IFIM LAW SCHOOL

EIGHTEENTH ANNUAL

WILLEM C. VIS (EAST) INTERNATIONAL COMMERCIAL ARBITRATION MOOT

14th MARCH – 21st MARCH 2021

IFIM LAW SCHOOL

MEMORANDUM FOR CLAIMANT

Case No. 300610-2020

ON BEHALF OF:	**AGAINST:**	
RespiVac plc	**CamVir Ltd.**	**VectorVir Ltd.**
1 Zinkernagel Avenida,	112 Rue L. Pasteur,	67 Wallace Rowe Drive,
Capital City,	Oceanside,	Oceanside,
Mediterraneo	Equatoriana	Equatoriana
CLAIMANT	**RESPONDENT NO. 1**	**RESPONDENT NO. 2**

FATHIMA RIFA P ● HARIHARAN SRIRAM ● KEHAN VORA ● MEGHANA R ● RISHITHA K ● SIMRAN KAUR●

TABLE OF CONTENTS

IFIM LAW SCHOOL

IFIM LAW SCHOOL

INDEX OF ABBREVIATIONS

ABBREVIATION	CITATION
&	And
%	Percent
ANA	Answer to the Notice of Arbitration dated 14th August 2020
Art./Arts.	Article/Articles
CE	Claimant Exhibit
CEO	Chief Executive Officer
cl.	Clause
COO	Chief Operating Officer
ed.	Edition
CISG	United Nations Convention on Contracts for the International Sale of Goods of 11th April 1980
CISG-Online	Case Law on the UN Convention on Contracts for the International Sale of Goods (Internet database), edited by the Institute of Foreign and International Private Law (Dept. I), University of Freiburg, Germany
CLAIMANT	RespiVac plc
CLOUT	Case Law on UNCITRAL Texts (Internet database), edited by the UNCITRAL Secretariat
Dt.	Dated
EUR	Euro
ICC	International Chamber of Commerce
ICC Rules	ICC Rules of Arbitration
IP	Intellectual Property
Ltd.	Limited
Mr.	Mister
MünchKomm	Münchener Kommentar (Germany)
NA	Notice of Arbitration dated 15th July 2020

New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958
No.	Number
¶	Paragraph
p./ pp.	Page/ Pages
P&L	Internal P&L of CLAIMANT and RESPONDENT No. 1
Parties	CLAIMANT and RESPONDENTS
PCLA	Purchase, Collaboration and Licensing Agreement
PO1	Procedural Order 1 dated 9th October 2020
PO2	Procedural Order 2 dated 7th November 2020
RE	Respondent Exhibit
RESPONDENTS	RESPONDENT No. 1 & RESPONDENT No. 2
RESPONDENT No. 1	CamVir Ltd.
RESPONDENT No. 2	VectorVir Ltd.
Ross agreement	Collaboration and License Agreement entered between RESPONDENT No. 2 & Ross Pharma.
Ross Pharma	Ross Pharmaceuticals
§	Section
SCAI	Swiss Chambers' Arbitration Institution
Swiss Rules	Swiss Rules of International Arbitration
Tribunal	The Arbitral Tribunal constituted as on 1st September 2020
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts (1994)
UNILEX	International Case Law & Bibliography on the UN Convention on Contracts for the International Sale of Goods, edited by Michael Joachim Bonell at the Center for Comparative and Foreign Law Studies, Irvington-on-Hudson, New York.
v.	versus (against)
Vol.	Volume
WHO	World Health Organisation

INDEX OF AUTHORITIES

Arbitration International (31st Vol., 2015)

Choi, Dongdoo ¶16 (*Choi*)
Joinder in international commercial arbitration
Arbitration International (35th Vol., 2019)

Rapporteur: Professor Christina Ramberg, Gothenburg, Sweden; ¶63 (*CISG-AC Op. 1*)
CISG-AC Opinion No 1, Electronic Communications under CISG dt. 15th August 2003.
Available at: https://www.cisg.law.pace.edu/cisg/CISG-AC-op1.html#art43

Chair: Schlechtriem, Peter ¶48 (*CISG-AC Op. 4*)
CISG-AC Opinion No 4, Contracts for the Sale of Goods to be Manufactured or Produced and Mixed Contracts (Article 3 CISG) dt. 24th October 2004.
Available at: https://www.cisg.law.pace.edu/cisg/CISG-AC-op4.html

Czerwenka, G. B. ¶39 (*Czerwenka*)
Rechtsanwendungsprobleme im internationalen Kaufrecht
Duncker & Humblot (1st ed., 1988)

Enderlein, Fritz; Maskow, Dietrich ¶55, 64 (*Enderlein/Maskow*)
International Sales Law: United Nations Convention on Contracts for the International Sale of Goods, Convention on the Limitation Period in the International Sale of Goods
Oceana Publications (1992)

Enderlein, Fritz; Maskow, Dietrich; Strohbach, Heinz
internationalesKaufrcht
Berlin: Haufe (1991)
¶47, 65, 66 (*Enderlein/Maskow/Strobach*)

Ferrari, Franco; Torsello, Marco
International Sales Law - CISG - in a Nutshell
West Academic Press, (1st ed., 2014)
¶43, 65 (*Ferrari*)

Habegger, Philipp
The Revised Swiss Rules of International Arbitration: An Overview of the Major Changes
ASA Bulletin (30th Vol., 2012)
¶6 (*Habegger*)

Hanotiau, Bernard
Joinder of Parties and Joinder of Claims: Voluntary and Compelled Intervention of Third Parties, Cross-Claims and Consolidation
Complex Arbitrations: Multiparty, Multicontract, Multi-issue, Class Action, Kluwer Law International (2006)
¶4 (*Hanotiau*)

Honnold, John
Uniform Law for International Sales under the 1980 United Nations Conventions
Kluwer Law International (3rd ed., 1999)
¶55, 59, 61 (*Honnold*)

Honnold, John O; Fletchner, Harry M.
Uniform Law for International Sales under the 1980 United Nations Convention
Kluwer Law International (4th ed., 2009)
¶47, 55 (*Honnold/Fletchner*)

Honsell, Heinrich; Lauko, R.
Kommentar zum UN-Kaufrecht: Übereinkommen der Vereinten Nationen über Verträge über den
¶45 (*Honsell/Lauko*)

Internationalen Warenkauf
Zweite Auflage (2nd ed., 2010)

Huber, Peter; Mullis, Alastair — ¶66 (*Huber/Mullis*)
The CISG: A New Textbook for Students and Practitioners
Sellier European Law Publishers (2007)

Kaufmann-Kohler, Gabrielle; Schultz, Thomas — ¶25 (*Kaufmann-Kohler/Schultz*)
The Use of Information Technology in Arbitration
Kluwer Law International (2005)

Kröll, Stefan; Mistelis, Loukas; Viscasillas, Pilar Perales — ¶60 (*Kröll Et Al.*)
UN Convention on the International Sales
of Goods (CISG) [Commentary]
München (2011)

Langenecker, Joseph — ¶55 (*Langenecker*)
UN-Einheitskaufrecht und Immaterialgüterrechte:
Die Rechtsmängelhaftung bei internationalen Kaufverträgen
nach dem UN-KaufrechtsÜbereinkommen unter
besonderer Berücksichtigsung von Immaterialgüterrechten
Munich (1993)

Lookofsky, Joseph — ¶56 (*Lookofsky*)
The 1980 United Nations Convention on Contracts
for the international Sale of Goods.
Kluwer Law International, The Hague (2000)

Münchener Kommentar zum Handelsgesetzbuch, — ¶66 (*MünchKomm HGB*)
Wiener UN-Übereinkommen über Verträge
über den internationalen Warenkauf – CISG
München (2nd ed., 2007)

Nater-Bass, Gabrielle; Pfisterer, Stefanie
Arbitration in Switzerland: The Practitioner's Guide
Kluwer Law International (2nd ed., 2012)
¶22, 29, 30 (*Nater-Bass/Pfisterer*)

Neumayer, Karl H; Ming, Catherine
Convention de Vienne sur les contrats de vente internationale de marchandises
Commentaire, Lausanne (1993)
¶45, 56 (*Neumayer/Ming*)

Prager, Martin
Verkäuferhaftung und ausländische gewerbliche Schutzrechte: Die Haftung des Verkäufers beweglicher Sachen für deren Freiheit von gewerblichen Schutzrechten oder Urheberrechten nach dem UNKaufrechtsübereinkommen vom
Pfaffenweiler (1987)
¶56 (*Prager*)

Redfern, Alan; Hunter, Martin; Blackaby, Nigel; Partasides, Constantine
Convention on the Recognition and Enforcement of foreign Arbitral Awards
Oxford University Press (6th ed., 2015)
¶13 (*Redfern/Hunter*)

