p.10*]. Tribunals have, at various instances, duly considered and assented to changes in venue of evidentiary examinations due to compelling factors [*G. AG v. TAS pp.311-322; ICC 10623/2001 ¶¶ 53,148; Himpurna California Award pp.145,190; Tongyuan Case*]. Further, CLAIMANT also relies upon art. 16(2) Swiss Rules, which provides the Tribunal with the discretion to decide the venue without reference to the parties [*Zuberbuehler II p.156; Blessing p.41; Lazopoulos p.623*], with due consideration to the circumstances [*Swiss Rules art.16(2); Zuberbuehler I p.157*], including their unexpectedness and potential to prevent the usual course of proceedings [*Pierre p.3*].

59. In the present case, the unexpected nature of the pandemic cannot be contested. At the time of conclusion of PCLA, such an extraordinary situation had not been expected or contemplated. This change in circumstances leads to conflict between *pacta sunt servanda* and *rebus sic standibus* when proceedings according to consented procedure become increasingly difficult to conduct [*Beisteiner p. 79; Shackleton*; *Jarvin p.58*]. The resulting uncertainties fundamentally change circumstances. In consequence, remote examinations would be the most appropriate mode of efficiently conducting the proceedings without undue delay, and should be directed in view of the Tribunal's discretion.

C. RESPONDENTS' right to due process will not be violated by remote examinations

60. Parties' right to due process, under art. 18 DAL and art. 15(1) Swiss Rules, is a reflection of the right of parties to be treated equally and be given full opportunity to present their case. In the present matter, as opposed to what RESPONDENTS may aver, their right to equal treatment **[1]** and right to be heard **[2]** will not be threatened in the course of remote examinations.

1. RESPONDENTS' right to equal treatment will not been violated

61. The arbitral procedure must provide all parties the same opportunity to present their arguments [*SFT 2011 ¶4.1; SFT 1994 p.221*; *Rotoaira Forest Case*], according due consideration to the context [*Born p.2173*], circumstances and the arbitral procedure as a whole [*ALI/UNIDROIT P-3A; Born*

p.2174]. Presently, both PARTIES are at an equality of arms **[a]** and the difference in time-zones will not imply unequal treatment **[b]**.

a. Both PARTIES are at an equality of arms

62. In a remote hearing, a violation of equal treatment arises only when the degree of prejudice as a result of technological or financial limitations of one party and the impact upon due process rights is substantially adverse [*Wahab p.415*; *Schrer p.444; Markert p.15*]. In the present matter, PARTIES possess sufficient technological capabilities, and neither is at a divisive disadvantage. RESPONDENTS admit to possessing sufficient facilities to participate in remote hearings [*P.O.2 ¶38*]. CLAIMANT'S possession of "better" equipment [*P.O.2 ¶38*] is of no consequence, as succeeding case-management hearings can be used to determine mutually accessible platforms [*ICC Commission Report p.7*; *Burghardt p.15*]. The Tribunal must also note that telephonic and remote means have been used *successfully* until RESPONDENTS' objections [*Letter Fasttrack, Oct. 2*] for communications, thereby indicating an overall equality of arms.

b. The difference in time-zones will not result in unequal treatment of PARTIES

63. RESPONDENTS also cannot claim violation of equality on the ground of excessive time difference. The trend in this regard is positively discernible. The Austrian OGH has dismissed objections on the ground of different time-zones, rationalising that submitting to arbitration at a distant venue is inconvenient as is, and the same is not aggravated by remote hearings [*OGH 2020*]. *Per contra*, participating in arbitration outside "core business hours" served to be more convenient than travelling [*Id.*], especially in the pandemic [*Supra II(B)(2)*]. In a recent SIAC arbitration, the developing situation of the pandemic was considered, and remote evidentiary hearings involving many participants, belonging even to time-zones thirteen hours apart were conducted [*Chahat Chawla*]. This is significantly more than the eleven hours of time difference between PARTIES [*P.O. 2 ¶36*]. In this context, equal treatment will be ensured in remote examinations.

2. RESPONDENTS' right to be heard will not be violated

64. Right to full opportunity to be heard is fundamental and embodies the "basic notion of fairness" [*A/CN.9/264 ¶7; Impex Corp. Case*], implying that parties have a right to effective hearing on all relevant issues [*Soh Beng Tee Case*]. The right to be heard indicates parties' right to be entitled to an oral hearing [*Generica Ltd. Case; Born p. 3512*]. This implies the "synchronous exchange of arguments or evidence", and not an equation [*Schrer p.15*] or right [*Bateson p.161; Otto pp.397,406*] to in-person hearings. An oral exchange is undertaken in in-person and remote hearings, with the trivial variance of the involvement of technology in the latter [*Bateson p.161; Schrer p.4*]. Thus, proceeding without in-person hearings is acceptable [*Otto pp. 405,406*].

65. CLAIMANT submits that the right is subject to implied limitations of fairness [*Holtzmann p.551*] that must consider whether "what the tribunal did falls within the range of what a reasonable and fair-minded tribunal in those circumstances might have done" [*China Machine Case* ¶*98*]. Accordingly, a tribunal must not forgo efficiency by yielding to unreasonable procedural demands [*Triulzi Cesare Case* ¶*151; Holtzmann p.551*]. In fact, the most "fair, expeditious, economical" determination should be ensured [*Dongwoo Case* ¶*87*].

66. CLAIMANT submits that RESPONDENTS have depended upon an incorrect equality of hearings with in-person hearings for the purpose of their objection, claiming that a documents-only arbitration was never agreed upon [*P.O.2* ¶*32; Letter Fasttrack, Oct. 2*]. As contested [*Letter Fasttrack, Oct. 2*], the specific inclusion of venue was not a modification inserted by RESPONDENT 1. The dispute resolution clause [*Cl. Ex. C3 §14*] has been replicated as template from Ross Agreement [*P.O.2* ¶*32; Notice* ¶*12*]. RESPONDENTS are not unfamiliar or uncomfortable with documents-only arbitration, as evidenced in past practice. The modification of reference to venue was inserted in the model clause by Ross Pharmaceuticals, with the intent of precluding the conduct of a documents-only arbitration, which was originally proposed by RESPONDENT 2 [*P.O.2* ¶*32*]. It is emphasised here, again, that the conduct of remote examinations has not been precluded even in prior negotiations of either agreements nor discussed by PARTIES [*P.O.2* ¶*32*].

67. Further, CLAIMANT finds it essential to assert that *in no circumstance* does a remote hearing equate to a documents-only arbitration. Reliance is placed upon the IBA Rules that define document [*IBA Rules Definitions*] as including those recorded electronically. It is clear, *ipso facto*, that a video-conference is not a pre-recorded instrument. Proceedings are contemporaneous as much as in-person hearings. The language of the provision provides an "opportunity for a live, adversarial exchange" but does not preclude the possibility of a virtual hearing in warranted circumstances [*ICC Guidance Note* ¶*23*]. In this light, CLAIMANT submits that remote examinations do not impact RESPONDENTS' right to participate in oral hearings.

D. Remote examinations do not raise data protection concerns

68. RESPONDENTS apprehend third-party interference in the conduct of remote hearings [*P.O.2* ¶*35*]. CLAIMANT recognises the significance of confidentiality in the present arbitration [*Supra I(C)(1)*]. However, CLAIMANT stresses upon the nature of RESPONDENTS' data protection concerns, which appear to be unfounded and exaggerated. This is clear from RESPONDENTS' admission of their objection being grounded in a "general perception" [*P.O.2* ¶*38*].

69. In accordance with their authority to decide upon the rules of evidence [*DAL art. 19; Swiss Rules art. 15(1)*], the participants of the present proceedings may choose among a plethora of guidelines [*ICCA-NYC Protocol; IBA Cyber Security Guidelines; ICC IT Note; LegalTech Adoption Protocol; Hague*

Conference] and tools [*SCC Platform; AAA Webfile Platform; WIPO e-ADR Docket; RAC's Online System*] to assist in the secure and effective conduct of examinations. Documentary evidence may be encrypted by employing suitable software solutions [*ICC Commission Report §3.3 p.13*].

