Nova University of Lisbon - School of Law

Work Project: 28th Annual Willem C. Vis International Commercial Arbitration Moot

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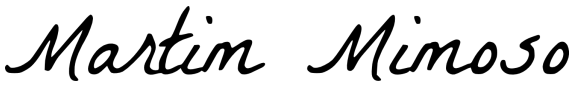
Lisbon, 03 June 2021



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Index of Abbreviations and Definitions

¶, ¶¶	Paragraph, paragraphs
Art./ Arts	Article, Articles
CISG	United Nations Convention on Contracts for the International Sale of Goods
	Convention Awards, 7 June 1959
Exh.	Exhibit
i.e	That is
IP	Intellectual Property
Ltd.	Limited
MfC	Memoranda for CLAIMANT
MfR	Memoranda for Respondent
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral
No.	Number
p., pp.	Page, pages
PO1	Procedural Order No 1
PO2	Procedural Order No 2
Problem	The Twenty-eight Annual Willem C. Vis International Moot Problem
NofA	Notice of Arbitration
ANofA	Response to the Notice for Arbitration
SCAI	Swiss Chambers' Arbitration Institution
Swiss Rules	Swiss Rules of International Arbitration (2012)
UNIDROIT Principles	Principles of International Commercial Contracts (2016)
vs.	Versus (against)

Introduction

In the following Work Project, the NOVA School of Law Team for the 28th Willem C. Vis International Commercial Arbitration Moot aims to describe the written and oral stages of the competition that the team went through, while representing the University. Initially, a detailed overview of the concept, organization and history of the competition will be described, followed by a close perspective on the Memoranda drafting process, which is ultimately required in order for any team to participate in the oral phases of the competition, and a detailed report of our first-hand experience. Moreover, the impact that the competition had in each of the team members will also be critically analysed in order to fully comprehend to what extent this experience is beneficial for law students that are in the verge of starting their professional careers.

For the purpose of this Work Project, it is important to take into consideration that the present dissertation consists of a group effort, except for the individual analysis of the issues that were brought by the Arbitral Tribunal.

The Willem C. Vis International Commercial Arbitration Moot

Moot Courts are mock trial exercises in which the students are stimulated to act as counsels for one of the parties of a simulated case created by law professionals. It is a very common practice within the law academic community, since it allows the future jurists to engage as lawyers and practitioners in a realistic court environment. Usually, the students are invited to present legal petitions in representation of their clients and to defend their case before a mocked tribunal composed by scholars and/or professionals of said field of practice.

The Willem C. Vis International Commercial Arbitration Moot is, in the field of commercial arbitration, the most recognized Moot Court competition, gathering thousands of participants in Vienna – the city where the Moot was created. With its foundation in 1994, the Willem C. Vis Moot has almost 400 participating teams of various jurisdictions. The Competition has grown to spur the creation of several pre-moots before the oral rounds in Vienna and of its sister competition the Willem C. Vis (East) Moot in Hong Kong.

Given that the goal of the moot is to foster the study of international commercial arbitration and trigger the students' attention to international sales transactions, the Moot is named after Willem Cornellis Vis, a Dutch expert in international commercial transactions and dispute resolution procedures who, as Secretary of the United Nations Commission on International Trade Law, was involved in the draft of the UNCITRAL Arbitration Rules. The Moot encourages the study of up-to-date controversial legal questions, engaging students and renowned practitioners.

Every year a case is drafted by the Association for the Organization and Promotion of the Willem C. Vis International Commercial Arbitration Moot, today directed by Christopher Kee, Patrizia Netal, and Stefan Kroll. There are common denominators that are present in all cases: there is always a dispute between companies located in different jurisdictions; such dispute will be (or at least such point will be discussed) governed by the United Nations Convention on Contracts for the International Sales of Goods ("CISG"); an Arbitration Agreement will be within the contracts signed by the parties and the seat of arbitration will be Danubia, a fictitious country, signatory of the UNCITRAL Model Law on International Commercial Arbitration ("UNCITRAL Model Law") and a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"); in such Agreement there is reference to a specific arbitral institution set of rules, usually of a world renowned arbitral center.

Organization of the Moot

The Willem C. Vis Moot releases a Problem annually on the first Friday of October, which consists of a legal dispute between two or more companies that will result in an arbitral proceeding. The Problem, in the form of a Record, includes the Notice of Arbitration, the Answer to the Notice of Arbitration, exhibits, witness statements, the relevant contracts in the scope of which the dispute has risen and the procedural orders. The Procedural Order Number 1 ("PO1") contains four relevant issues - two procedural and two substantive - that the parties must elaborate on and that will be decided on by the Tribunal in order to solve the dispute.

The Vis Moot sets the end of October as the deadline for the teams to request clarifications regarding the Records i.e. the Parties involved and their business; the commercial side of the agreements; negotiation, drafting and conclusion of the scope of the agreements; the applicable laws and rules. Later on, the Organization releases the clarifications requested by the teams, in the form of the Procedural Order Number 2 ("PO2") allowing the teams to begin the competition, which is divided between a written stage and an oral one.