Scherer, Maxi
Remote Hearings in International Arbitration: An Analytical Framework
Journal of International Arbitration (37th Vol., 2020)
¶25 (*Scherer*)

Schlechtriem, Peter
Commentary on the UN Convention on the International Sale of Goods (CISG)
Oxford University Press (2nd ed., 1998)
¶43 (*Schlechtriem*)

Schlechtriem, Peter *Uniform Sales Law – The-UN Convention on Contracts for the International Sale of Goods* Manz, Vienna (1986), *available at:* https://cisgw3.law.pace.edu/cisg/biblio/schlechtriem19.html	¶60 (*Schlechtriem II*)
Schlechtriem, Peter; Schwenzer, Ingeborg *Commentary on the UN Convention on the International Sale of Goods* Oxford University Press (2nd ed., 2005) / (4th ed., 2016)	¶33, 39, 55, 64, 66 (*Schlechtriem/Schwenzer*)
UNCITRAL Secretariat *"Guide to CISG Article 42," (closest counterpart to an Official Commentary), available at*: http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-41.html	¶55 (*Secretariat's Commentary Art.42*)
Schramm, Dorothee *Commentary on the Swiss Rules Art.4* [*Consolidation and Joinder*]*;* M. Arroyo (ed.) Arbitration in Switzerland: The Practitioner's Guide; Kluwer Law International (2nd ed., 2018)	¶2, 3, 7 (*Schramm*)
Magnus, Ulrich von Staudinger, J., *Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen: Wiener Kaufrecht (CISG)* [*CISG commentary, Art.-by-Art. in German*] Magnus, Berlin (13th ed., 1994)	¶43, 47, 55 (*Staudinger/Magnus*)

Strong, S.I. ¶13 (*Strong*)
Third party intervention and joinder as international arbitration: An infringement of individual contract rights or a proper equitable measure?
Vanderbilt Journal of Transnational Law (31st Vol., 1998)

Waincymer, Jeffrey M. ¶27 (*Waincymer*)
Online Arbitration
Indian Journal of Arbitration Law Kluwer
Intl'l Journal (19th Vol., 2020)

World Health Organization Secretariat ¶37 (*WHO Report*)
WHO Consultation on Characterization and Quality Aspect of vaccines based on live Viral Vectors
WHO Meeting report (4th December 2003)

Mak, Yvonne ¶26 (*Yvonne*)
Do Virtual Hearings Without Parties' Agreement Contravene Due Process? The View from Singapore
Kluwer Law International (2020)

Zeller, Bruno ¶55 (*Zeller*)
Intellectual Property Rights & The CISG Article 42
(2011) 15(2) VJ 289 – 302

Zuberbühler, Tobias; Müller, Christoph; Habegger, Philipp ¶6 (*Zuberbühler/ Müller/Habegger)*
Swiss Rules of International Arbitration: Commentary
Schulthess Verlag (2nd ed., 2013)

STATUTES, RULES AND TREATIES

ABBREVIATION	CITATION
CISG	United Nations Convention on Contracts for the International Sale of Goods 1980 19 I.L.M. 668 (1980)
ICC Guideline	ICC Guidance Note on Possible Measures Aimed at Mitigating the Effect of the COVID19 Pandemic (9th April 2020)
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1959)
UNCITRAL Model Law	United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration with amendments as adopted in 2006 24 ILM 1302 (1985)
UNCITRAL Rules	United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules (as revised in 2010) UN Doc. A/RES/31/98; GA/RES/65/22
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts International Institute for the Unification of Private Law (2010)
Swiss Rules	Swiss Rules of International Arbitration (2012)

IFIM LAW SCHOOL

INDEX OF CASES

Sun Legend Investments Ltd. v. Ho Yuk Wah [2008] 4 H.K.L.R. D	¶42
Super Perfect Investments Ltd. v. Agroinvestbank OJSC SCAI Case No. 300310-2014	¶10
The Automobile Case [2006] VIII ZR 268/04	¶69 (*CLOUT 822*)
The C D Media Case, [2006] 10 Ob 122/05z	¶69 (*CLOUT 753)*
Tetra Pak Marketing Pty. Ltd. v. Musashi Pty. Ltd., [2000] F.C.A. 1261	¶42
UsedSoft GmbH v. Oracle International Corp [2012] C-128/11	¶ 58, 66
[1997] 2 U 31/96	¶61 (*CLOUT 282*)
[2011] A40-56769/07-23-401	¶28
[2008] T-4/05	¶58 (*CLOUT 1021*)
[1999] A3 1997 61	¶57 (*CLOUT 328*)
ICC 7893 [1994]	¶15

STATEMENT OF FACTS

1. ***RespiVac plc*** (CLAIMANT) is a biopharma start-up that develops vaccines for respiratory diseases caused by viruses. ***CamVir Ltd*** (RESPONDENT No. 1) is a 100% subsidiary of the Roctis Group, one of the biggest pharmaceutical companies in the world. ***VectorVir Ltd***, (RESPONDENT No. 2) another subsidiary of Roctis Group, is a startup for the development of vaccines and the owner of GorAdCam as well as ChAdCam vector vaccines.
2. GorAdCam viral vector is derived from the genetically modified adenovirus that causes common cold in Gorillas. The viral vector is so modified as to stop the replication of the virus. This, when combined with the charged virus of interest can be used as a vaccine as there is no risk of proliferation of the virus.
3. RESPONDENT No. 2 was a start-up founded in 2012 that sought to commercialize and further develop patents in the use of viral vectors. The two most promising of those were the GorAdCam and the ChAdCam viral vectors. The latter was believed to hold more potential in respiratory disease vaccines, while the former was said to be best applicable in malaria medicine. Due to limited funding and line of technical expertise, RESPONDENT No. 2 decided to concentrate on the development of vaccines for respiratory diseases using the ChAdCam vector whilst completely stopping working on the GorAdCam viral vector.
4. In June 2014, the "*Ross Agreement"* was entered into by RESPONDENT No. 2 and Ross Pharma which granted the latter a license for the use of the GorAdCam viral vector for development and production of malaria vaccines. The license was apparently given for "malaria and infectious diseases". In the following years, research into the GorAdCam viral vector showed that the initial assessment was wrong and that it had potential for treatment of respiratory diseases.
5. RESPONDENT No. 1 is the Contract Manufacturing Company for the Roctis Group and produces base materials used in vaccines and other drugs, mostly through licenses and sublicenses from companies within and outside the Roctis Group. They specialize in production of monoclonal antibodies and sell them to other companies involved in cancer research and medicine production for great profits.
6. In January 2018, RESPONDENT No. 1 acquired a non-exclusive license for the production of HEK-294 cells, a new cell-line that contains the E1 replication adenovirus that is further optimized for high production rates. These cells can be used as hosts to create more

modified viral vectors with gene inserts. RESPONDENT No. 1 had developed a specific cell culture growth medium containing necessary energy sources for the proliferation of this cell line. Thus, the cells and the growth culture medium are both crucial for the production of sufficient quantities of viral vectors to use in vaccines.

7. In August 2018, Roctis Group acquired RESPONDENT No. 2 along with all its patents. Following this, RESPONDENT No. 2 entered into an exclusive license agreement with RESPONDENT No. 1 which granted the latter the permission for production, sale and sublicensing of the GorAdCam viral vector for all applications except Malaria.
8. In January 2019, the CLAIMANT entered into a Purchase, Collaboration and License Agreement (hereinafter referred to as the PCLA) with RESPONDENT No. 1 which concerned with the delivery of GorAdCam viral vectors and its subsequent use for research, development and commercial production of vaccines against respiratory diseases. The initial template provided by Mr. Doherty's predecessor was not suitable for the type of research that the CLAIMANT undertook and thus was unacceptable for them. When Mr. Doherty, who formerly worked with RESPONDENT No. 2 during the time of negotiations and then in January 2019 started working with RESPONDENT No. 1, had taken over, he suggested that the further discussions be based on the template used by RESPONDENT No. 2 for their Collaboration and License Agreement. In addition to a few minor changes, a new §16 was included in the template which incorporated additional purchase obligations on the CLAIMANT and an option to have the vaccine produced by RESPONDENT No. 1. The obligations would arise if the CLAIMANT had successfully developed a vaccine and if so, they would then have to purchase the HEK-294 cells and the necessary growth medium from RESPONDENT No. 1.
9. This purchase requirement is different from the prevailing practice as what usually happens is that the licensor or the patent owner, will sell and deliver a specifically modified harmless viral vectors (containing the specific gene of interest) to the licensee for research use to determine the most suitable insert for subsequent vaccine development. Once the optimized gene insert has been identified, the licensor delivers large quantities of GMP produced viral vectors to the licensee for conducting clinical trials. If such a vaccine turns out to be successful, then the licensee themselves produce larger quantities of the viral vector and merely pay royalty for the use of the patent. There is no prevailing need to purchase the

HEK cells or the growth medium from the licensor. Normally, HEK -293 cells are used for amplification and standard growth mediums are opted.