70. CLAIMANT acknowledges that there isn't absolute certainty of third-party non-interference [*P.O.2 ¶35*] in remote hearings. However, that is also the case with paper based and in-person hearings [*Burghardt p. 17; Wilske p. 318*]. Parties, in arbitration, have always been exposed to such risks. This is why, in balance, convenience and efficiency is often chosen over such risks [*ICC Commission Report §3.5*]. In this light, the Tribunal is requested to disregard RESPONDENTS' concerns and proceed with remote examinations as originally proposed [*Letter SCAI, Sept. 4*].

71. **Conclusion**: CLAIMANT submits that remote examinations *can* and *should* be conducted by the Tribunal in view of fairness and efficiency, especially since they do not raise due process or significant data protection concerns.

ISSUE III: THE CISG IS APPLICABLE TO PCLA CONCLUDED BETWEEN CLAIMANT AND RESPONDENT 1

72. RESPONDENTS contend that PCLA is not a contract of sale and consequently, outside the scope of the CISG, as defined by arts. 1-6 CISG [*Answer ¶19*]. CLAIMANT however submits that the transaction and subject matter of PCLA is within the ambit of the CISG **[A]** and it is a contract of sale under art. 3(1) CISG **[B]**. Alternatively, the scheme of art. 3(2) CISG favours the applicability of the CISG **[C]**.

A. The transaction and subject matter of PCLA falls within the ambit of the CISG

73. Contrary to RESPONDENTS' contention, the CISG governs PCLA as the subject matter of PCLA is "goods" within the meaning of the CISG **[1]** and PARTIES have their place of business in Contracting States as per art. 1(1)(a) CISG **[2]**. Additionally, PARTIES have not derogated from the CISG under art. 6 CISG **[3]**.

1. The subject matter of PCLA is "goods" within the meaning of the CISG

74. The criteria for applicability under art. 1(1) CISG mandates the "sale of goods" and requires the parties to the contract to be located in Contracting States to the CISG [*Schlechtriem/Schwenzer art. 1 ¶16*]. Although the term "goods" is not explicitly defined in any provision, the interpretation under the CISG favours an "extensive" definition of goods and includes all objects that may be part of a commercial transaction [*Computer Chips Case*; *Software Case; Ferrari p.125*], including pharmaceutical materials [*Pharmaceutical Ingredients Case; Schlechtriem/Schwenzer art. 1 ¶16; Staudinger/Magnus art. 1 ¶48*]. Another prerequisite is for "goods" to be *movable* and *tangible* property [*PVC Case; Schlechtriem/Schwenzer art. 1 ¶16; Huber/Mullis p.41; UNCITRAL Digest p.7*].

Additionally, for the CISG to be applicable, "goods" in the agreement must not be disqualified under art. 2 CISG, which provides an *exhaustive list* of items that are excluded from the scope of the CISG [*Stallion Case; Schlechtriem/Schwenzer art. 2 ¶3; Staudinger/Magnus art. 2 ¶7*].

75. In the present case, GAC vector and HEK-294 cells constitute "goods" that are physically delivered to CLAIMANT [*Res. Ex. R2*], thereby proving their movable and tangible nature. Moreover, the scope of "goods" is inclusive of GAC vectors as vectors are often the subject matter of commercial agreements in the pharmaceutical industry [*Loo/Wright*]. This understanding is also consistent with the scheme of art. 2 CISG, which does not include pharmaceutical materials in the exhaustive list of transactions that exclude the applicability of CISG.

2. PARTIES have their place of business in Contracting States as per art. 1(1)(a) CISG

76. In addition to the requirement of "goods", the CISG applies if it fulfils the requirements of art. 1(1)(a) CISG. Art. 1(1)(a) CISG rests on the internationality principle and applies "directly" [*Second-hand Tractor Case; Railway rails Case*] and "autonomously" [*UNCITRAL Digest p.5; Huber/Mullis p. 60*], where the place of business of the parties to the contract is located in different Contracting States to the CISG [*Agricultural Products Case; Gasoline Case; Key Case; Vest Case; Schlechtriem/Schwenzer art. 1 ¶28*]. Additionally, where the Contracting State has not declared reservation under arts. 92 or 93 CISG, all provisions of the CISG will apply [*Schlechtriem/Schwenzer art. 1 ¶29*].

77. In the present case, both CLAIMANT and RESPONDENTS have their place of business in Mediterraneo and Equatoriana respectively [*Cl. Ex. C3 Preamble*], which are Contracting States to the CISG [*P.O.1 §III(3)*]. Since neither State has declared a reservation under the CISG [*P.O.2 ¶39*], the CISG is directly applicable by virtue of art. 1(1)(a) CISG.

3. PARTIES have not derogated from the CISG under art. 6 CISG

78. The CISG applies, unless parties have derogated from its provisions under art. 6 CISG. Derogation under art. 6 CISG requires a "clear" [*Electric Case; Stave Case*], and "express" [*Gasoline Case; Rubber Case*] exclusion of the CISG. Consequently, a mere reference to the law of a Contracting State is not an express exclusion and, does not constitute derogation under art. 6 CISG [*Frozen Foods Case; Naptha Case; Schlechtriem/Schwenzer art. 6 ¶14; Staudinger/Magnus art. 6 ¶24; UNCITRAL Digest p.34*].

79. *In casu*, §15.2 of PCLA (*Governing Law Clause*) does not exclude the application of the CISG [*Cl. Ex. C3 §15.2*]. Additionally, as explained above, reference to "laws of Danubia" under §15.2 of PCLA does not constitute derogation under the CISG. In fact, the courts of Danubia interpret "laws of Danubia" to include the CISG [*P.O.2 ¶39*]. Therefore, the CISG is applicable to PCLA.

B. PCLA is a contract of sale under art. 3 CISG

80. In addition to the abovementioned submissions, there is no reason to exclude the CISG as PCLA is a contract of sale under art. 3(1) CISG **[1]**. Further, PARTIES always intended to enter into a

sales contract **[2]** and have fulfilled their obligations as buyer and seller, set out in the CISG **[3].** In addition, the delivery of GAC vectors and HEK-294 cells amounts to a "permanent transfer" of property in favour of CLAIMANT **[4]**, thereby amounting to a sales contract.

1. PCLA is a contract of sale under art. 3(1) CISG

81. RESPONDENTS' contend that PCLA is not a contract of sale [*Answer ¶19*]. CLAIMANT submits that PCLA is a sales contract under art. 3(1) CISG as GAC vector and HEK-294 cells qualify as "goods to be manufactured or produced" under art. 3(1) CISG **[a]**, and exception envisaged under art. 3(1) CISG is inapplicable as CLAIMANT does not supply the "substantial part of the materials necessary" for manufacture of GAC vector and HEK-294 cells **[b]**.

a. GAC vector and HEK-294 cells qualify as "goods to be manufactured" under art. 3(1) CISG

82. Under art. 3(1) CISG, contract for the sale of goods "to be manufactured or produced" fall within the scope of CISG [*CISG ACO 4 ¶1.5; UNCITRAL Digest p.20*], which extends to contracts for goods to be manufactured by work and materials of the seller [*Schlechtriem/Schwenzer art. 3 ¶3; Hachem&Kee ¶8.30*]. Therefore, application of CISG is not limited to sale of ready-made goods but rather extends to goods which are yet to come into existence and thereafter to be manufactured by the seller [*UNCITRAL Digest p.20; UNCITRAL Record p.17; Aubrey p. 337; ICC 7660/1994*]. Consequently, agreements where a party manufactures and supplies pharmaceutical ingredients are within the scope of art. 3(1) CISG [*Pharmaceutical Ingredients Case; Clathrate Case; Medinol Case*].