The first stage requires the teams to submit written Memorandums for both parties of the dispute: CLAIMANT and RESPONDENT. Memorandums, for the purpose of the Vis Moot, are documents where parties present their arguments in a convincing manner, supported by authorities and jurisprudence. In that sense, Memorandums are evaluated according to various criterions: quality of the analysis, persuasiveness of arguments, thoroughness of research, clarity of the writing and adherence to the elements of style set out by the Vis Moot Rules.

From the moment that the PO2 is released, the teams have three months to submit their first Memorandum, representing CLAIMANT. For that, teams must research into legal arguments regarding the issues established in the PO1, select the most suitable ones and present them in a clear and compelling manner. After submitting the Memorandum for CLAIMANT, the Organization assigns a Memorandum for CLAIMANT from a different participating team that has to be answered in the form of a Memorandum for RESPONDENT. This means that teams must elaborate on the perspective of the CLAIMANT and then switch to the RESPONDENT's point of view. Our team was assigned the Memorandum for CLAIMANT written by the team of the Peking University and was given a one-month deadline to submit the Memorandum for RESPONDENT. The submission of the Memorandum for RESPONDENT constitutes the end of the written phase, leading to the second stage of the competition, the oral rounds.

The oral rounds of the Willem C. Vis Moot are generally held in-person in Vienna, Austria, in

the end of March. However, due to the COVID-19 pandemic, in the last two years they were held remotely. For the teams to improve their oral skills and sharpen their arguments, several pre-moots are organized by various law firms and universities and the teams are encouraged to practice between themselves as well.

During the oral phase, the teams will argue against each other, one representing CLAIMANT and the other representing RESPONDENT (i.e. X University of Law v Y University of Law). Each team will have to select two of its members, one to defend the procedural issues and another to defend the substantive ones. Each team will be awarded 30 minutes to present their case and answer the Tribunal's questions. Therefore, each team member is allowed 15 minutes for their speech and rebuttal/surrebuttal. Within the 15 minutes given to each team member, the general practice is that 7 minutes should be allocated to each issue and 1 minute allocated to rebuttal or surrebuttal.

Each arbitrator, in a panel of three, will score each of the oralists on a scale of 50 to 100 based on the following criterions: the organization and preparation, the knowledge of the facts and the law, the presentation and the capacity to handle questions.

The Vis Moot oral rounds are structured, firstly, in general rounds and, secondly, in elimination rounds. In the general rounds each team participates in four sessions, two for CLAIMANT and two for RESPONDENT. In the end of the general rounds, team scores are calculated and the 64 teams with the highest scores go through to the elimination rounds. In such phase, teams face each other and the panel of arbitrators chooses the best team to proceed to the round of 32, round of 16, round of 8, round of 4 and finals.

In the end of the competition, awards are given to the Best Team (Eric E. Bergsten Award), Best Individual Oralist (Martin Domke Award), Best Memorandum for CLAIMANT (Pieter Sanders Award), Best Memorandum for RESPONDENT (Werner Melis Award) and Spirit of the Moot (Michael L. Sher Award).

1. Our Experience

Participating in the Willem C. Vis Moot and representing NOVA School of Law is an opportunity that is given to the best students enrolled in the Master's course "Moot Courts". All team members attended that same course, where we were required to study the 27th Willem C. Vis Moot problem, prepare a Memorandum for CLAIMANT and participate in oral rounds, being judged by experienced lawyers and arbitrators.

From all of the students, Ana Sousa, Catarina de Pedro, Martim Mimoso and Andreas Rodrigues have been chosen by the team coaches, André Pereira da Fonseca and Rute Alves, to form the 28th Willem C. Vis Moot Court team.

Since the Vis Moot competition is an internationally recognized, unique way to develop advocacy skills due to its realistic and practical nature, putting us out of our comfort zones, we were very pleased to be selected as we saw the mooting experience as an enriching journey.

Additionally, having the opportunity to complete our Master Degree by testing our legal expertise in a competitive environment was a motivating factor and the perfect complement to our education. Thus, even though we all have different career ambitions, the competition was undoubtedly the best way to grow as students and future professionals.

a) Memorandum for CLAIMANT

Due to the scarceness of time to write the Memoranda and the complex nature of the legal questions that were posed by the Arbitral Tribunal, our first decision, after consulting with our coaches, was to allocate each of the four issues to a specific team-member who, as a result, would have the responsibility to present, to the rest of the team, a draft of the arguments that were to be used in CLAIMANT's Memoranda.

Despite this decision appearing to be irrelevant, one cannot neglect its strategic importance. On the on hand, if a clear division of tasks is not done, the team will most definitely be inefficient and lose precious time. On the other hand, and by taking into consideration the personal preferences of each team member, we were able to separate the tasks in a manner that motivated each individual.