10. GorAdCam viral vectors are best amplified with HEK-294 cells, and by the end of 2018, RESPONDENT No. 1 was one of the only two producers of HEK-294 cells and its cell culture growth media. This led to the inclusion of purchase obligation of the HEK-294 cells in the PCLA. RESPONDENT No. 1 was obliged to deliver the first batch of the GorAdCam viral vectors to the CLAIMANT for a price of 2.5 million EUR. A further amount of nearly 3 million EUR was also due upon fulfilment of successful completion of various clinical phases and approval from the Regulatory Authorities.
11. The CLAIMANT had soon identified that the GorAdCam viral vector has great potential to create a vaccine against the SARS-CoV-2 virus that causes COVID-19. Thus, from early February 2020, the Claimant concentrated its further research into the development of a vaccine against COVID 19 and the first results in April 2020 were very promising.
12. On 1st May 2020**,** CLAIMANT's COO, Mr. Paul Metschnikow through an older article published in a journal named Biopharma Science, became aware of a dispute between Ross Pharma and RESPONDENT No. 2 as to the reach and extent of the license granted in 2014 under the Ross agreement. It can be deduced from the article that the license was granted for "malaria and comparable infectious diseases". Following this, the COO, Mr. Paul Metschnikow immediately contacted Ms. Alexandra Flemming, the CEO of RESPONDENT No. 1 to clarify the situation but the latter assured that the existing claim was baseless.
13. CLAIMANT'S CFO, Ms. Rosaly Hübner who worked for Ross Pharma during negotiations of the Ross agreement confirmed through her source that there were continuing discussions about the extent of the exclusive license agreement and the right to use the GorAdCam vector against COVID-19 between Roctis and Ross Pharma.
14. The CLAIMANT contends that the PCLA is governed by the CISG as it involves the sale of goods. Thus, pursuant to Art.42(1) CISG, RESPONDENT No. 1 was required to deliver goods that were "free from any right or claim of a third party based on industrial property or other intellectual property." The CLAIMANT's use of the GorAdCam viral vectors can be potentially restricted by the IP-right or claim made by Ross Pharma due to their agreement with RESPONDENT No. 2. The CLAIMANT, based on the explicit dispute resolution clause contained in §14 of the PCLA, has approached the Tribunal.

DATE	**EVENTS**	**POINT OF REFERENCE**
15th June 2014	RESPONDENT No. 2 entered into an agreement with Ross Pharma to use GorAdCam Vector for malaria and other infectious diseases.	*p.*5 ¶8
January 2018	RESPONDENT No. 1acquired non-license to produce HEK-294 Cells.	*p.*5 ¶5
25th Aug 2018	Roctis acquired RESPONDENT No. 2 and its patents.	*p.*5 ¶10
10th September 2018	RESPONDENT No. 2 granted RESPONDENT No. 1 an exclusive license for the use of the GorAdCam for respiratory disease.	*p.*26 ¶8
26th November 2018	Article by Lifescience Today on RESPONDENT No. 1 acquiring exclusive license agreement from RESPONDENT No. 2 of GorAdCam viral vector for all applications except malaria.	*p.*10 *CE2*
1st January 2019	Claimant entered an agreement with RESPONDENT No. 1 for subsequent production of vaccine against respiratory diseases.	*p.*6 ¶11; *CE3*
19th December 2019	Biopharma reported a dispute between Ross and RESPONDENT No. 2.	*CE4*
February 2020	Claimant concentrated its further research on vaccine against Covid-19.	*p.*7 ¶18
1st May 2020	Claimant's COO found an article by Biopharma Science regarding the dispute	*p.*7 ¶19

	between Ross and RESPONDENT No. 2 as to the scope of Ross Agreement.	
2nd May 2020	Claimant's COO contacted CEO of RESPONDENT No. 1 to clarify the situation.	*CE5*
6th May 2020	Response from CEO of RESPONDENT No. 1.	*CE6*
June 2020	Ongoing discussions between Roctis and Ross Pharma about the scope of Ross Agreement.	*p.*7 ¶22
15th July 2020	Notice of Arbitration by Claimant.	*p.*4
14th August 2020	Answer to Notice of Arbitration by the Respondents.	*p.*25
2nd October 2020	Claimants objects to the joinder of Ross Pharma.	*p.*48
2nd October 2020	Respondent objects to virtual hearing.	*p.*49
9th October 2020	Issued P.O No. 1	*p.*51
7th November 2020	Issued P.O No. 2	*p.*53

SUMMARY OF ARGUMENTS

ISSUE I: ROSS PHARMA SHOULD NOT BE JOINED IN THIS INSTANT DISPUTE.

The CLAIMANT raises strong objection to the joinder of Ross Pharma as §14 (1) of the PCLA did not empower the Tribunal to join Ross Pharma without its consent to this instant dispute. The Tribunal is not obstructed from resolving this dispute without the presence of Ross Pharma. The joinder would convolute the proceedings and would provide sufficient ground for challenging the enforcement of the award. Thus, the compelled joinder of Ross Pharma would be a major regression in the adjudication of this dispute.

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

The Swiss Chamber's Arbitration Institution requested the Parties to submit its objections to remote hearing. The CLAIMANT raised no objections as essentials of fair hearing are fulfilled. The CLAIMANT also submits that the Tribunal has the discretion to conduct the examination remotely and Parties are bound to act in good faith to avoid unnecessary costs and delay.

ISSUE III: CISG IS APPLICABLE TO THE "PURCHASE, COLLABORATION AND LICENSE AGREEMENT" CONCLUDED BETWEEN CLAIMANT AND RESPONDENT No. 1.

The CLAIMANT pleads that the PCLA is a mixed contract, where the predominant nature of the agreement is the sale of goods. This is evident by the clear intention to enter into a 'buyer-seller' relationship, confirmed delivery of goods and the staggering economic value of the purchase obligations. The Viral Vectors, along with the cell culture and media are indeed 'goods' as per the CISG, as clearly displayed by the production and delivery of tangible goods by the seller, and customization as per the buyer's instructions.

ISSUE IV: RESPONDENT No. 1 HAS BREACHED THE CONTRACTUAL OBLIGATION TO DELIVER CONFORMING GOODS EXISTING PURSUANT TO ART.42 CISG.

The CLAIMANT submits that the RESPONDENT No. 1 has delivered encumbered goods which held a third-party claim from Ross Pharma, thus violating Art. 42 CISG and §11.1.3 of the PCLA. Further, the CLAIMANT asserts that RESPONDENT No. 1 had positive knowledge of the claim while contracting with the CLAIMANT, failing to inform the latter of the same. The CLAIMAINT also conforms to the requirements of Art.43(1), as it did not have knowledge of the claim and informed the RESPONDENT No. 1 of the same within reasonable time. Hence, the CLAIMANT pleads to grant declaratory relief by asserting breach of PCLA by RESPONDENT No. 1.

ARGUMENTS ADVANCED

ISSUE I: ROSS PHARMACEUTICALS SHOULD NOT BE JOINED IN THIS INSTANT DISPUTE.

1. It is undisputed that a consensus was reached between the Parties that disputes arising out of the PCLA shall be submitted to the rules of Swiss Chambers Arbitration Institution [*CE3 p.16 §14.1*]. Thus, the CLAIMANT sent the notice of arbitration pursuant to Art.3 of the Swiss Rules seeking to declare the breach of PCLA by the RESPONDENT No. 1 [*NA p.8 ¶30*]. The RESPONDENTS in reply to the notice requested the joinder of Ross Pharma to discuss the scope of Ross Agreement [*ANA p.28 ¶23(a)*]. The CLAIMANT objects to the joinder of Ross Pharma in this instant dispute as compelling an unwilling non-signatory such as Ross Pharma to arbitrate is impossible under Art.4(2) of the Swiss Rules **(A)** and the limited scope of §14.1 of PCLA precludes the Tribunal from compelling the joinder of third party i.e., Ross Pharma **(B).**

A. ROSS PHARMA CANNOT BE COMPELLED TO JOIN THIS INSTANT DISPUTE UNDER ART.4(2) OF THE SWISS RULES.

2. Third persons can either intervene or join arbitration proceeding pursuant to Art.4(2) of the Swiss Rules. The rule explicitly provides that the tribunal shall consult with the parties to the pending arbitration and the third person before deciding on joinder [*Schramm p.492*]. In this instant dispute, the essential ingredients for a third person's participation upon request by a party to the arbitration are not satisfied **(a)** and weighing the relevant circumstances the compelled joinder of Ross Pharma serves no purpose in the adjudication of this instant dispute **(b).**

a) The ingredients for joinder under Art.4(2) of Swiss Rules are not satisfied in this instant case.