83. In the present case, RESPONDENT 1 produces and supplies GAC vector with disease specific inserts [*P.O.2 ¶4; Cl. Ex. C3 §9.2*]. Similarly, at the commercialisation stage, RESPONDENT 1 will produce and supply batches of HEK-294 cells to CLAIMANT [*P.O.2 ¶5; Cl. Ex. C3 §16*]. These goods are manufactured by work and materials provided by RESPONDENT 1, at an estimated cost of €2.1mn per batch [*Appx. 1; P.O.2 ¶¶4, 17; Cl. Ex. C3 §9.2*] and €1.5mn per batch [*Appx. 1; P.O.2 ¶5; Cl. Ex. C3 §16*] for production of GAC vector and HEK-294 cells respectively. Therefore, both GAC vector and HEK-294 cells qualify as "goods to be manufactured" and thereby, PCLA is a sale under art. 3(1) CISG.

b. CLAIMANT does not provide "substantial part of the materials necessary" for manufacturing of GAC vectors and HEK-294 cells

84. Under art. 3(1) CISG, the scope of "sales" excludes situations where the buyer supplies a "substantial part of the materials necessary" for the production of the goods [*Schroeter p.75; Secretariat Commentary on art. 3 ¶1*]. In this regard, the buyer supplies "substantial part of the materials necessary" when the economic value of the material supplied by buyer is higher than that supplied by the seller [*Waste Container Case; CISG ACO 4 ¶2.3; Honnold ¶59*]. In addition, contracts in which

the buyer supplies only technical specifications or formulas are covered within the CISG [*Art Books Case; Furniture Case; CISG ACO 4 ¶2.1; Staudinger/Magnus art. 3 ¶14*], as these are not considered "materials necessary" for the production of goods within the meaning of art. 3(1) CISG [*Windows Case; CISG ACO 4 ¶2.14; UNCITRAL Digest p.20*]. In the *Shoes Case*, for example, art. 3(1) CISG was applied despite the seller having to produce shoes as per buyers' specifications [*Shoes Case*].

85. In the present case, the "substantial part of the materials necessary" and technical equipment required for the production of GAC vector and HEK-294 cells are owned and provided by RESPONDENT 1 [*Answer ¶8; Cl. Ex. C2 ¶1.5*]. Additionally, CLAIMANT does not supply any material for production, but only specifies the disease specific insert to be added to the GAC vector [*Answer ¶2; Notice ¶¶3, 14*]. The specifications provided by CLAIMANT do not qualify as material supplied. Even at the commercialization stage, CLAIMANT incurs no additional investment costs as HEK-294 cells and growth medium are provided by RESPONDENT 1 [*P.O.2 ¶5*]. Since the exception under art. 3(1) CISG does not apply, PCLA is a sales transaction where the substantial part of the materials necessary for manufacturing have been supplied by RESPONDENT 1.

2. The intention of PARTIES was to enter into a sales transaction

86. RESPONDENTS argue that PCLA is not a sale, rather a licensing agreement [*Answer ¶19*]. However, pursuant to the rules of interpretation under art. 8 CISG, it is clear that RESPONDENT 1 was aware of CLAIMANT'S intention to enter into a contract of sale **[a]**. Furthermore, an objective interpretation of RESPONDENT 1'S conduct indicates a sales transaction **[b]**. Lastly, the negotiated terms in PCLA are an accurate and binding representation of PARTIES' intent **[c]**.

a. RESPONDENT 1 was aware of CLAIMANTS' intention to enter into a contract of sale

87. The interpretation of PARTIES' conduct under art. 8(1) CISG clarifies that CLAIMANTS intention was always to enter into a sales agreement. Art. 8(1) CISG determines "subjective intent" [*Toluene Case; Headwear Case; Office Furniture Case*] and states that parties will be deemed to have shared a common intention if they were aware of each other's intention [*Cable Case; Wine Case; UNCITRAL Digest p.55*]. Here, "subjective intent" may be understood where intent was easy to decipher or circumstances were such that compelled an inquiry into the matter [*Clothes Case; Schlechtriem/Schwenzer art. 8 ¶17; Staudinger/Magnus art. 8 ¶12*].

88. Under PCLA, there is no transfer of know-how in GAC vector [*P.O.2 ¶17*] as CLAIMANT is not required to independently produce GAC vector at any stage, and the first batch delivered is sufficient to fulfil CLAIMANT'S needs [*P.O.2 ¶4*]. CLAIMANT did not object to the inclusion of the Purchase Obligation in PCLA as it did not have the equipment for large scale production of the goods, which could cost up to €80 to 100mn per production line [*P.O.2 ¶5; Res. Ex. R2 ¶13*]. Importantly, CLAIMANT'S unequivocal intention to purchase base materials was reported in

November 2018 by Lifescience Today [*Cl. Ex. C2*]. RESPONDENT 1 being a major player in the industry, would have been privy to such information and in fact, had the duty to inquire into the same if it considered that the intent of PARTIES was not aligned. Accordingly, RESPONDENT 1 was aware of CLAIMANT'S intention to *purchase* GAC vector and HEK-294 cells, and enter into a sales contract. Seeing a clear intent of PARTIES, the same must be given effect to and the CISG applies.

b. An objective interpretation of RESPONDENT 1'S conduct indicates a sales transaction

89. Art. 8(2) CISG provides for "objective" intent [*Toluene Case; Inventory Case*], i.e. interpretation in accordance with the understanding of a reasonable person of the same kind [*Packaging Machine Case; Fruits & Vegetables Case*] and in the same business as the parties [*Wine Case; Heaters Case*]. In this regard, art. 8(3) CISG provides the "relevant circumstances" including "usages" in the industry, which must be considered while deciphering intent [*Electric Actuators Case; Metal Ceiling Case; Shares Case; Schlechtriem/Schwenzer art. 8 ¶47; UNCITRAL Digest p.57*].

90. In the present case, RESPONDENT 1'S regular business includes *production* and *sale* of base materials [*Cl. Ex. C3 Recitals*]. Furthermore, the strategy adopted by RESPONDENT 1 for GAC vector is akin to its work with monoclonal antibodies, i.e. to *produce* and *sell* base materials for profits [*Cl. Ex. C2; Notice ¶5*] and RESPONDENT 1 had recently up scaled their production facility for both GAC vectors and HEK-294 cells and was on the lookout for companies to secure manufacturing contracts [*Res. Ex. R2 ¶9; Answer ¶8; Cl. Ex. C2*]. Considering the surrounding circumstances, a reasonable person in CLAIMANT'S position would understand RESPONDENT 1'S intention to be to *produce* and *sell* base materials to companies interested in research and development of vaccines and thereafter, would favour the interpretation of PCLA as a sales transaction.

91. Moreover, while "Milestone Payments" may be found in other licensing agreements, this is not the case in PCLA. In light of the high risk factor and uncertainty in development of the final product, milestone payments are commonly used as they act as risk mitigation clauses [*Antibiotic Strategies; Pharmaceutical Development*], where companies make payments as and when they are closer to regulatory approval [*Cuban Biotechnology*]. On interpreting its usage in the pharmaceutical industry as per the understanding of a reasonable person, it is evident that §9.3 and §9.4 of PCLA, under which CLAIMANT is obligated to pay "Milestone Payments" [*Cl. Ex. C3*] only represent a usual practice in the pharmaceutical industry and cannot be deemed to be indicative of a licensing transaction. Therefore, the CISG applies as PARTIES intended to enter into a sales agreement.

c. Negotiated terms in PCLA are an accurate and binding representation of PARTIES intent

92. It is undisputed that PCLA is almost identical and is based on a standard template, which has been frequently used by RESPONDENT 1 [*P.O.2 ¶¶18, 24; Res. Ex. R2 ¶8; Answer ¶10*]. Apart from a few

minor changes, §16 of PCLA (*Purchase Obligation and Production Option*), is the only negotiated part of PCLA [*P.O.2 ¶25*]. When parties to a contract specifically negotiate and agree on particular provisions, such provisions take preference over standard provisions as they are more likely to reflect the intention of the parties [*CISG ACO 13 Eiselen ¶8; Schlechtriem/Schwenzer art. 8 ¶67; Hachem&Kee ¶12.25; PICC Commentary p.71*]. Since RESPONDENT 1 deviated from the standard-form template only to the extent of inclusion of §16 of PCLA, the same will take preference and must be given effect to, as they are a more accurate representation of PARTIES intent.