Therefore, the rationale behind this decision allowed for a maximum specialization and dedication during the research process, a decision which overall increased the quality of the Memoranda. Nevertheless, we were all conscious that due to our inexperience, we would still have to provide assistance to the other team members who took over different issues whenever

necessary. In this sense, Andreas Maximilian dedicated itself to Issue A[1], Ana Sousa to Issue B [2], Martim Mimoso to Issue C [3]and Catarina de Pedro to Issue D [4].

Despite this decision, we made sure to schedule team meetings, at least 3 times a week, so that we could share our progress, discuss eventual problems and critically discuss our research in order to separate the wheat from the chaff. It must be noted that this year's research process was peculiar as we could not go to physical libraries - contrary to what happened to the previous NOVA Moot teams - due to the COVID-19 pandemic and the associated lockdowns.

Thus, in the beginning of this process we all felt some difficulty in finding, for example, relevant legal texts, jurisprudence or books. However, and since this was problem shared by the majority of teams, we soon received some valuable materials from the organization[5]and access to a platform that allowed us to consult various decisions from Tribunals all over the world [6]. Thereafter, the research process became more efficient and in a matter of a few weeks we concluded the first draft of the arguments for CLAIMANT's Memoranda. Nonetheless, we were soon to discover two major problems. Firstly, when the drafts were combined, they would clearly surpass the maximum threshold of pages that are allowed[7] and, secondly, since they were written individually, each of them had a specific style and, when analysed under the perspective of a single legal document, lacked a common denominator.

Hence, we decided that it would be beneficial to thoroughly revise the work as a team, in order to uniformize the writing, identify eventual mistakes, discuss strategy and help in the process of cutting down the text. Given the minutiae associated with the complex factual relationships embedded in the problem and the specific formatting of the Memoranda required by the organization[8], this was, naturally, a very intense and time-consuming process that required a

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[1] *Should Ross Pharmaceuticals be joined to the Arbitration Proceedings?*

[2] *Should the examination of witnesses and experts in the 2nd Hearing of 3 to 7 May 2021, be conducted remotely if a hearing in person is not possible or considered by the Arbitral Tribunal to be appropriate?*

[3] *Is the CISG applicable to the "Purchase, Collaboration and License Agreement" concluded between Claimant and Respondent No. 1?*

[4] *Has Respondent No. 1 breached its contractual obligations to deliver conforming goods existing pursuant to Article 42 CISG by providing Claimant with the batches of GorAdCam viruses?*

[5] *For example: Huber, Peter and Mullis, Alastair "The CISG A new textbook for students and practitioners", European Law Publishers (2007)*

[6] *Jus Mundi, available at https://jusmundi.com/en/*

[7] *According to Rule 50 of 28th-Vis-Moot-Rules, the Memoranda may be no longer than thirty-five (35) 8½ x 11 inch or A4 typed pages, including any statement of facts, argument or discussion and any conclusion. Cover pages, tables of contents, indices, lists of authorities or other material that does not consist of facts, argument, discussion or conclusions may be in addition; Available at: https://www.vismoot.org/wp-content/uploads/2021/03/28th-Vis-Moot-Rules_FINAL-6.pdf*

[8] *Extensively described under Rule 44 to 52; Available at https://www.vismoot.org/wp-content/uploads/2021/03/28th-Vis-Moot-Rules_FINAL-6.pdf*

daily effort by the team in order to respect the deadlines imposed.

However, in the end, the efforts were fruitful as we were able to submit CLAIMANT's Memoranda two days prior to the deadline and, as CLAIMANT, it was upheld that: the Tribunal had no jurisdiction to decide over the conflict, since Ross Pharmaceuticals was not a part of the Arbitration Agreement signed between CLAIMANT and RESPONDENT No. 1 (a); the Tribunal had the power and should decide to hold the hearing remotely as the Tribunal's discretion allows for the choice of the hearing's modus operandis and remote hearings are a suitable format (b); the agreement celebrated between CLAIMANT and RESPONDENT No. 1 involves the delivery "goods to be produced/manufactured" in exchange for money, thus constituting a "contract for sales of goods" for the purposes of the CISG (c); and, finally, RESPONDENT No. 1 has breached its obligations by providing the batches of GorAdCam viral vectors encumbered by a third-party intellectual property claim.

b) Memorandum for RESPONDENT

After finishing CLAIMANT's Memoranda, our attention quickly changed to an introspective analysis of the process that we had previously adopted, *i.e*, we tried to identify possible mistakes or inefficiencies and put new solutions into place in order to avoid those undesirable situations. In this sense, we made some small tweaks which consisted, mainly, in a higher proximity between the team members that were dealing with the procedural issues (issue A and B) and those dealing with the substantive issues (issue C and D), with the intention of increasing the uniformization throughout the Memoranda. Furthermore, we made some informal guidelines that were designed to encourage us to be more objective.