3. Firstly, a request must be made either by one of the parties or both the parties to the pending arbitration proceeding [*Schramm p.497*]. It is undisputed that the RESPONDENTS submitted a request for the joinder of Ross Pharma [*Letter by Fasttrack p.24; ANA p.28 ¶23(a)*] in accordance with Art.4(2) of the Swiss Rules.

4. Secondly, Art.4(2) provides that the Tribunal shall consult with all the Parties and the third person to the proceeding before deciding on its joinder. It is not possible for the joinder of a non-signatory third party without its consent under the Swiss Rules, as this type of joinder raises issues about the scope of the arbitration agreement as well as the overriding issue of the consensual nature of arbitration [*Bamforth pp.12 & 13; Hanotiau p.332*].
5. It is to be noted that Ross Pharma has rejected the request for joinder multiple times [*Letter by Fasttrack p.24; Letter by SCAI p.37; Letter by Sinoussi p.47*] and the CLAIMANT has strongly raised an objection to the joinder request as there exists neither legal nor contractual relationship with Ross Pharma. Thus, the CLAIMANT and Ross Pharma did not see any cogent basis for joinder in this instant dispute [*Letter by Langweiler p.48; Letter by Sinoussi pp.46 & 47*].
6. It is to be observed that if Art.4(2) had been intended to allow joinder without the consent of the participants, it would have explicitly stated so [*Zuberbühler/Müller/Habegger p.64*]. Since consent is the cornerstone of arbitration [*Born p.1133*], the mere existence of Art.4(2) cannot serve as a substitute for the consent of either Parties to the arbitration or the third person [*Habegger p.280*]. Thus, if the Tribunal decides to rule on its own jurisdiction and proceed to decide on the issue of joinder, it is still bound to give due consideration to the objections raised by the CLAIMANT and Ross Pharma before deciding on the joinder issue.

b) Weighing the relevant circumstances, the compelled joinder of Ross serves no purpose in adjudication of the instant dispute.

7. It has been well established by the CLAIMANT that the application for joinder pursuant to Art.4(2) of the Swiss Rules is misconceived by the RESPONDENTS [¶*3*-¶*6*]. Assuming arguendo that the request of the RESPONDENTS is valid, still the Swiss Rules provides that the Tribunal shall decide post taking into account all relevant circumstances [*Schramm p.500; Smith p.179*]. The legitimate interests of the Parties for raising objections must be considered **(i);** the unlikelihood of arousal of conflicting decision by having a separate proceeding with Ross Pharma **(ii);** the joinder of Ross Pharma hampers the procedural efficiency of this instant dispute **(iii);** and there is likelihood of supplementary conflicts if the joinder of Ross Pharma is permitted **(iv)**.

i. The Tribunal shall consider the legitimate interests of the Parties for raising objection and acceptance to joinder.

8. The CLAIMANT seeks declaration for the breach of PCLA and the RESPONDENTS seek to determine conclusively the scope of Ross agreement through this joinder [*ANA p.28 ¶22*]. The Ross Agreement was concluded on 15th June 2014 [*RE3 p.32*]. It is to be noted that prior to the enforcement of PCLA, Ross Pharma claimed that license granted to it was not limited to the use of research for malaria vaccine and the RESPONDENTS failed to reach a conclusive decision when the dispute formerly arose then. It is evident that the research for MERS coronavirus was started by Ross in 2015 [*PO2 p.54 ¶14*]. The article of Biopharma Science, a news source, stated that an article dt. 14 December 2018 mentioned about a dispute involving Ross Pharma [*CE4 p.18*]. The dispute mentioned the differences that concerned the scope of the exclusive license granted to Ross Pharma in relation to malaria and comparable infectious diseases [*PO2 p.54 ¶8*]. Owing to the drastic differences existing between the subject matters of this instant dispute and the pre-existent dispute between the RESPONDENTS and Ross Pharma, enabling joinder in this instant case will be unreasonable.
9. The CLAIMANT objects to the forced joinder of Ross Pharma to prevent a potential challenge to the enforcement of arbitral award pursuant to Art.34(a)(iii) UNCITRAL Model Law on the ground that this arbitration does not fall within the terms of the submission to arbitration and the Tribunal acted beyond the scope of agreement. The Tribunal's decision of joining an unwilling party to this dispute will form basis for setting aside or resisting the enforcement of arbitral award [*Carrión p.498*]. The willful rejection of Ross Pharma to the Tribunal's invitation irrespective of being updated on the progress of the proceedings [*Letter by Sinoussi p.46*] will not hamper the enforcement of award as Ross Pharma has waived its right to arbitrate in this instant dispute. Thus, it cannot challenge the enforcement of the arbitral award in the future.

ii. There is unlikelihood of arousal of conflicting decision by having a separate proceeding with Ross Pharma.

10. It has been established that the issues between the CLAIMANT and RESPONDENTS are distinct from the differences between the RESPONDENTS and Ross Pharma [*¶8*]. Since

the Tribunal is not being prevented from asserting the performance of RESPONDENTS obligations in the absence of the third party to be joined [*Super Perfect*], the award in this instant dispute has zero probability of contradicting the future decision that will be taken in a separate proceeding between RESPONDENTS and Ross Pharma.

iii. The joinder of Ross Pharma hampers the procedural efficiency of this instant dispute.

11. The likelihood of increase in efficiency of the overall arbitration process by a joinder or consolidation in a dispute benefitting the parties will vary on case-to-case basis [*Smith p.174*]. The Letter from Ross Pharma dt. 25th August 2020 to the Tribunal expressing its objection to be joined in this instant proceeding [*Letter by Sinoussi p.47*] is a progress to draw a closure to the issue of joinder. The compelled joinder of Ross Pharma will attract a set of new claims or requirement of expert witness which would further complicate the issue at hand. Thus, the joinder of Ross Pharma does not amplify the efficiency of this instant proceeding.

iv. There is likelihood of supplementary conflicts if the joinder of Ross Pharma is permitted.

12. It is to be noted that arbitrations are private [*Bompey p.28*] and parties choose to arbitrate their disputes rather than litigate them because they do not want certain information, such as trade secrets, revenue, and other sensitive data, to become public [*Baldwin p.453*]. It can be prima facie observed from the PCLA, wherein the CLAIMANT and RESPONDENT No. 1 acknowledged that the confidentiality of the compound, licensed technology [*PO2 p.56 ¶30*] and the know-how is of paramount importance for the other party [*CE3 p.15 §10.1*]. It has been asserted by the RESPONDENTS that the proceedings would entail disputations on operating mode of viral vectors, their ways of production and the differences between the various application of the virus [*Letter by Fasttrack p.49*]. The active participation of Ross Pharma in this instant dispute would prima facie be detrimental to the CLAIMANT as it provides unfair access to the CLAIMANT's technical know-how since it is the forerunner in the same field that Ross Pharma is operating to research and develop vaccines for COVID-19 [*PO2 p.55 ¶16*].

B. §14.1 OF PCLA DOES NOT EMPOWER THE TRIBUNAL TO COMPEL THE JOINDER OF ROSS PHARMA.

13. An arbitrator derives his authority and jurisdiction from the specific contractual language of the arbitration agreement [*Strong p.924*]. The current preferred default position is to bar joinder in situations where the contract does not expressly grant third parties the ability to participate in the arbitration [*Redfern/Hunter pp.186, 187*]. Though the most prevalent stance adopted by national courts while disposing disputes related to scope of arbitration agreement is usually "pro-arbitration" [*Born I p.299*]. The strong "pro-arbitration" presumptions that apply in the context of interpreting a valid arbitration agreement are not fully applicable in the context of determining whether an arbitration agreement binds a party [*Born p.1488*].

14. The arbitration clause is far wider than being a mere jurisdiction clause as it vests the arbitrators the power to judge, whereby excluding the intervention of State Courts [*Chardoonnet*]. Due to the consensual nature of international arbitration, the effects of the arbitration agreement extend to parties and not to those who are foreign to the contract [*OIAETI; A40-56769*].

15. The dispute in this instant case arises from the PCLA [*NA p.7 ¶23*]. It is to be observed that the Parties to the PCLA agreed to submit to the Tribunal all disputes that arouse out of the PCLA. The inclusion of the word "this" agreement [*CE3 p.16 §14.1*] limits the jurisdiction of the Tribunal [*ICC 7893*]. Thus, this Tribunal which derives its powers from §14.1 of the PCLA is not empowered by the Parties to compel the joinder of Ross Pharma. The CLAIMANT submits that §14.1 of the PCLA does not empower the Tribunal to extend the arbitration agreement to enable the joinder of Ross Pharma **(a)**.

a) The extension of arbitration agreement on Ross Pharma is inapplicable in this instant case.