93. In addition, §16 of PCLA cannot be treated as ancillary as it is the most important obligation of PCLA. Under §16.1 (*Purchase Obligation*) and §16.2 (*Production Option*) of PCLA, RESPONDENT 1 makes a profit of €31.25mn per 20 batches of HEK-294 cells and €70.25mn per 20 batches of vaccine respectively [*Appx. 1*], earning profits 2% to 5% higher than other collaboration and licensing agreements [*Cl. Ex C2*]. Accordingly, RESPONDENT 1 insisted on inclusion of §16 of PCLA in all agreements [*P.O.2 ¶26; Res. Ex. R2 ¶10; Res. Ex. R5*] and admitted that its "ultimate intention" was to induce the buyer to outsource the entire manufacturing process to RESPONDENT 1, for more revenue [*Res. Ex. R2 ¶11*]. Considering the indispensable nature of HEK-294 cells for the amplification of GAC vector [*P.O.2 ¶19*] and the few companies who had the ability to produce HEK-294 cells at the time of contracting [*P.O.2 ¶2*], it is clear that §16 of PCLA is the most important obligation for CLAIMANT and best reflects the intention of PARTIES.

3. PARTIES fulfil the requirements of "sale" under art. 30 and art. 53 CISG

94. The implicit definition of sale can be inferred from the obligations of sellers and buyer under art. 30 (*Obligations of the Seller*) and art. 53 (*Obligations of the Buyer*) CISG respectively [*Merry-go-round Case; Printing Machine Case; UNCITRAL Digest p.130; Ferrari p.99*]. Consistent with this position, the UNCITRAL Working Group has defined contract of sale as one "by virtue of which the seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods sold, whereas the buyer is bound to pay the price for the goods and take delivery of them." [*Secretariat Note (38th session) ¶27; Schlechtriem/Schwenzer art. 1 ¶8; Mowbray p.123*]. On fulfilment of the same, a transaction qualifies as a sale under the CISG [*Fausing p.17; Huber/Mullis p.43*].

95. *In casu*, RESPONDENT 1 performed its obligation to deliver the first batch of GAC vector and transferred the property in goods to CLAIMANT [*Infra III(B)(4)*]. Correspondingly, CLAIMANT fulfilled its obligations by paying the purchase price of €2.5mn and other payments under §9.1 to §9.4 of PCLA [*P.O.2 ¶28*] and taking delivery of GAC vectors [*Res. Ex. R1*]. At commercialisation stage, CLAIMANT will pay €2mn per batch of HEK-294 cells and take delivery of the goods [*Cl. Ex. C3 §16.1*]. This exchange between PARTIES is a clear representation of a transaction specifically for the sale of base materials, where both PARTIES meet the requirements of a sales transaction.

96. In this context, CLAIMANT has never wavered from their intent to perform their part of the obligations. Consequently, RESPONDENTS allegation that the present arbitration is CLAIMANT'S "thinly concealed effort" to avoid their obligations under PCLA [*Answer ¶3*] is nothing but an attempt to raise baseless allegations to distract the Tribunal from the real issues at hand. Therefore, seeing the fulfilment of the requirements of sales transaction, the CISG will apply.

4. The delivery of GAC vector and HEK-294 cells amounts to permanent transfer of materials in favour of CLAIMANT

97. The CISG is applicable where the seller *permanently transfers* the goods in exchange for a single payment [*Graphiplus Case; Diedrich p.71; Fausing p.19; Hachem/Kee p.105*]. PCLA is a sales transaction as RESPONDENT 1 permanently transfers and delivers *copies* of GAC vectors and HEK-294 cells **[a]** and on delivery, CLAIMANT obtains rights in the copies for an infinite term **[b]**.

a. RESPONDENT 1 transfers copies of GAC vector and HEK-294 cells to CLAIMANT under PCLA

98. Sale of a *copy* of a patented good is different from the licensing of the same [*Huber/Mullis p.43*]. The seller may not hold IP rights to the product but can still be the owner and manufacturer of goods [*Sono p.517*]. Therefore, the most crucial test is for the seller to place the buyer in a position that justifies the title of "buyer" [*Schlechtriem/Schwenzer art. 1 ¶18*]. Where a seller produces patented goods under a licensing agreement with a third party, he will be the owner of the goods so produced as they will be treated as *copies* of patented good [*Diedrich p.56*].

99. In the present case, RESPONDENT 1 produces and sells *copies* of GAC vector and HEK-294 cells to CLAIMANT, the patent of which are held by RESPONDENT 2 [*Res. Ex. R1; Cl. Ex. C2*] and VisOrg [*P.O.2 ¶2*] respectively. Therefore, on delivery of the goods, CLAIMANT obtains rights in the *copies* of GAC vectors and HEK-294 cells so produced and delivered by RESPONDENT 1, without any transfer of IP rights in the patent. Given this, PCLA is a sales contract where there is permanent transfer of property in the *copies* of GAC vector and HEK-294 cells.

b. RESPONDENT 1 transfers rights in favour of CLAIMANT for an infinite term

100. The rights transferred under PCLA are for an infinite term. In the landmark decision of the *UsedSoft Case*, the ECJ opined that a transaction involving the *perpetual transfer* of rights to the buyer is a sales contract [*UsedSoft Case; Software Case*], irrespective of the name given to the contract [*Milk Packaging Case; Fakes p.584*]. Therefore, where a "license" is granted for an undefined or infinite term and the seller has no expectation of return of the rights under the license, the contract is a sales agreement under the CISG [*Software Case; Fakes p.584; Primak p.221; Fausing p.18; Beckerman-Rodau*]. This reasoning has been extensively used, to apply the CISG to software agreements, where the use of the software is not limited in time, thereby amounting to a sales contract [*Software Case*].

101. In the present case, PCLA grants CLAIMANT "perpetual, worldwide, sublicensable, transferrable, fully paid-up" right to use GAC vectors, on expiration of the Royalty Term [*Cl. Ex. C3 §13.1*]. In case of HEK-294 cells too, RESPONDENT 1 transfers all rights in goods to CLAIMANT under §16.1 of PCLA for an infinite term [*Cl. Ex. C3 §16.1*], without any retention of rights. This transfer of rights under PCLA for an infinite term indicates a permanent transfer of ownership, with no expectation of return of rights to RESPONDENT 1, thereby qualifying as a sale under the CISG.

102. Further, the use of GAC vectors for research only into respiratory diseases does not hinder the "permanent transfer" of goods as existence of third-party IP rights does not dilute the "sale" character of the transaction [*Schlechtriem/Schwenzer art. 1 ¶18; Diedrich p.75*]. For example, a buyer of a physical copy of a book, only obtains its ownership and is not permitted to reproduce its contents due to the author's IP rights [*Diedrich p.56*]. Therefore, this restriction on the use of GAC [*Cl. Ex. C3 §2*] does not impede the "permanent transfer" to CLAIMANT, and qualifies as a sale.

C. Alternatively, the scheme of art. 3(2) CISG favours the applicability of the CISG

103. Art. 3(2) CISG excludes contracts where the preponderant part of the seller's obligations is for the supply of services [*Schlechtriem/Schwenzer art. 3 ¶11*]. Even if it is accepted that PCLA includes a licensing element due to the transfer of know-how, this will be treated as a service obligation under art. 3(2) CISG [*Schwenzer/ Tafur p.178; Hubert ¶278; Howard §9:12*]. PCLA is within the ambit of art. 3(2) CISG as the preponderant part of the sellers' obligation is for the sale of goods [*Kantons Luzern Case; Saltwater tank Case*]. Here, "preponderant obligation" must be determined by looking into the entire price structure of the contract [*Pizzaria Case; Shipped Equipment Case; Modular wall Case*] and comparing the economic value of goods with that of services [*KG Zug Case; CISG ACO 4 ¶3.2*]. The CISG is only inapplicable where the service obligation is significantly more than 50% of the total value of the contract [*Windows Case; OLG Köln Case; Schroeter ¶2.2*].