These two modifications allowed RESPONDENTs drafting process to be, overall, smoother. Nonetheless, by representing Respondent, *i.e*, the party who is in the position of defending against a petition, one is now encumber new and different types challenges. In other words, since one is now required to present its case in a manner that refutes the arguments that were presented by its counter party - which, in this case, were represented by the University of Peeking - , one necessarily has to change, in part, the mindset that had been previously adopted. Hence, and after all of these adjustments, we finally read University of Peeking CLAIMANT's Memoranda and concluded that it was very complete and adopted, in most situations, a different perspective when compared to our own. As a result, this part of the competition was, simultaneously, harder and more interesting, because we had to adopt a contradictory position to arguments that we had not previously thought of. However, and given the importance of

being responsive, the majority of our time was spent in a critical analysis of the arguments that were brought by CLAIMANT and we concluded that despite of their complete perspective of the problem it became, in some occasions, a disadvantage.

This can be easily explained by the nature of the problem in itself. As it cannot be a one-sided dispute one will always have room to contradict its opposing party. Thus, and since they dedicated so much attention to non-contentious details, in the context of the dispute, they lost a lot of space which costed them the opportunity of exploring some important legal arguments. Therefore, we tried to capitalize as much as we could in this "weakness", by contradicting the arguments that were brought and, additionally, using some arguments which they did not mentioned. Hence, as RESPONDENTS, we upheld that: the Tribunal should order the joinder of Ross Pharmaceuticals, since it has jurisdiction and all of the circumstances of the case are favourable to the joinder (a); the Tribunal should conduct the hearing physically as both parties agreed on in-person hearings and a remote hearing would not be the best decision given the circumstances of the case (b); the CISG is not applicable to the RespiVac Agreement as the Tribunal should not undervalue the governing law clause and, even if such clause did not exist, the preponderant part of RESPONDENTS' obligations consisted in the supply of additional services (c); there is no breach of contract as there is no third-party claim and, should there be one, its frivolous nature is not sufficient to render the goods non-conforming (d).

c) Pre-Moots and Training Sessions

During our preparation for the Vienna oral rounds, we had the opportunity to participate in six Pre-Moots and several training sessions with other teams from various parts of the world.

We attended the Guadalajara Pre-Moot, the Fox Williams Pre-Moot, the Shanghai Pre-Moot, the Rio de Janeiro Pre-Moot, the ICC Pre-Moot and the St. Petersburg Pre-Moot. Within those, we were the First Runner-up Team in the Fox Williams Pre-Moot amongst 24 teams and Winning Team in both the Rio de Janeiro Pre-Moot amongst 29 teams and the ICC Pre-Moot amongst 30 teams.

The Pre-Moots were a key element in the development of our advocacy skills, oral presentation, time management and argumentation. We were able to test which arguments were most convincing, how to better deliver them and how to react to different tribunals when doing so. The cultural element was very present and our main challenge was to adapt to the different dynamics of each tribunal, especially in Pre-Moots such as Shanghai and St. Petersburg. However, that also prepared us to face the unexpected and learn from it. Furthermore, even in Pre-Moots where the culture differences were not a key element, the different dynamics of each

Tribunal also prepared us, for example, to face hearings where multiple questions were asked and hearings where no questions were asked, and still be able to make convincing and compelling presentations to defend our case. We also had the opportunity to plead before outstanding arbitrators and lawyers such as Professor Ingeborg Schwenzer during the Pre-Moots, who gave us valuable feedback and advices to improve our skills and our knowledge. Overall, the Pre-Moots were the best practicing opportunities to prepare us for the Oral Rounds in Vienna and we were very grateful to have had the opportunity to attend all six, which was only possible due to their virtual organization.

Regarding the training sessions, we were able to contact several teams from various parts of the world, i.e. Italy (Bocconi), Germany (Bremen), Russia (St. Petersburg), United States of America (Boston), among many others, whether through email or social networks, in order to schedule training sessions which were held via Zoom. Those training sessions helped us to exchange ideas regarding the arguments and the case with those teams, while also practicing our speeches, and giving/receiving feedback. In that sense, it is important to highlight the mutual cooperation spirit among the teams we encountered and the eagerness to improve our performance.

Thus, the Pre-Moots and training sessions gave us the capacities and the confidence which allowed us to do our best possible performances in Vienna, as well as networking opportunities that will surely remain.

d) Oral Rounds in Vienna

After all the preparation, the oral rounds in Vienna started on the 26th of March with a Welcoming Session to Vienna. Due to the COVID-19 pandemic, the competition was held remotely, with the organizing Committee located in Vienna, while the participants (team members, coaches and arbitrators) were attending from various parts of the world. As these was the second edition of the Willem C. Vis Moot that was conducted remotely, all the involved participants were aware of such format from the beginning of the competition, since the organization notified all teams before releasing the Problem. This decision had an impact on the number of teams enrolled for the 28th Willem C. Vis Moot – with an all-time record of 387 teams which attended the virtual moot, including various teams that never had the opportunity to be physically present in Vienna (i.e Mozambique).

An undoubtable sense of responsibility was pending in all of us, since, after six months of hard work, the ultimate challenge was the oral rounds in Vienna. The pressure was very present but the pre-moots were an excellent practicing opportunity in terms of emotional management and

focus.