16. The extension of an arbitration agreement to a non-signatory should be supported by a legal theory that is recognized under the proper law applying to the arbitration agreement [*Choi p.35*]. Though these legal doctrines are likely to contribute to the overall efficiency of this instant dispute, the arguments of efficiency are not applicable as they are not based on the consent of the Parties [*Born I p.1206*]. The Tribunal does not have the jurisdiction to

compel the joinder of Ross Pharma by employing the legal doctrines of agency **(i);** veil piercing/alter ego **(ii);** and group of companies' [*Choi p.35*] **(iii)**.

i. The ingredients of agency are absent in this instant case.

17. In the doctrine of agency, a principal is bound by the contract that was entered on its behalf by its authorized agent [*Born p.1419*]. Principles of agency require proof that the agent was granted express or implied authority to enter into the relevant contractual relationship on behalf of its principal [*Bridas*].
18. It is evident that the RESPONDENT No. 1 was acquired by Roctis AG in 2009 [*PO2 p.53 ¶1*]. Subsequently, RESPONDENT No. 2 was acquired by Roctis AG on 25th August 2018 [*ANA p.26 ¶7*]. Thus, the averment made by the CLAIMANT that the RESPONDENT No. 1 and the RESPONDENT No. 2 are 100% subsidiaries of Roctis AG is established [*NA p.4 ¶2*]. The bare perusal of the facts of this instant case reveal no positive evidence that there exists a principal-agent relationship amongst Roctis AG, its subsidiaries and Ross Pharma. Thus, the application of principle of agency would be inappropriate in this instant dispute.

ii. The doctrine of alter ego cannot be attracted in this instant case.

19. A party who has not assented to a contract containing an arbitration clause may nonetheless be bound by the clause if that party is an "alter ego" of an entity that did execute or was otherwise a party to the agreement. To consider an entity to be an alter ego (1) one party must strongly dominate the affairs of another party and (2) that party has sufficiently misused such control that it is appropriate to disregard the two companies' separate legal forms and to treat them as a single entity [*Born pp.1432, 1433*]. It is prima facie evident from the facts of this instant case that there exists no relationship between the RESPONDENTS and Ross Pharma that is capable of attracting the attention of alter ego doctrine.

iii. Group of Companies is inapplicable in this instant case.

20. The doctrine of group of companies is applicable when a company is part of a corporate group, subject to the control of or controls a corporate affiliate that has executed a contract and is involved in the negotiation or performance of that contract, then that company may in some circumstances invoke or be subjected to an arbitration clause contained in that

contract, notwithstanding the fact that it has not executed the contract itself [*Born p.1445*]. It is evident that Ross Pharma never had any involvement with regards to the negotiation of the PCLA [*Witness Statement of Mr. Doherty pp.30, 31*]. Thus, application of the group of companies' doctrines to compel the joinder of Ross Pharma is impossible in this instant case.

Conclusion of Issue I: Ross Pharma cannot be compelled to join this instant arbitration proceedings as the necessary requirements for joinder under Art.4(2) of the Swiss Rules are not met. The circumstances prevailing in this instant case is at odds with the request for joinder. Owing to the limited scope of the §14.1 of the PCLA, the Tribunal is not empowered to enable the compelled joinder of Ross Pharma, a third party to the contract. If the Tribunal decides to rule on its jurisdiction and proceeds to force joinder, the Tribunal is still disallowed from compelling the joinder of Ross Pharma owing to the inapplicability of legal doctrines.

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

21. The Parties were requested by the Swiss Chamber's Arbitration Institution to submit its objections to remote hearing [*Institution Mail p.47*]. The CLAIMANT has no objections to remote hearing as the present dispute involves primarily legal questions [*Letter by Langweiler p.48*]. The RESPONDENTS objects to remote examination of witnesses and experts on the assumption that Swiss Rules are based on and requires physical hearing [*Letter by Fasttrack p.49*]. The CLAIMANT submits that the Tribunal has the discretion to decide on the procedure of the hearings. Therefore, the Tribunal should hold remote hearings **[A]** and avoid unnecessary costs and delay to expedite the proceedings **[B].**

A. THE TRIBUNAL SHOULD EXERCISE ITS WIDE DISCRETION TO CONDUCT REMOTE PROCEEDINGS.

22. It is well established that the Parties have consented to resolve the dispute under the Swiss Rules [*CE3 p.16 §14*]. According to Art.25(4) of the Swiss Rules, the Tribunal has the discretion to determine the procedure on which the witnesses may be heard [*Nater-Bass/Pfisterer p.5 ¶41*]. Further, Art.24(2) of the Swiss Rules empowers the Tribunal to determine the admissibility, relevance, materiality, and weight of the evidence offered

[*Nater-Bass/Pfisterer p.5 ¶28*]. Therefore, in the instant case, a clear reading of Art.24(3) and 25(4) provides that the Tribunal can examine the witnesses and experts remotely **[a]**.

a) The Tribunal is empowered to conduct remote proceedings under Art.25(4).

23. The witnesses and experts may be heard at the hearing and examined in the manner as set by the Tribunal pursuant to Art.25(4) of the Swiss Rules [*Gabrielle p.5 ¶41*] and expressly provides the option of remote hearing through videoconference. Therefore, the Tribunal can examine the witnesses and experts remotely, as the instant matter satisfies the essentials of fair hearing **[i]** and lacks impediments to remote hearing **[ii].**

i. The essentials of fair hearing are satisfied in this instant dispute.

24. The instant matter satisfies the fundamental ingredients of an arbitration hearing, firstly right to be heard and secondly, equal treatment of the parties [*Born p.3512*]. These essentials of fair hearing are also enshrined in Art.15(1) of the Swiss Rules.

25. The right to be heard means that in arbitral hearings, parties must be granted sufficient opportunity to present their case i.e., to allege facts, present legal reasoning, and to produce evidence on relevant facts [*Kaufmann-Kohler/Schultz p.37*]. Hence, there is no sufficient necessity to hold 'oral hearings' physically, as long as there is an oral and synchronous exchange of arguments or evidence [*Scherer p.6*].

26. While expounding on the concept of remote hearing, emphasis is given to the meaning of 'oral hearing' and it cannot be equated strictly with an in-person hearing [*Yvonne p.10*]. It has been held by various jurisdictions around the world that the remote hearings do not constitute a breach of the parties' right to be heard [*Compare EWHC 4293*] as the requirements of oral hearings can be met by remote hearings [*ICC Guideline p.5 ¶23*]. Thus, the virtual hearing of witnesses and experts will not be detrimental to the right to be heard of the Parties' to the instant dispute.

27. Further, the Seat of Arbitration adopted by the Parties [*CE3 p.16 §14*] is governed by UNCITRAL Model Law [*PO1 p.52 ¶3*]. Art.24 of the UNCITRAL Model Law which mirrors the Art.15(1) of the Swiss Rules, does not strictly seek a physical hearing of an arbitration dispute. The CLAIMANT agrees with the RESPONDENT that as the Parties have not adopted document-only arbitration, the Tribunal has the power to hold 'hearings' at any stage of arbitral proceedings under Art.24(1) of UNCITRAL Model Law [*Letter by*

Fasttrack p.49]. But it is to be noted that the words *'such hearings'* mentioned in Art.24(1) refers to 'oral hearings' [*Waincymer pp.3, 4 ¶6*] and do not strictly seek for a physical hearing of the dispute. Therefore, Art.24(1) of UNCITRAL Model Law also empowers the Tribunal to conduct the hearing of witnesses and experts remotely.

ii. There exist no impediments that bars the conduct of virtual hearings.

28. It is justified to conduct remote hearings in the absence of considerable impediments [*Tetra Pak p.15 ¶25*]. The onus of proving the existence of considerable impediments is on the party resisting the remote proceedings [*Sun Legend*]. It has been established that all participants involved in this dispute have sufficient bandwidth and equipment to guarantee that a hearing can be held [*PO2 p.58 ¶38*]. Therefore, CLAIMANT submits that the examination of witnesses and experts can be conducted remotely and the onus of proving the existence of considerable impediments is upon the RESPONDENTS.

B. **THE TRIBUNAL SHOULD EXPEDITE THE PROCEEDINGS.**

29. The Parties to the dispute and the Tribunal are obliged to make every effort to conduct efficient proceedings without unnecessary costs and delays under Art.15(7) of the Swiss Rules [*Nater-Bass/Pfisterer p.613 ¶41*]. Therefore, in the instant matter, the Tribunal is bound to expedite the proceedings.
30. Good faith is one of the fundamental principles in arbitration [*Born pp.1256, 1263*]. It means acting sincerely or genuinely and this requires parties to act fairly in relation to each other [*Antony p.599*]. Art.15(1) of PCLA obligates the Parties to act in good faith in matters concerning IP-rights [*C3 p.16 §15.1*]. Moreover, it is undisputed that the Parties have consented to resolve the dispute under the Swiss Rules. Therefore, under Art.15(7) of the Swiss Rules, Parties are bound to make every effort to contribute to the efficient conduct of proceedings. Further, *'all participants'* mentioned in Art.15(7) of the Swiss Rules also refers to the tribunal [*Nater-Bass/Pfisterer p.613 ¶41*], which empowers the Tribunal to take necessary measures to expedite the proceedings efficiently.
31. In the instant case, it has been clearly stated that due to the pandemic, some of the participants to the dispute are not comfortable to travel for physical hearings. [*PO2 p.57 ¶34*]. Therefore, it is necessary to conduct virtual hearing of witnesses and experts to

expedite the proceedings as holding a physical hearing is not possible. Hence, in the given situation it is the duty of the Parties to act in good faith and cooperate for a virtual hearing.