104. In the factual matrix, the sale element in PCLA comprises of the Upfront Payment [*Cl. Ex. C3 §9.2*] and payment for HEK-294 cells and cell culture medium [*Cl. Ex. C3 §16*]. Here, HEK-294 cells may be purchased either through Purchase Obligation or Production Option [*Id*]. The service element arguably comprises of Development and Regulatory Payments [*Cl. Ex. C3 §9.4*] and Royalty Payments [*Cl. Ex. C3 §9.5*]. Additionally, the provisions of PCLA are subject to different royalty slabs, depending on annual net sales by CLAIMANT [*Cl. Ex. C3 §9.5, §16.3*]. Under Production Option, 5% rate is applied on sales up to €25mn, 4% on the next €75mn and 2.5% on sales higher than €100mn [*Cl. Ex. C3 §16.3*]. Under Purchase Obligation, 6% rate is applied on sales up to €25mn, 5% on sales of €75mn and 4% on sales higher than €100mn [*Cl. Ex. C3 §9.5*].

105. If Production Option is applied, including royalty slabs, the sales element will be larger than the service element as the former will constitute 82.70% while the latter will only be 17.29% of the

total value of the transaction. Alternatively, even if the Purchase Obligation is applied, including the royalty slabs, the sales element would still be higher than the service element as the former will constitute 63.67% while the latter will be merely 36.32% of the total value of the transaction.

106. In addition, under §13.1 of PCLA *(Term)* CLAIMANT is required to pay royalties on annual net sales *only* for the duration of the royalty term of 10 years [*P.O.2 ¶6*]. Thus, the royalty payments which constitute a major portion of the service element will cease to exist on expiration of the royalty term [*P.O.2 ¶29; Cl. Ex. C3 §13.1*], thereby increasing the sales element of the transaction.

Stages of PCLA	Sales Element	Service Element	Analysis
In case Production Option is invoked	€82,500,000* [*Appx. 1*]	€17,250,000** [*Cl. Ex. C3 §16.3*]	**Sale element is 82.70% and license element is 17.29%.**
In case Purchase Obligation invoked	€42,500,000*** [*Cl. Ex. C3 §16.1; P.O.2 ¶6*]	€24,250,000**** [*Cl. Ex. C3 §9.5; Appx. 1*]	**Sale element is 63.67% and license element is 36.32%.**

107. Therefore, on comparison between the economic value of RESPONDENT 1'S sale and service obligations, it is clear that the preponderant obligations consist of the supply of goods, i.e. the batch of GAC vector, HEK-294 cells and cell culture medium. Therefore, the applicability of CISG for a dispute under PCLA is not excluded pursuant to art. 3(2) CISG.

108. **Conclusion**: The CISG is applicable to PCLA as PARTIES' place of business are in Contracting States to the CISG. In light of the analysis of subjective and objective intent of PARTIES and art. 3(1) CISG, PCLA constitutes a contract of sale. Both PARTIES have fulfilled the requirements of "sale" by completing their obligations under the CISG. This is also evidenced by the permanent transfer of goods in favour of CLAIMANT. Alternatively, PCLA is within the ambit of the CISG as the preponderant obligations lie in the sale of goods.

ISSUE IV: RESPONDENT 1 HAS BREACHED ITS CONTRACTUAL OBLIGATIONS TO DELIVER CONFORMING GOODS UNDER ART. 42 CISG

109. CLAIMANT and RESPONDENT 1 entered into PCLA in 2019, the scope of which extends to the use of GAC vector for "infectious and non-infectious respiratory diseases" [*Cl. Ex. C3 §2*]. On the other hand, Ross Agreement, concluded in 2014 between Ross Pharmaceuticals and RESPONDENT 2, granted the former an "exclusive license" for the use of GAC vector for "malaria and related infectious diseases" [*Res. Ex. R3 §2*]. Ross Pharmaceuticals has interpreted the scope of Ross

* Upfront Payments + Cost of HEK-294 cells (€4,000,000 * 20).
** Milestone Payments + Royalty Payments (5% of €25,000,000 + 4% of €75,000,000+ 2.5% of €400,000,000).
*** Upfront Payments + Cost of HEK-294 cells (€2,000,000 * 20).
**** Milestone Payments + Royalty Payments (6% of €25,000,000 + 5% of €75,000,000 + 4% of €400,000,000).

Agreement to include several infectious respiratory diseases [*Cl. Ex. C4*]. Accordingly, it has entered the development phase of a COVID-19 vaccine using GAC vector delivered by RESPONDENT 2 and is currently in its pre-clinical stage [*P.O.2 ¶16*]. However, CLAIMANT is developing a vaccine against COVID-19, what it believed was well within its rights granted under PCLA [*Answer ¶1*]. Hence, Ross Pharmaceuticals' interpretation of Ross Agreement implies a restriction on CLAIMANT'S right to use GAC vector delivered to it by RESPONDENT 1.

110. In this light, CLAIMANT asserts that RESPONDENT 1 has breached its art. 42 CISG obligations incorporated in §11 of PCLA [*Cl. Ex. C3 §11.1.3*]. Ross Pharmaceuticals' assertion of the existence of a right potentially overlapping with that of CLAIMANT violates the representations made by RESPONDENT 1 under PCLA as Ross Pharmaceuticals' assertion constitutes a third-party claim as envisaged under art. 42(1) CISG **[A]**, of which RESPONDENTS could not have been unaware **[B]**. Further, RESPONDENT 1 cannot take refuge under any exceptions provided under the CISG **[C]**.

A. Ross Pharmaceuticals' assertion constitutes a third-party claim under art. 42(1) CISG

111. Art. 42 CISG is aimed at protecting the expectation of the buyer that it is not purchasing a lawsuit [*Honnold art. 42*]. Accordingly, the seller has an obligation to deliver goods free from any claim of a third party based on "industrial or intellectual property" [*CISG art. 42*], wherein the third-party right impairs the contractually agreed use of the goods [*Schlechtriem/Schwenzer art. 42*]. Any violation of this obligation makes the seller accountable for delivering non-conforming goods [*E. Butler*].

112. In the present matter, Ross Pharmaceuticals' assertion constitutes a third-party claim as possibility of a claim is sufficient to constitute a third-party claim under art. 42 CISG **[1]** and Ross Pharmaceuticals' claim is not frivolous **[2]**. Additionally, the claim would also lead to adverse consequences for CLAIMANT **[3]**.

1. Possibility of a claim by Ross Pharmaceuticals constitutes a third-party claim as envisaged under art. 42 CISG

113. Contrary to RESPONDENTS' contention [*Answer ¶21*], buyer has the right to hold the seller accountable under the CISG even if the third party has not made a formal claim against it [*Schwerha*]. The requirement of a claim under art. 42(1) CISG is satisfied when there is a possibility that a third party *might* raise a claim against the buyer [*Janal p.211*], irrespective of the validity of such claim [*Beline; Secretariat Commentary art. 41*]. Consequently, the mere assertion of a claim by a third party [*Secretariat Commentary art. 41*], without adjudication of its rightfulness, is sufficient to constitute a breach by the seller [*Honnold art. 42*].