Another key aspect to our preparation was the gained ability to sense the tribunal's opinions during the pleading. In order to truly impress the arbitral tribunal, it was imperative to analyse each one of the arbitrators and adapt our posture and strategy, without losing our own essence as pleaders.

After the welcoming session, on the 27th of March, the first pleading consisted of Peking University vs NOVA School of law, which meant that our team would represent RESPONDENTS. Thus, the team members Andreas Rodrigues and Catarina de Pedro pleaded before the Tribunal composed by the Presiding Arbitrator Dr Sven Lange, Mr Patrick Pithon and Mr Arjun Agarwal.

On the 28th of March, the pleading NOVA School of Law vs Bond University took place and the team members Ana Sousa and Martim Mimoso pleaded on behalf of CLAIMANT before the panel of arbitrators composed by the Presiding Arbitrator Dr Alberto Miglio, Ms Polina Romanova and Ms Ashlesha Mittal.

On the 29th of March, Kerala Law Academy vs NOVA School of Law faced each other, with Andreas Rodrigues and Catarina de Pedro as RESPONDENTS with the arbitral tribunal chaired by the Presiding Arbitrator Ms Caroline Swartz-Zern, Mr Matthias Schrader and Mr Marcus Liew.

On the final day of the general rounds, the pleading NOVA School of Law vs University of Zenica took place, with Ana Sousa and Martim Mimoso again representing CLAIMANT before the panel of arbitrators composed by the Presiding Arbitrator Dr Matthias Schlingmann, Ms Evanthia Kasiora and Dr Rajesh Sharma.

In the end of each pleading the arbitrators would provide feedback to the teams, which was a valuable tool to understand how they felt about the team performance. However, a common denominator of which we had already been warned about was present: a randomness element regarding the Arbitral Tribunal. In our case, there were pleadings in which the arbitrator's feedback did not fit the standard of the competition, i.e. affirming that the use of jurisprudence was irrelevant, or contradicted the opinion of other arbitrators. Indeed, the disparity in terms of scoring was something that was pointed out by the organization committee before revealing the top 64 teams that would continue to the elimination rounds. Therefore, the team members and coaches were not confident that the team would move to the elimination round, even though our performance was of a very high-level and fulfilled the competition's requirements.

When the announcement of the 64 prevailing teams was live streamed, we were expecting to hear the name of our University as one of the teams that would continue to the elimination

rounds, which in fact happened with the proper virtual celebration between the team members and coaches. In the round of 64 the pleading took place between National Law School of India vs Nova School of Law.

At this stage of the competition, it was clear that the level of the teams would be tremendously outstanding, as well as the Arbitral Tribunal's experience and knowledge regarding the Problem, the legal arguments and the competition in itself. For that reason, the threshold and the attention to details would be of even more importance, leaving no room for mistakes, since the smallest error could mean that the opposing team would prevail over us. Another particularity of the elimination rounds is that the tribunal is more interventive in their approach to test the team's legal, factual, jurisprudential and doctrinal knowledge, as well as their ability to adapt the speech in terms of time management, persuasiveness and confident posture.

Accordingly, on the 31th of March, Andreas Rodrigues and Catarina de Pedro represented Respondent against the National Law School of India. The Indian teams are known to be extremely persuasive and to make the Tribunal feel engaged and well received during the pleading. Thus, there was a certainty that the opposing team would be highly competent, not only in terms of argumentation but also in terms of oral skills.

In the end, even though the opposing team was outstanding, the NOVA School of Law team was selected to be in the round of 32 - for the first time ever a Portuguese team reached the top 32 teams in the Willem C. Vis Moot Competition, which left us all very proud.

In that same day, in the round of 32, the pleading was held between NOVA School of Law vs National Research University "Higher School of Economics" Moscow. The CLAIMANT's counsels, Ana Sousa and Martim Mimoso, faced the Russian team before an extremely interventive arbitral tribunal. Even though the team members did their best and had a high-level performance, the Russian Team unfortunately won and continued to the Round of 16.

In the 28th Willem C. Vis Moot, NOVA School of Law team reached, for the first time ever, the top 32 teams and thus won an honourable mention for Best Team in the overall competition. In the general rounds the team had a score of 2158 out of 2400 and was ranked as the 22nd best. The team is extremely proud of their performance and classifications and can now see the curve of improvement throughout the months of competition.

The Willem C. Vis Moot was an excellent leaning opportunity and gave us tools that we will use for the rest of our lives. All team members improved tremendously their research, legal thinking, argumentation and oral skills.

Disclaimer: For the purposes of the present Work Project, issue A, that was the focus of our colleague Andreas Rodrigues, will not be addressed, since the present paper only regards the

work of Ana Sousa, Catarina de Pedro and Martim Mimoso.