Conclusion of Issue II: The Tribunal is empowered to conduct remote examination of witnesses and experts. The Parties should act in good faith for an efficient proceeding and avoid unnecessary costs and delay.

ISSUE III. CISG IS APPLICABLE TO THE "PURCHASE, COLLABORATION AND LICENSE AGREEMENT" CONCLUDED BETWEEN CLAIMANT AND RESPONDENT NO. 1.

32. The CLAIMANT submits that the *Purchase, Collaboration and License Agreement* is predominantly a Purchase agreement and a contract of sale of goods, and not merely a licensing agreement. The CLAIMANT holds that the transfer of know-how is not the dominant nature of the contract and submits that the subject of the Agreement is indeed a sale of "goods" as per the CISG **A** and that the PCLA is a Contract of Sale of goods under the CISG **B**.

A. THE AGREEMENT ADHERES TO ALL APPLICABILITY REQUIREMENTS OF THE CISG.

33. CISG's general provisions of application under Art.1 mandate parties to belong to different contracting states of CISG. It is widely accepted in international sales law that 'goods' refer to objects [*Schlectriem/Schwenzer p.221* ¶16]. The subject matter of the PCLA, 'viral vectors', can be defined under 'goods' **(a)** and the PCLA is well within the territorial scope of the CISG **(b)**.

a) The viral vectors, HEK-294 cells and cell culture media are 'goods' under CISG.

34. Through Articles 1-7 of the Convention, the scope of applicability of CISG varies. Art.1 makes a contract of sale of goods to be governed by CISG, and Art.3(1) extends the scope of CISG to contracts of production, as well. It can be ascertained that the PCLA is within the scope of both these provisions.

(i) This agreement is a contract for the GorAdCam viral vectors to be produced as under Article 3(1).

35. In reference to the Convention, which expressly allows the inclusion of contracts for such production within the governance of CISG [*Art.3(1) CISG*], the CLAIMANT pleads that the subject matter of this agreement is within the ambit of CISG. A contract for goods to be produced/ manufactured by work and materials of the supplier is basically treated as a contract of sale.
36. Further, a contract of sale also includes specific or custom-made goods. The GorAdCam viral vectors have been 'customized' by the addition of special inserts by the RESPONDENT No. 1 upon the instructions of the CLAIMANT [*NA p.6 ¶14*].
37. It is prima facie evident that Adenovirus Viral Vectors are considered to be 'manufactured and produced' [*WHO Report p.3 ¶1*]. Further, the RESPONDENT No.1 admits that the vectors were indeed 'produced' [*ANA p.25 ¶8,9*].
38. The Viral Vectors in question undergo the production procedure right from extraction of the DNA of the Adenovirus, the replication of the viral vector, genetic modification, to the insertion into the human body in order to stimulate the reaction of the human immune system against diseases [*NA p.4* ¶3]. Since the RESPONDENT No. 1 has clearly produced and delivered the GorAdCam Viral Vectors for the CLAIMANT's research purposes, this Agreement falls under the ambit of the Contract of sale as per the CISG.

(ii) Viral Vectors are Tangible and Deliverable

39. The term 'Goods' is not expressly defined in the CISG but are typically characterized as objects, merchandises, which are tangible and deliverable or movable [*Czerwenka p.147; Schlectriem/Schwenzer p.221* ¶16*; UNCITRAL Digest p.6 ¶28*]. It is well-founded that for a contract to be considered as a sales contract, the primary essential is the moveability of the goods [*CLOUT 967; CLOUT 651; CLOUT 608; UNCITRAL Digest p.6 ¶27, 28*].
40. It is reasonable to declare that Viral Vectors are 'tangible', as evidenced by their production, carried out by the RESPONDENT No. 1 [*ANA p.25 ¶9*]. Further, the PCLA expressly states that there shall be delivery of the first batch of GorAdCam viral vectors [*CE3 p.13 §9.2*]. The delivery of this first batch is confirmed as a subsequent payment for

the same has been made [*PO2 p.56 ¶28*]. Thus, it is evident that the GorAdCam Viral Vectors are indeed tangible and deliverable.

b) Territorial sphere of the CISG is adhered to.

41. The Convention, through Art.1(1) requires the contracting parties to belong to different States [*Art.1(1) CISG*], and all contracting parties must belong to Contracting States of the CISG [*Art.1(1)(a) CISG*]. Exhibit C3 states: *"RespiVac, a corporation organized and existing under the laws of Mediterraneo, having a business address at 1 Zinkernagel Avenida, Capital City, Mediterraneo ("Licensee"), and, CamVir, a corporation organized and existing under the laws of Equatoriana, having its registered office at 112 Rue L. Pasteur, Oceanside, Equatoriana ("Licensor")* [*CE3, p.11*] entered into by and between the CLAIMANT and RESPONDENT No. 1expressly states in its recitals that the parties belong to Mediterraneo and Equatoriana, respectively. It is undisputed that the two States are Contracting States of the CISG [*PO2 p.52 ¶3*]. Hence, this Agreement is well within the territorial sphere of the Convention.

B. THE AGREEMENT IS A CONTRACT OF SALE OF GOODS.

42. The CLAIMANT submits that the PCLA concluded between the CLAIMANT and RESPONDENT No. 1 undoubtedly falls within the applicability of CISG as PCLA is a contract of sale of good **(a)**; RESPONDENT No. 1 had an intention for sale **(b)**; the scope of PCLA is not limited to a 'license agreement' **(c)**.

a) PCLA is a contract of sale of goods.

43. The CISG includes contracts of sale of goods within the sphere of its application under the ambit of Art.1(1). A contract for the sale of goods covered by the CISG can be defined as a contract pursuant to which one party is bound to deliver the goods and transfer the property in the goods sold and the other party is obliged to pay the price and accept the goods [*Semi-Materials Co. case*]. 'Contracts of sale' in the sense of the CISG are thus reciprocal contracts directed at the exchange of goods against the 'price' [*Schlechtriem Art.1 ¶14; Ferrari Art.1 ¶13; Staudinger/Magnus Art.1 ¶14*]. It has been held that the essence of the contract governed by the CISG lies in goods being exchanged for money [*CLOUT 328*]. It has already been established [*¶39*] that the viral vectors are 'goods' and

thus the PCLA can be construed to be a contract of sale of goods as the delivery of the GorAdCam viral vectors has been made to the CLAIMANT by RESPONDENT No. 1. Moreover, as per PCLA, the CLAIMANT is also obliged to pay the price of 2.5 million EUR and accept the goods [*NA p.6 ¶12*].

44. The CISG applies to contracts for the sale of goods- irrespective of the label given to the contract by the parties [*CLOUT 1021*]. The mere use of the word 'licence agreement' is irrelevant if the agreement is actually a contract of sale [*UsedSoft GmbH v. Oracle International Corpn case*]. As the CISG does not provide any definition of a contract for sale, it is general practice to derive an autonomous description [*CLOUT 867*] for the same from Arts.30, 53 [*CLOUT 867; CLOUT 916; CLOUT 651*]. Both these provisions deal with the obligations of the buyer and the seller, respectively, as laid down under the CISG.
45. Art.30 of the CISG identifies and summarizes the main duties that the seller is obliged to fulfil. Read along with Arts.53, 30 has been found to contain an implicit definition of what is a sale [*CLOUT 916*]. In general terms, 'delivery' relates to those acts which the seller must perform in order to give the buyer possession of the goods. [*Honsell/Lauko Art.30 ¶8*]. The seller is simply required to agree that property in the goods is to vest henceforth in the buyer [*Neumayer/Ming Art.30 note 2*]. In the instant matter, the CLAIMANT had already begun research using the GorAdCam vector (the good) and therefore was in possession of the same [*NA p.7 ¶18*].
46. Art.53 of the CISG identifies the main obligations of the buyer which are required to be fulfilled. Art.53 sets out the two characteristic obligations of the buyer: he has to pay the purchase price, and he has to take delivery of the goods. In the instant matter, as per PCLA, RESPONDENT No. 1 was obliged to deliver to CLAIMANT a first batch of the GorAdCam viral vectors for a price of EUR 2.5 million [*NA pp.6, 7 ¶16*]. These terms have been met and the Claimant had begun research into the GorAdCam vectors in 2019 [*NA p.7 ¶18*], showing that the obligations of the buyer have been met in the instant matter. Thus, as the obligations laid under Arts.30, 53 of the CISG have been met by the respective buyer and seller in the instant matter, the CLAIMANT submits that PCLA is indeed a contract of sale of good.

b) RESPONDENT No. 1 had an intention for sale.