114. In the present case, there exists a real possibility that Ross Pharmaceuticals would make a formal IP infringement claim against CLAIMANT regarding the use of GAC vector for respiratory diseases. This possibility is accentuated by the communication made by Ross Pharmaceuticals to

RESPONDENT 2 of the divergence in interpretation where Ross Pharmaceuticals termed the matter to be an *'*IP issue" [*Res. Ex. R4 ¶1*]. RESPONDENTS also admit that such a claim could eventually be raised by Ross Pharmaceuticals [*Answer ¶21*], which is known for aggressively enforcing its IP claims [*P.O.2 ¶15; Answer ¶13; Cl. Ex. C5; Cl. Ex. C7 ¶7*]. Even the IP laws of Danubia where Ross Pharmaceuticals is located, allow it to enforce its rights to protect the use of the GAC vector [*Id.*]. This difference of interpretation of Ross Agreement qualifies as a third-party claim given the validity of the same need not be established by CLAIMANT under art. 42(1) CISG. Therefore, even though Ross Pharmaceuticals has not made a formal claim against CLAIMANT, CLAIMANT is entitled to invoke its rights under art. 42 CISG in view of the real risk of such claim.

2. Ross Pharmaceuticals' claim is not frivolous

115. Frivolous claims invoke warranty of title under art. 42 CISG [*Lookofsky; Ackerman pp.42-46; Rauda p.36*]. Alternatively, if CLAIMANT has to establish the "minimum level of seriousness*"* of the third-party claim (which it does not have to), it does not consider Ross Pharmaceuticals' claim to be frivolous. The seriousness of Ross Pharmaceuticals' claim [*Vida; Niggemann p.92*] is evident from the conduct of RESPONDENT 2, by applying art. 8 CISG and the rules of interpretation contained in arts. 4.1- 4.3 UNIDROIT Principles. The underlying principle of these provisions is the determination of the intention of the parties [*Zürich Case; CISG ACO 3 ¶2.8; UNCITRAL Digest art. 8*], in accordance with their statements and conduct [*UNIDROIT Principles art. 4.2*; *ICC 7331/1994; Honnold p.115*]. The intention is to be determined as per the understanding of a reasonable person in the same position as the parties to the contract [*Pacific Case; Glengallan Case*].

116. Under the objective test of a reasonable person, the statements and conduct of RESPONDENT 2 show that the scope of Ross Agreement was not intended to restrict the use of GAC vector to malaria. In fact, the scope of Ross Agreement was deliberately expanded to *"*malaria and related infectious diseases" [*P.O.2 ¶20; Res. Ex R2 ¶5*], despite it being the only known use of GAC vector at the time of conclusion of Ross Agreement [*Answer ¶4*]. Ross Pharmaceuticals considered the initial scope to be "too narrow" [*Res. Ex. R2 ¶5*] and drafted its proposal for the clause as broadly as possible [*P.O.2 ¶20*]. Accordingly cholera, an infectious disease, was also included as an example of "related infectious diseases*"* in the proposal and this extension was accepted by RESPONDENT 2 [*P.O.2 ¶20*]. In return for this broadening of the scope of Ross Agreement, Ross Pharmaceuticals agreed to pay an additional amount of €600,000 [*P.O.2 ¶20; Res. Ex. R4*]. Hence, the statements and conduct of RESPONDENT 2 show that the true intent of parties to Ross Agreement was to license GAC vector to Ross Pharmaceuticals for applications in the field of malaria and also any other use known subsequently during research, without any restrictions [*P.O.2 ¶20*].

117. RESPONDENT 2 itself gave a wide interpretation to the scope of Ross Agreement by using the phrase "malaria and infectious diseases" in its Press Release specifically excluding the term "related" from it [*Cl. Ex. C1*]. Additionally, RESPONDENT 2 licensed GAC vector to Ross Pharmaceuticals with the intent to focus its resources solely on the study of CAC vector, thereby indicating that it was not interested in pursuing any research in GAC vector [*Answer ¶4*]. Therefore, the conduct of RESPONDENT 2 evidences that Ross Pharmaceuticals' claim is not frivolous.

3. Ross Pharmaceuticals' claim would lead to adverse consequences for CLAIMANT

118. The policy objective of art. 42 is to protect the buyer from possibility of litigation and potential liability towards a third party [*Schwerha; Beline*]. Accordingly, buyer should not have to engage in a dispute with a third party about the existence of the latter's claim in future [*Schlechtriem/Schwenzer art. 42 ¶6; Staudinger/Magnus, art. 42 ¶13*]. The seller has the obligation to deliver unencumbered goods [*Neumayer/Ming, art. 41 ¶4; Schlechtriem pp.6-32*] and ensure undisturbed use of the same by the buyer [*Rauda p.7*]. Otherwise, the buyer will have to bear the risk of longstanding uncertainty in the use of the goods delivered to it [*Schlechtriem/Schwenzer, art. 42; Neumayer/Ming, art. 41 ¶4*].

119. CLAIMANT is a biopharmaceutical company engaged in the development of vaccines [*Cl. Ex. C3; Notice ¶1*]. In pharmaceutical industry, the cost of bringing a new drug to market is estimated to be in billions [*Ayman Chit*]. Apart from the upfront and two milestone payments which the CLAIMANT has already made to RESPONDENT 1 [*P.O.2 ¶28*], irreversible investments have been made in the research and development stage, which were estimated to be in wide range of €5 to 400mn [*Appx. 1*]. In addition to the great expense that the parties involved in an IP infringement suit have to incur [*J. Smythe*], they suffer from reputational harm as well [*Ike Silver*]. CLAIMANT has successfully conducted Phase-II trial and has announced the start of a Phase-III-trial for mid-December 2020 [*P.O.2 ¶16; Answer ¶3*] for the development of a COVID-19 vaccine. Thus, CLAIMANT'S research outcomes of clinical trials have generated public interest [*Res. Ex. R1*]. A mere threat of a lawsuit at such a crucial stage of development of vaccine would cause adverse publicity and seriously endanger CLAIMANT'S interests. As a result, the sales of CLAIMANT'S vaccines can decrease leading to loss of profits and material commercial damage [*Adv. Co. En*].

120. Moreover, Ross Pharmaceuticals' claim would hamper CLAIMANT'S social responsibility of delivering the vaccine at an appropriate time [*Wharton Feb 10, 2011*]. Bearing in mind the worrying mortality statistics, high contagiousness and rapid spread of the disease [*Sanche S*], an expeditious development and sale of a COVID-19 vaccine is important [*FDA vaccine; WHO Int'l*].Therefore, the third-party claim would have considerable ramifications for CLAIMANT who might be deprived of the use and commercialization of the vaccine for COVID-19 for an "uncertain period of time".

B. RESPONDENTS knew and could not have been unaware of Ross Pharmaceuticals' claim at the time of conclusion of the contract

121. The seller is in breach of its contractual obligations under art. 42 CISG when the seller "knew or could not have been unaware" of claims existing at the time of conclusion of the contract [*CISG art. 42(1); Maglificio Case ¶19;Zeller*]. Knowledge may be established when there is actual knowledge of the claim [*Bulldozer Case; Holland p.260*] or as a result of negligence [*Fogt p.74*] or failure to investigate [*Schwenzer p.701; Rauda p.49*]. Contrary to RESPONDENTS' contention, CLAIMANT submits that RESPONDENT 2 had knowledge of Ross Pharmaceuticals' claim at the time PCLA was concluded **[1]**, and RESPONDENT 1 could not have been unaware of the third-party claim **[2]**.

1. RESPONDENT 2 had actual knowledge of Ross Pharmaceuticals' claim

122. The expression "knew or could not have been unaware" implies seller's liability resulting from actual knowledge of the claim [*Bulldozer Case; Lookofsky p.139*]. The phrase has been interpreted to impute actual knowledge, with a lower standard of proof [*Id.; Kingspan Case; Ceramica Case ¶36*].