3. The Problem

The Problem of the 28th edition of the Vis Moot, released on the first Friday of October 2020, is based on an unusual Purchase, Collaboration and License Agreement for the GorAdCam viral vectors, which was celebrated with the objective of producing a Covid-19 vaccine. The contracting parties are RespiVac plc, the buyer, and CamVir Ltd, the seller. In that sense, the dispute involves the following companies:

RespiVac plc ("**CLAIMANT**"), which is a biopharmaceutical start-up, based in Mediterraneo, with an established reputation in the development of vaccines for respiratory diseases.

CamVir Ltd ("**RESPONDENT No. 1**"), located in Equatoriana, which is the Contract Manufacturing Organisation of the Roctis Group for the production of base materials for various vaccines.

VectorVir Ltd ("**RESPONDENT No. 2"**), which is an Equatoriana based company dedicated to the development and commercialisation of several patents, including the promising GorAdCam viral vector. It is presently owned by Roctis Group, one of the biggest pharmaceutical companies in the world.

In order to fully comprehend the case, it is important to understand how the viral vector plays a key role in the development of the vaccine. To obtain the viral vector, the DNA of the adenovirus is genetically modified so that the genes responsible for the replication are deleted. As a consequence, the viral vector forms the basic structure for a vaccine, and it can then be further modified to target the virus against which the vaccine is directed. Therefore, the injection of the viral vector charged with the gene of the virus of interest will stimulate the reaction of the human immune system against the virus of interest without the risk of proliferation of such virus in the patient.

In 2012, when RESPONDENT No. 2 was founded, the general expectation was that the greatest potential of the GorAdCam vector was in the field of malaria. Consequently, RESPONDENT No. 2, which was interested in respiratory diseases, decided not to pursue any further research with the GorAdCam viral vector. Instead, it concentrated its own further research activities on the development of vaccines for respiratory diseases using a different viral vector (ChAdCam).

In an effort to monetize the know-how attached to the GorAdCam viral vector, RESPONDENT No. 2 looked for potential licensees for the malaria field. Thus, on 15th of June 2014, RESPONDENT No. 2 entered into a Collaboration and License Agreement with

Ross Pharmaceuticals ("Ross Agreement") the biggest life-science company in Danubia. Under the Ross Agreement, Respondent No. 2 granted Ross Pharmaceuticals an exclusive license for the use of the GorAdCam vector for the development and production of a vaccine in the field of "malaria and related infectious diseases"[9].

Due to the research done with the GorAdCam viral vector, by Ross Pharmaceuticals, it became apparent that, contrary to the initial expectations, the GorAdCam vector might also be useful for vaccination of respiratory diseases. As a consequence, in the summer of 2018, Ross Pharmaceuticals made another offer to purchase RESPONDENT No. 2 and to acquire its patents. However, at the time, RESPONDENT No. 2 was already in negotiations with Roctis AG which finally acquired the first company in August 2018. Immediately after its acquisition, RESPONDENT No. 2 entered into an exclusive license agreement with Respondent No. 1, that granted it permission for the production, sale and sublicensing of the GorAdCam viral vector for all applications with the exceptions of malaria[10].

On 1 January 2019, Respondent No. 1 entered into the RespiVac Agreement (Purchase, Collaboration and License Agreement – Claimant Exhibit C 3) which concerned the delivery and the use of the GorAdCam viral vector for the research, development and subsequent production of a vaccine against respiratory diseases, including the necessary licenses. The RespiVac Agreement was based on a template of a Collaboration and License Agreement which had been used for the Ross Agreement. In addition, it contained an unusual purchase obligation for Claimant, since, if a vaccine were to be successfully developed, CLAIMANT would have to buy the HEK 294-cells as well as the necessary cell culture medium from Respondent No. 1.

Under the RespiVac Agreement, RESPONDENT No. 1 was obliged to deliver to CLAIMANT a first batch of the GorAdCam viral vectors for research purposes and, for the delivery of that first batch, CLAIMANT would pay a price of EUR 2,5 million (Section 9.2, p. 13).

Due to the research done with the GorAdCam virus, during 2019, Claimant recognized the potential of the GorAdCam as a vector for a vaccine against the SARSCoV-2. Thus, from early February 2020 onwards, CLAIMANT concentrated its further research on a vaccine against COVID-19. The first results, in April 2020, were very promising and on

[9] The Problem, Exh. R3, Collaboration and License Agreement – Ross Pharmaceuticals, p. 32
[10] The Problem, Exh. C2, LiveScience Today, 29 November 2019, p.10

21st of April 2020 Claimant was taken over by Khorana Lifescience, one of the leading life science companies in Danubia (Respondent Exhibit R 1, p. 29), which, unlike CLAIMANT, has the know-how, the equipment and the financial means to produce the HEK-294 cells and cell culture medium.