47. Art.8 of the CISG governs the interpretation of all legally relevant conduct of the parties to the contract [*Staudinger/Magnus Art.8, ¶8*] and it is undisputed that the Art.8 also regulates the interpretation of contracts [*Enderlein/Maskow/Strohbach Art.8 note 2.3; Honnold/Flechtner Art.8 ¶105; B Leisinger p.145; Staudinger/Magnus Art.8 ¶3*]. The criteria set forth in Art.8 are used to interpret statements and conduct relating to the process of formation of contract [*CLOUT 282*].
48. In the instant matter, during the preliminary negotiations for PCLA in December 2018, Mr. Doherty suggested to base further negotiations on the template used by RESPONDENT No. 2 for its Collaboration and License Agreements instead of amending the previous template [*NA p.6 ¶12*]. It must be noted that RESPONDENT No. 1 did not proceed with amending the original template but decided to insert an additional purchase obligation to the new template. This can be seen from the inclusion of §16 to PCLA [*CE3 p.*11], unlike the template used by RESPONDENT No. 2 that is no more than a licensing contract [*RE4 p.35*]. Another aspect to be noted is that RESPONDENT No. 1 gains a major recurring advantage of providing the required vectors and base materials at a price which is overall around 2-5% higher than revenues usually generated for providing types of viral vectors under the usual conditions of Collaboration and License Agreements dominating the industry [*CE2 p.10*]. Further, the substantive part of the agreement can be easily ascertained to be the one with greater economic value [*CISG-AC Op.4 p.3 ¶2*]. In the PCLA, it is evident that the purchase obligation under §16 is the preponderant part of the agreement as it yields greater income and profits for the RESPONDENT No. 1 [*PO2 Appendix 1 p.59*].
49. In the instant matter, the CLAIMANT submits that the inclusion of the 'Purchase Obligation' as under §16 of the PCLA, can be construed as conduct by the RESPONDENT No. 1 (the seller) with the intent of a sale. It must be noted that the purchase requirement is a very peculiar feature of the Agreement and deviates from the normal practice in the development and production of vaccines based on viral vectors [*NA p.6 ¶14*].
50. Furthermore, §15.2 of the PCLA lays down the governing law of the PCLA as the laws of Danubia [*CE3 p.11*]. The general contract law of all three countries is a verbatim adoption of the UNIDROIT Principles on International Commercial Contracts. [*PO1 p.51 ¶3*]. Arts.4.3, 4.3 of the UNIDROIT Principles deal with the interpretation of the statements and

other conduct of the parties, with respect to relevant circumstances that ought to be considered when doing so. Arts.4.2, 4.3 of the UNIDROIT Principles corresponds almost literally to Arts.8(1), 8(2) of the CISG whereas, Art.4.3 helps in providing relevant circumstances that need to be considered whilst interpreting the intent of the parties. Such circumstances, as laid under the aforesaid Art. are:

a. Preliminary negotiations between the parties,
b. Practices which the parties have established between themselves,
c. The conduct of the parties subsequent to the conclusion of the contract.

51. In the instant matter, RESPONDENT No. 1 had specifically inserted §16 as a purchase obligation to the PCLA during negotiations, something that is in deviation to the prevailing practice [*NA p.6 ¶14*] and could insist on the same as the GorAdCam vector is best amplified using HEK-294 cells, for which RESPONDENT No. 1 was one of two producers which did not only deliver the HEK-294 cells, but also the growth medium required for their reproduction [*NA p.6 ¶15*]. It did not merely provide for additional royalties for the production and sale of the vaccine but, in addition, PCLA obliged CLAIMANT, in case of the commercialization of the product developed, to purchase the HEK 294-cells as well as the culture medium which are needed for the amplification of the GorAdCam vectors required for the production of the vaccine [*NA p.7 ¶17*]. In light of all of the above, the CLAIMANT submits that in all aspects of the relevant circumstances given as under Art.4.3 of the UNIDROIT Principles, the intent of the RESPONDENT No. 1 as the seller, was to create a contract for the sale of goods.

c) The scope of PCLA is not just limited to a 'licensing agreement'.

52. The CLAIMANT submits that PCLA is not merely an agreement for the transfer of know-how but rather, as mentioned earlier, extends to the scope of a contract of sale of goods. This can be ascertained from the [*UsedSoft GmbH v. Oracle International Corpn case*] wherein the differences between what is considered as a contract of sales and a license agreement were looked at. The Court defined a 'sale' as *"an agreement by which a person, in return for payment, transfers to another person his rights of ownership in an item of tangible or intangible property belonging to him."* The *ratio* of the same case was used in *Corporate Web Solutions v. Dutch company and Vendorlink B.V.* [*CLOUT 1586*] wherein it was held that – "*that the parties' agreement was not a licence agreement but instead a*

contract of sale despite the mere description of the agreement". When classifying the agreement, the Court interpreted Art.8(3) CISG, where the intention of the parties or the understanding of which a reasonable person would have had with regard to said contract, is the determining factor [*CLOUT 1586*]. Taking into consideration the aforementioned arguments [¶*42-52*], the PCLA in the instant matter, cannot be said to be a mere licensing agreement or a transfer of know-how.

Conclusion of Issue III: The PCLA concluded between the CLAIMANT and RESPONDENT No. 1 does fall within the ambit of the CISG as it adheres to all the applicability requirements of the CISG and as the PCLA is a contract of sale of goods and not a mere licensing agreement.

ISSUE IV: RESPONDENT NO. 1 HAS BREACHED THE CONTRACTUAL OBLIGATION TO DELIVER CONFORMING GOODS EXISTING PURSUANT TO ART.42 CISG.

53. It is well-established in the aforementioned issue [¶*46-66*] that CISG is applicable to the PCLA concluded between the CLAIMANT and RESPONDENT No. 1. The CLAIMANT seeks for declaratory relief that RESPONDENT No. 1 has breached the contractual obligations as per §11.1.3 of the PCLA [*CE3 p.15 §11.1.3*]. The CLAIMANT submits that the RESPONDENT No.1 failed to deliver goods free from third-party claim, breaching Art.42 CISG **(A)** and the CLAIMANT has adhered to the requirements pursuant to Art.43(1) CISG and therefore does not lose its right to rely on the provisions of Art.42 **(B).**

A. THE RESPONDENT NO. 1 FAILED TO DELIVER GOODS FREE FROM THIRD-PARTY CLAIM, BREACHING 42(1) CISG.

54. The CLAIMANT submits that the GorAdCam viral vectors were impeded with a third-party claim pursuant to Art.42(1) CISG. It contends that in order to invoke Art.42 CISG, a mere assertion of a claim by a third party is sufficient **(a)**; RESPONDENT No. 1 had positive knowledge that the goods were encumbered with a third-party claim **(b)** and RESPONDENT No. 1 cannot invoke Art.42(2)(a) and thus is not exempt from subsequent liability **(c).**

a) A mere assertion of a claim by a third-party is sufficient to invoke Art.42(1) CISG.

55. Art.42(1) of the CISG does not require the claim to be justified [*Schlechtriem/Schwenzer Art.42 ¶6*], nor for there to be an actual existence of an intellectual property right [*Honnold/Flechtner Art.42 ¶270; Zeller (2011) 15 VJ 289, 292*]. Art.42 is considered to be breached even if any industrial property right is being unrightfully claimed, as this risk is to be dealt by the seller [*CLOUT 753*]. RESPONDENT No. 1 has breached its obligation under Art.42(1) regardless of the validity of the claim [*Enderlein/Maskow Art.42 note 2; Secretariat's Commentary Art.42*]. The rationale behind this rule is to protect the CLAIMANT in its normal expectation that it is not purchasing a lawsuit [*Honnold*]. Third party claims which are prima facie baseless still hinder the CLAIMANT in exercising its rights on the goods, eventually causing injury [*Honnold Art.42 p.164 ¶270*]. Not only would it be excruciating for the CLAIMANT to dispute with Ross Pharma about the existence of the latter's claim in future, but also incur an added encumbrance of prosecuting the seller and bear additional costs in the process, irrespective of the fact whether the claim by Ross Pharma was unfounded or not [*CLOUT 822; Schlechtriem/Schwenzer Art.42 ¶6; Staudinger/Magnus, Art.42 ¶13; Langenecker, p.67*].
56. There exists a difference in the interpretation of the term "related infectious diseases" under the Ross agreement [*RE3 p.32*]. Ross Pharma claims that it is entitled to use GorAdCam viral vectors for research in the context of respiratory diseases [*RE4 p.35*], especially COVID-19, whereas the RESPONDENTS refute it. It is to be noted that since PCLA is for the research and development of a vaccine in the field of respiratory diseases, particularly COVID-19, by using the same GorAdCam viral vectors, the existing claim of Ross Pharma is neither frivolous nor without merit that can be quickly predisposed of [*Bernstein/ Lookofsky p.66*]. Moreover, Ross Pharma is quite violent in defending its IP rights and is not afraid to approach the courts [*CE5 p.19*] and this also makes the CLAIMANT's claim significantly valid and convincing [*Neumayer/Ming Art.41 note3; Prager p.72*], given that, "*Ross Pharma already is involved in two IP litigations and one arbitration against third parties infringing their rights."* [*PO2 p.54*]. Thus, the RESPONDENTS' assertion that there is clearly no IP-right of Ross Pharma nor has such a right ever formed the basis of a claim [*ANA p.28 ¶20*] raised against CLAIMANT is untenable and must be dismissed.

b) RESPONDENT No. 1 had positive knowledge that the goods were encumbered with third-party claim.