123. *In casu*, Ross Pharmaceuticals claimed that it was entitled to use GAC vector in the field of "comparable infectious diseases" in its communication to RESPONDENT 2 in 2018 [*Res. Ex. R4 ¶¶1,2*]. Prior to such a communication, negotiations on this issue took place between RESPONDENT 2 and Ross Pharmaceuticals [*P.O.2 ¶1*]. RESPONDENT 2 was aware of Ross Pharmaceuticals' research in MERS, a *respiratory* disease, in 2018 [*P.O.2 ¶14*], evident from the existence of a Joint Research Committee for the development of vaccines for malaria and related infectious diseases [*P.O.2 ¶21*]. The MERS research was clearly outside the RESPONDENTS' interpretation of the scope of Ross Agreement, i.e. malaria and related infectious diseases [*Res. Ex. R3 §2*]. The communication between Ross Pharmaceuticals and RESPONDENT 2 can also be established from the fact that following the initiation of this research into MERS, Ross Pharmaceuticals even renewed its efforts for the acquisition of RESPONDENT 2 [*P.O.2 ¶14; Res. Ex. R4; Answer ¶14*]. Thus, *before* the conclusion of PCLA in 2019, RESPONDENT 2 had *actual knowledge* of Ross Pharmaceuticals' claim, which overlapped with CLAIMANT'S rights under PCLA.

2. RESPONDENT 1 could not have been unaware of Ross Pharmaceuticals' claim

124. Even if the seller does not have actual knowledge of a third party claim, the expression "could not have been unaware" imposes an obligation upon the seller to inquire claims [*Schlechtrieum/Schwenzer art. 42 ¶6; Schlechtrium p.74; Audit ¶117*]. In this regard, any attempt by RESPONDENT 1 in these proceedings to claim exemption from liability on the ground that it could not have been aware of the claim of Ross Pharmaceuticals must fail. CLAIMANT submits that RESPONDENT 2's knowledge (discussed above) can be attributed to RESPONDENT 1 **[a]**. Further, in any case, RESPONDENT 1 did not fulfil its obligation to research claims **[b]**.

a. Knowledge of RESPONDENT 2 can be attributed to RESPONDENT 1

125. Knowledge is imputed on account of negligence [*Coat Case; Clay Case*] when the seller is unaware in the presence of *evident* and *obvious* facts [*Car Case ¶2; Tracy Case; Fogt p.74*]. The seller, accordingly, must not ignore *apparent facts* [*Bulldozer Case; Janal p.213; VanDuzer p.192*]. Knowledge is established when there are reasons to know that such a claim is "*likely to be asserted*" [*Summers p.363*].

126. In the present matter, RESPONDENT 2's knowledge [*Supra IV(B)(1)*] can be imputed upon RESPONDENT 1 as it had superior awareness about the dealings of RESPONDENT 2 given both companies were fully owned subsidiaries of the same parent company, Roctis AG [*P.O.2 ¶1*]. Strategic decisions as such are also known to be taken at a group level [*P.O.2 ¶1*]. In fact, Roctis AG, on behalf of both subsidiary companies, took over the negotiations concerning the scope of Ross Agreement initiated in 2018 [*P.O.2 ¶1; Res. Ex. R5; Answer ¶12*]. Apart from this, Mr. Doherty conducted the negotiations for RESPONDENT 1 while he was Director Legal for RESPONDENT 2 [*Answer ¶9*]. Thus, RESPONDENTS have no legitimate grounds to dispute its knowledge, in view of the relationship of the RESPONDENTS *inter se* with their parent company.

127. RESPONDENT 1 may contend that since no formal claim has been made by Ross Pharmaceuticals, it has not breached its obligations under art. 42. However, even if that were to be the case (which it is not), RESPONDENT 1 was under a contractual obligation [*Cl. Ex. C3 §15.1*] to disclose information to CLAIMANT. Consequently, RESPONDENT 1 could not have been unaware of Ross Pharmaceuticals' claim, and was obligated to inform CLAIMANT of the same (which it did not).

b. RESPONDENT 1 did not fulfil its obligation to research claims under art. 42 CISG

128. The seller has an obligation to duly research concerned IP claims over goods delivered to buyer [*Schlechtrieum/Schwenzer art. 42 ¶15; Audit ¶117*]. Seller's obligation extends to the conduct of due diligence [*Rauda p.49*] and taking reasonable measures for avoidance of third-party claims [*Huber/Mullis p.176; Katzenberger p.586*]. Imposition of this duty to inquire is essential for protecting buyer's right to "quiet possession of goods" [*Schlechtrieum; Honnold p.386; Enderlein/Maskow/Strohbach art. 42*]. Consequently, RESPONDENT 1 was obligated to research and clarify ambiguities as to the scope of Ross Agreement before it concluded PCLA with CLAIMANT. This duty to inquire relates to information that is "routinely or uniquely" in seller's possession [*Shinn p.125*]. Failure to comply with this duty imputes knowledge upon the seller [*Beline*].

129. The claim, in the present matter, was first published on December 14, 2018, in Biopharma Science, a local journal in Danubia, accepted as a credible source of information [*P.O.2 ¶9; Cl. Ex. C4*]. The journal is popular among investors in Equatoriana [*P.O.2 ¶9*], where RESPONDENT 1 is registered [*Cl. Ex. C3 Preamble*]. Additionally, the Press Release by RESPONDENT 2 made it clear that GAC vector was exclusively licensed out to Ross Pharmaceuticals in the field of "malaria and infectious

diseases" [*Cl. Ex. C1*]. RESPONDENT 1, in accordance with the duty to inquire, *should have been* aware of Ross Pharmaceuticals' claim. Therefore, RESPONDENT 1 did not fulfil its obligation to inquire and research under art. 42 CISG, thereby imputing knowledge upon RESPONDENT 1.

C. RESPONDENT 1 cannot take refuge under any of the exceptions provided under arts. 42 and 43 CISG

130. The seller is exempted from liability under art. 42(1) CISG when the buyer is aware or could not have been unaware of the third-party claim, at the time of the conclusion of the contract [*CISG art. 42(2)(a); UNCITRAL Digest p.214*]. Additionally, art. 43(1) CISG absolves the seller of any liability when the buyer fails to give notice to the seller, within reasonable time after gaining knowledge about the claim. Contrary to RESPONDENTS' submissions, CLAIMANT submits that RESPONDENT 1 is not protected by these exceptions as the former was unaware and could not have been aware of Ross Pharmaceuticals' claim at the time of the conclusion of PCLA **[1]**, and that CLAIMANT has complied with the requirements of art. 43 **[2]**.

1. CLAIMANT could not have been aware of Ross Pharmaceuticals' claim at the time of the conclusion of PCLA

131. RESPONDENTS may aver that they are absolved from liability under art. 42(1) based on CLAIMANT'S alleged awareness of Ross Pharmaceuticals' claim at the time of conclusion of the PCLA [*Schlechtrieum/Schwenzer art. 42; Secretariat Commentary*].There is, however, nothing on record indicating that CLAIMANT had any knowledge of the claim made by Ross Pharmaceuticals at the time of conclusion of PCLA. Neither was CLAIMANT in a position to have knowledge of these claims or assertions unless RESPONDENTS provided such information to CLAIMANT during the negotiations of the PCLA (which RESPONDENTS did not).

132. Art. 42(2) CISG imposes no duty on the buyer to inquire into third-party claims [*Schlechtriem/Schwenzer art. 42 ¶17; Kroll I art. 42 ¶38; Enderlein et. al. art. 42*]. Even if such an obligation exists, the standard of duty imposed on CLAIMANT is lower than that of RESPONDENT 1, in view of the asymmetric information available to seller and buyer [*Sunwear Case p.478; J. Smythe p.531; Saidov p.221*]. Application of the same standard of duty upon the buyer and the seller would absolve seller from liability in all instances on account of buyer's duty to research [*Schlechtrieum/Schwenzer p.702; Kröll p.658; Janal p.219*]. Accordingly, reliance is placed on art. 42(2) CISG by the seller only when the buyer has *complete knowledge* [*Footware Case*], or was *negligent* in its conduct [*Textile Case*]. CLAIMANT submits, in this regard, that it did not have, and could not have had *complete knowledge* of the claim at the time of concluding PCLA **[a]**, and that its lack of awareness of Ross Pharmaceuticals' claim then was not the result of any negligence on its part **[b]**.

a. CLAIMANT did not have complete knowledge of the third-party claim

133. It is established that seller has greater access and knowledge of the nature of the goods [*Zamir p.77*], and is more likely to be aware of any third-party claim. It must be proven that buyer has *complete knowledge* of the third-party claim in order to attract art. 42(2) CISG [*Footware Case*].