On 1st of May 2020, CLAIMANT's COO, Mr. Paul Metschnikow, received from the CFO of Khorana Lifescience an article from the Biopharma Science Journal, dating back to the 19th of December 2019, which reported an ongoing dispute between Ross Pharmaceuticals and RESPONDENT No. 2. This dispute regarded the reach of the license granted, in 2014, to Ross Pharmaceuticals under the Ross Agreement (Claimant Exhibit C 4 p. 18). According to such article, the CEO of Ross Pharmaceuticals confirmed, at a press conference, the continued existence of different views as to the scope of the Ross Agreement and, according to their interpretation of the Ross Agreement, the exclusive license granted was not limited to the field of malaria. According to their perspective, this was justifiable by the reference to "related infectious diseases" which, according to Ross Pharmaceuticals, would cover "*the GorAdCam as a viral vector for its research into vaccines against several infectious respiratory diseases including that caused by the MERS-coronavirus.*" [11].

Mr. Paul Metschnikow immediately contacted Ms. Alexandra Flemming, the CEO of RESPONDENT No. 1 to clarify the situation. (Claimant Exhibit C 5, p. 19). She replied by email on 4th May 2020 (Claimant Exhibit C 6, p. 20) assuring that Ross Pharmaceuticals never received an exclusive license for any research in respiratory diseases and that the license given to them was *"clearly limited to the use of the GorAdCam vector for malaria research"*. Ms Flemming informed Mr. Metschnikow that, according to the information gathered among the colleagues from Roctis AG, the interpretation put forward by Ross Pharmaceuticals and the alleged divergence of views was merely a means to "to get a better deal for a non-exclusive license for the use of the GorAdCam vector for their research into a COVID-19 vaccine." Ms. Hübner, the CFO of RespiVac plc. and prior Senior Financial Adviser of Ross Pharmaceuticals, was unable, through her contacts, to get hold of a copy of the Ross Agreement. However, her contacts confirmed that in June 2020 there were still ongoing discussions between Roctis AG and Ross Pharmaceuticals about the scope of the exclusive license granted under the Ross Agreement and the right to use GorAdCam vectors in connections with the

[11] The Problem, Exh. C4, BiopharmaScience, p. 18

research for a vaccine against COVID-19 (Claimant Exhibit C 7, p. 21).

Thus, CLAIMANT initiated the arbitral proceedings against RESPONDENTS and the arbitral tribunal directed a notice to the parties (Records, pp. 46/47) to advert them of the existence of a Teleconference to discuss the conduct of the proceedings, given that, due to the COVID-19 pandemic, an in-person hearing could be impossible or, at least, difficult to hold. For this reason, the Tribunal requested the parties to share their position regarding the possibility to conduct the oral hearing remotely, if necessary, instead of an in person one, bearing in mind the time-zone differences.

In response, on the one hand, CLAIMANT stated (Records, p. 48) that it had no objections against a virtual hearing, since this is a straight forward case that involves legal questions, without the need to hear witness and experts. It also emphasized that the tribunal's duty, under art. 15(7) Swiss Rules, is to avoid costs/delays and that the parties had the technical capacity to conduct the hearing virtually.

On the other hand, RESPONDENTS objected to remote hearings (Records, p. 49), defending that the Swiss Rules are based on the assumption that a hearing in person will be held. Moreover, RESPONDENTS defended that the arbitral clause requires an in-person hearing – which was one of the few modifications made to the model arbitration clause of the Swiss Chambers' Arbitration Institution. Lastly, it stated that the examination of witness and experts is essential to prove that Ross Pharmaceuticals' license does not extend to the use of GorAdCam viral vector for respiratory diseases, which would necessarily involve complex and difficult explanations about the viral vector.

Given this set of circumstances, described *supra*, the teams were requested to address, in their memoranda, the following questions:

a. (…)

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

c. Is the CISG applicable to the "Purchase, Collaboration and License Agreement" concluded between CLAIMANT and RESPONDENT No. 1?

d. Has RESPONDENT No. 1 breached its contractual obligations to deliver conforming goods existing pursuant to Article 42 CISG by providing CLAIMANT with the batches of GorAdCam viral vectors?

Issue B is inspired by the international reality and challenge posed by the COVID-19 pandemic in regards to the conduction of oral hearings within the context of travel bans and social distancing measures. In that sense, the Tribunal inquired both parties regarding the possibility of conducting the hearings remotely, to which CLAIMANT was favorable, contrarily to the RESPONDENTS. Therefore, the first aspect to be discussed was whether the Tribunal had the power to hold a remote hearing. On the one hand, CLAIMANT defended that the hearing format fell within the Tribunal's discretion to conduct the arbitral proceedings under art. 15.1 Swiss Rules since the arbitration agreement did not exclude the option for remote hearings. On the other hand, RESPONDENTS' argumentation was sustained by its interpretation of the arbitral clause as imposing a physical hearing.

The second key point that was debated was whether the circumstances of the case were in favor or against a remote hearing. At this point, CLAIMANT alleged that the exceptional circumstances of the case required a remote hearing as it would not jeopardize parties' right to be heard and treated equally. On RESPONDENTS' side, a benefits/harm comparison, in regards to remote hearings, dictated their inadequacy, especially since the parties right to present their case and be treated equally would be jeopardized.