57. The claim referred to under the previous argument [¶ *70*] was first raised by Ross Pharma in early 2018 [*ANA p.27 ¶12*], and yet again in late 2018 [*RE4 p.35 ¶2*]. The said claim falls within the definition of "*intellectual property*" under Art.42 CISG [*WIPO Convention Art.2 cl.vii*].
58. It is undisputed that the CLAIMANT entered into the PCLA with RESPONDENT No. 1 on 1st January 2019 [*CE3 p.11 ¶1*]. The existing claim and its current unresolved status are prima facie evident through the communications between RESPONDENTS' and Ross Pharma [*RE5 p.36 ¶2*] which proves that RESPONDENT No. 1 breached its obligations and violated the provisions of Art.42(1) by delivering non-conforming goods with existing third-party claim at the time of conclusion of contract.
59. The phrase "*knew or could not have been unaware*" in Art.42(1) CISG imposes an assertive obligation on the seller and implies that the seller is liable for claims that are obvious [*Honnold Art.35 p.260 ¶229*]. It is already established in the previous argument [*¶71*] that Mr. Peter Doherty, who was involved in concluding both Ross agreement and PCLA, was informed of the existing claim in December 2018 by Ross Pharma [*ANA p.27 ¶12*]. It is to be noted that the asserted claim still existed when Mr. Doherty repositioned to RESPONDENT No. 1 and subsequently concluded the PCLA with the CLAIMANT [*NA p.6 ¶12*]. This clearly ascertains the positive knowledge of RESPONDENT No. 1 at the time of conclusion of PCLA [*CE6 p.20*].
60. As per Art.42(1)(b) CISG, the claim must exist in the buyer's place of business, provided that the parties took this State into consideration at the time of the conclusion of the sales contract [*CLOUT 753*]. Several States of use can also be contemplated by the parties [*Schlechtriem II p.74; Kröll et al/Kröll Art.42 ¶17*]. All these requirements are met as the patent of GorAdCam viral vectors is recognised and protected in all jurisdictions with no territorial limitation [*PO2 p.54 ¶10*]

c) *In arguendo* RESPONDENT No. 1 cannot invoke Art.42(2)(a) CISG.

61. The CLAIMANT became aware of the existing third-party claim on 1st May, 2020 [*CE5 p.19*], which was mentioned in an article [*CE4 p.18*] published by Biopharma Science.

The CLAIMANT had no access to this journal [*PO2 p.54 ¶8*] since it was a local journal with its origin of publication in the State of Danubia [*CE4 p.18*], whereas the place of business of the CLAIMANT is Mediterraneo [*CE3 p.11 ¶1*]. As per Art.42(1) CISG, it is the obligation of the seller to carry out research and take necessary measures against potential third-party claims [*Honnold Art.42 ¶292*]. This was not adhered by RESPONDENT No.1.

B. THE CLAIMANT HAS ADHERED TO THE REQUIREMENTS PURSUANT TO ART.43 CISG; RESPONDENT NO. 1 HAS BREACHED §11.1.3 OF PCLA.

62. The CLAIMANT contends that it does not lose its right to rely on Art.42 CISG since it has complied with all ingredients of Art.43 CISG. The CLAIMANT gave notice within a reasonable time to RESPONDENT No. 1 **(a);** RESPONDENT No. 1 is not entitled to rely on the "ought to have known" clause of Art.43(1) and is not exempt from liability pursuant to Art.43(2) CISG **(b);** CLAIMANT can invoke Art.43(2) CISG; RESPONDENT No. 1 has breached §11.1.3 of PCLA **(c).**

a) The CLAIMANT gave notice within a reasonable time to RESPONDENT No. 1.

63. Art.43(1) CISG mandates the buyer to give a notice, which may be in an electronic form [*CISG-AC Op. 1*] to the seller within a reasonable period of time after the former became aware of the existing third-party claim. The CLAIMANT furnished a valid notice via email on 2nd May, 2020 to RESPONDENT No.1 [*CE5 p.19*].
64. Although the Convention does not expressly define reasonable time under Art.43 [*CLOUT 822*], the period can be determined based on the seller's ability to dispel off the concerns [*Enderlein/Maskow Art.43 note 4*]. The rationale behind delivering the notice to the seller is to enable it to settle the existing third-party claim [*CLOUT 822; Schlechtriem/Schwenzer Art43 ¶2*] and despite the passage of over two months post-furnishing of notice, the RESPONDENT No. 1failed to resolve the claim [*NA pp.3,4*].
65. The CLAIMANT complied with the necessities of a valid notice in the email sent to RESPONDENT No. 1, where it cited the identity of the third party, the specificity of the claim which is being asserted, and further about the steps to be taken to settle the inconsistency [*Enderlein/Maskow/Strohbach Art.43 note4; Ferrari et al/Ferrari Int VertragsR Art.43 ¶5*].

b) *In arguendo* RESPONDENT No. 1 cannot rely on the "ought to have known" clause under Art.43 CISG.

66. Art.43(1) lays down an added provision of giving the notice to the seller once the buyer becomes aware or ought to have become aware of the existing third-party claim. It does not put an obligation on the buyer to investigate the position in this regard, but only requires the buyer to consider concrete indications of third-party's claim [*Schlechtriem/Schwenzer Art.43 ¶4; Huber/ Mullis; Enderlein/Maskow/Strohbach, Art.3 note 3; MünchKommHGB/Benicke, Art.43 ¶4*]. The CLAIMANT had no access to the Biopharma Article. Even if they did, which they don't, it vaguely mentioned the scope of the license under Ross agreement, providing no concrete evidence of the underlying claim [*PO2 p.54 ¶8*].

c) CLAIMANT can invoke Art.43(2) CISG; RESPONDENT No. 1 has breached §11.1.3 of PCLA.

67. The verbatim of Art.43(2) CISG clearly maintains that the exemption of liability under Art.43(1) applies if the seller "knew" of the claim [*RE5 p.36 ¶2*] viz. he has positive knowledge of the claim [*CLOUT 822*]. It has already been established [*¶71*] beyond doubt that RESPONDENT No. 1 clearly knew of Ross Pharma's existing claim, yet was maliciously silent when entering into PCLA.
68. Further, RESPONDENT No. 1 was bound by the contractual obligations under §11.1.3 of the PCLA, where it guaranteed that, "*To Licensor's best knowledge, Licensor is not aware of any Third Party's Intellectual Property that might be infringed by conducting the Research Plan in the manner contemplated under the Research Plan* [*CE3 p.15 §11.1.3*]," where they breached the aforementioned clause, in turn breaching the contract to deliver conforming goods existing pursuant to Art.42 CISG.

Conclusion of Issue IV: CLAIMANT should be granted a declaratory relief since RESPONDENT No. 1 had positive knowledge of the existing third-party claim and nevertheless failed to deliver conforming goods existing pursuant to Art.42 CISG, breaching contractual obligations pursuant to §11.1.3 of PCLA.

REQUEST FOR RELIEF

For the above reasons, Counsel for CLAIMANT respectfully requests the tribunal to:

a) Declare the RESPONDENT No. 1 breached the Purchase, Collaboration and License Agreement by delivering GorAdCam viral vectors which were not free from third party rights or claims.

b) Order the RESPONDENTS to bear the costs of these arbitration proceedings.

Respectfully and submitted by Counsel on behalf of the CLAIMANT on 10 December 2020:

/s/ Fathima Rifa P /s/ Hariharan Sriram /s/ Kehan Vora

/s/ Meghana R /s/ Rishitha K /s/ Simran Kaur