134. In the present matter, CLAIMANT had no knowledge of the article published in Biopharma Science as its subscription had been terminated in January 2018 [*P.O.2 ¶8*]. Further, Ms. Hübner, who had been working for Ross Pharmaceuticals at the time of conclusion of Ross Agreement, joined CLAIMANT only in June 2019, *post* the conclusion of PCLA [*P.O.2 ¶12*]. CLAIMANT was able to gather complete knowledge only on May 1, 2020, and hence, at the time of the conclusion of PCLA i.e. in January 2019, CLAIMANT did not have and could not have had *complete knowledge* of the third-party claim. Therefore, in view of the absence of evidence imputing complete knowledge upon CLAIMANT, RESPONDENT 1 cannot rely upon art. 42(2) CISG.

b. CLAIMANT's lack of awareness of the third-party claim is not a result of any negligence on its part

135. Admittedly, buyer's knowledge may be established even in the absence of complete knowledge if the buyer is negligent in dealing with available information [*Textile Case; Société Case*]. The buyer is said to be negligent when it ignores obvious facts [*Janal p.213; Van Duzer p.192*]. This threshold appeals to the test of a reasonable man [*BGH (1992)*].

136. In the present matter, knowledge cannot be imputed upon CLAIMANT on the ground that it was negligent as PCLA concerned contractual relationship between RESPONDENT 1 and CLAIMANT alone. CLAIMANT could not have been aware about the dealings of RESPONDENT 2 and Ross Pharmaceuticals, since both were third parties to PCLA. In fact, CLAIMANT has never entered into business with Ross Pharmaceuticals [*P.O.2 ¶13*]. It would be *unreasonable* to expect CLAIMANT to have been aware of a claim made by a party so distant in the chain of commercial relations as far as CLAIMANT is concerned. Similarly, the Press Release of RESPONDENT 2 could not have been reasonably detected in the process of CLAIMANT'S due diligence as it was published four years prior to the conclusion of PCLA between RESPONDENT 1 and CLAIMANT in 2019 [*Cl. Ex. C1*]. Consequently, it cannot be proven that CLAIMANT was negligent in the absence of any obvious fact imputing knowledge upon it. Therefore, CLAIMANT was not aware or could not have been aware of Ross Pharmaceuticals' claim at the time of the conclusion of PCLA.

***2.* CLAIMANT has complied with the notice requirement under art. 43 CISG**

137. Protection under arts. 41 and 42 CISG is subject to the buyer's obligation to notify the seller of any third-party claim of which the buyer has or ought to have become aware of [*CISG art. 43; Automobile Case*]. The notice should be sent within reasonable time [*Bianca/Bonnell-Sono*]. Art. 43(2)

CISG states that notice need not be sent when the seller's knowledge of the third-party claim is proven [*CISG art. 43(2)*]. Accordingly, CLAIMANT submits that art. 43(1) is not applicable as it was exempted from giving any notice, as per art. 43(2) **[a]** and, in any event, notice was sent to RESPONDENT 1 within a reasonable period of time **[b]**.

a. CLAIMANT was exempted from giving any notice under art. 43(2) CISG

138. A seller, who is aware of third-party claims based on IP, cannot seek exemption from liability [*CISG art.43; CD Media Case*]. Depriving the buyer of remedy under art. 42 CISG, in spite of seller's established knowledge, on grounds of lack of notification would be unfair [*Bianca/Bonnell-Sono pp.322-323*]. As, RESPONDENT 1 had knowledge of the third party claim at the time of the conclusion of PCLA [*Supra IV(B)*], and thus, no notice was required under art. 43 CISG.

b. In any event, CLAIMANT sent notice to RESPONDENT 1 within a reasonable time

139. Notice is required to be based on *reliable* information about the third-party claim, as it would warrant relevant parties to take measures in regards to the claim [*Schlechtriem/Schwenzer art.43 ¶3; Bianca/Bonell art. 43*]. While the buyer may have such an obligation, it "ought to have become aware of the claim" only in the presence of *concrete facts* establishing so [*Schlechtriem/Schwenzer art. 43 ¶4*], based on the standard of reasonableness [*Kroll p.529*]

140. In the instant case, CLAIMANT became aware of Ross Pharmaceuticals' claim no earlier than May 1, 2020, when CLAIMANT'S COO, Mr. Metschnikow, learnt about an article published in Biopharma Science [*Cl. Ex. C5*]. Prior to this, CLAIMANT was not aware of the claim. Ms. Hübner could not have been aware of the IP dispute given the negotiations as to the Ross Agreement concluded in 2014 [*Cl. Ex. C7*]. Additionally, she is not a lawyer [*Id. ¶6*], and is unlikely to be involved in detailed contract negotiations on the legal matters. Consequently, Ms. Hübner, given her minimal role, could not have been aware of the divergent view which Ross Pharmaceuticals communicated only four years later. The only contentious issue, known to Ms. Hübner, was limited to the exclusivity of the license [*Id. ¶¶6-7*]. Hence, to her best knowledge until May 2020, the scope of Ross Agreement was not disputed.

141. Additionally, CLAIMANT'S efforts to get access to the copy of Ross Agreement also failed [*Notice ¶22*]. Therefore, in the absence of any *concrete facts* prior to May 1, 2020, CLAIMANT had no reason, and was not obliged, to send a notice under art. 43(1) to RESPONDENT 1 until such time. Immediately after CLAIMANT had concrete knowledge of the dispute between RESPONDENT 2 and Ross Pharmaceuticals [*Cl. Ex. C4*], CLAIMANT sent the notice to RESPONDENT 1 on May 2, 2020 [*Cl. Ex. C5*], *i.e.,* within reasonable time for the purpose of art. 43 CISG.

142. **Conclusion**: RESPONDENT 1 has breached its contractual obligations to deliver conforming goods, free from any claim of a third-party, under art. 42 CISG. Lack of conformity in GAC vector

is established as Ross Pharmaceuticals' potential claim is not frivolous and sufficient to constitute third-party claim. Further, RESPONDENT 1 also could not have been unaware of this claim at the time of the conclusion of PCLA. Lastly, refuge cannot be sought under exceptions provided under arts. 42 and 43 CISG by RESPONDENT 1.

PRAYER FOR RELIEF

In light of the above submissions, CLAIMANT respectfully requests Tribunal to declare that:

1. Ross Pharmaceuticals' should not be joined to the present proceedings.
2. The evidentiary examinations at the 2nd Hearing should be conducted remotely.
3. The CISG is applicable to PCLA as it a contract of sale within the ambit of the CISG.
4. RESPONDENT 1 breached its obligation to deliver conforming goods under art. 42 CISG.

All of which is most humbly and respectfully, submitted.

Abhinav

Aditya Bamb

Aryan Yashpal

Bhavyakirti Singh

Devika Sreekumar

Jehan Jhaveri

Malaika Shivalkar

Maulik Khurana

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Rishika Arya

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

Certificate and Choice of Forum

To be attached to each Memorandum

I, **Rishika Arya**, on behalf of the Team for **National Law University, Jodhpur**, hereby certify that the attached memorandum was prepared by the members of the student team, and that no person other than a student team member has participated in the writing of this Memorandum.

Check off the boxes as appropriate:

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

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

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

Or

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

☐ Vis East Moot in Hong Kong, or

☐ Vienna Vis Moot

Authorised Representative of the Team for National Law University, Jodhpur

Name: Rishika Arya

Signature_____