Regarding issue C, the RespiVac Agreement is a modified version of the "typical" collaboration and license agreement which is often used in the life-science industry for the development of vaccines. In these contracts, the primary element is the grant of licenses to use the crucial IP-rights and the know-how for the research and production of the new vaccines. As RESPONDENT No. 1 is primarily a contract producer, CLAIMANT also had the option to request RESPONDENT No. 1 to produce the vaccines directly under the "Production Option" in Section 16.2 which provides that the Licensee had the option to request the Licensor to produce the vaccines under GMP-conditions using the purchased HEK-294 cells and the cell culture medium at a price to be agreed by the parties. If this production option were to be exercised, there would be a slight reduction on the royalty fees for revenues generated with the vaccine (Section 16.3, p. 17).

According to CLAIMANT, these obligations to deliver the first batch of the GorAdCam vector (mentioned in Section 9.2), the HEK-294 cells and the cell culture medium – in case of a vaccine production – justify the classification of the RespiVac Agreement as a Contract of Sale of Goods in the sense of art. 3 CISG. On the other hand, RESPONDENTS

considered the RespiVac Agreement to constitute a license agreement, as the transfer of know how was by far the most important obligation for RESPONDENT No. 1 and therefore the RespiVac Agreement would not be a sales agreement for the purpose of the CISG.

Regarding issue D, it must be taken into consideration that RESPONDENT No. 2 granted an exclusive license to Ross Pharmaceuticals for "malaria and related infectious diseases" in 2014.
Ross Pharmaceuticals has relied upon the extension to "related infectious diseases", made against an additional payment of Eur 600.000, to justify its use of the GorAdCam viral vector in its research for respiratory diseases.
Thus, CLAIMANT's argumentation was that RESPONDENT No. 1 breached its contractual obligations since there was indeed an intellectual property claim from Ross Pharmaceuticals regarding the viral vectors of which RESPONDENT No. 1 was aware at the time of the conclusion of the contract. On that regard, RESPONDENTs' argumentation followed the opposite rationale, claiming that the dispute regarding the Ross Agreement did not meet the necessary threshold of art. 42 CISG, hence not constituting an intellectual property claim, and that RESPONDENT No. 1 was not - and had no obligation to be - aware of said claim. Additionally, CLAIMANT submitted that it was not, nor could it have been, aware of the existence of the claim prior to the conclusion of the contract, while RESPONDENT argued that CLAIMANT ought to have become aware of said claim and thus failed to fulfil the notice requirement of arts. 42 (2) and 43 CISG.

Procedural Issues

Issue B: Should the examination of witnesses and experts in the 2nd Hearing of 3 to 7 May 2021, be conducted remotely if a hearing in person is not possible or considered by the Arbitral Tribunal to be inappropriate?

Ana Sousa

The issue at hand regards the possibility of having the oral hearing, for the examination of witnesses and experts, conducted remotely, when one of the parties objects. Within the COVID-19 pandemic and the consequent difficulties in gathering all participants, after the Tribunal's letter to the parties[12], CLAIMANT agreed with the virtual conduction of the hearing, expressing its belief on the suitability of such format to the present case[13]. Contrarily, RESPONDENTS submitted their objection based on their interpretation of the arbitral clause, according to which the hearing must be held physical, and on the inadequacy of a virtual setting for the examination of witness and experts[14]. The Tribunal, then, decided to hold a virtual hearing to hear each party on this topic[15].

1. Did the Tribunal have the power to decide to conduct the hearing remotely?

The first relevant topic that needed to be addressed, for the sake of a logical and coherent argumentation, regardless of the party's position on this issue, was whether the Tribunal had the power to decide on the hearing format. The interesting twist of the factual context of the case, which was obviously created to balance the merits of both parties' position, was that the following Hearing Provision was added to the model arbitral clause suggested by the Swiss Chamber's Arbitration Institution ("SCAI")[16]:

> *"Any dispute, (...) hall be resolved by arbitration in accordance with the Swiss Rules of International Arbitration of the Swiss Chambers' Arbitration Institution (...). The seat of arbitration shall be Vindobona. Hearings shall be held, at the Arbitral Tribunal's discretion, either in Vindobona or in the city where the Respondent has its place of business."*[17]

Given that this provision was added to the SCAI model dispute resolution clause, RESPONDENTS interpreted it as an expression of the parties' intention to exclude any other

[12] *The Problem, Tribunal's notification to the parties of 4 September 2020, pp. 46/47*
[13] *The Problem, CLAIMANT's submission of 2 October 2020, p. 48*
[14] *The Problem, RESPONDENTS' submission of 2 October 2020, p. 49*
[15] *The Problem, PO, p. 52, ¶IV*
[16] *The Problem, Respondents' submission of 2 October 2020, p. 49*
[17] *The Problem, Exh. C3, p. 16, Clause 14.1*

format besides in-person hearings. Thus, RESPONDENTS' role was to prove that the parties selected physical hearings as the only format acceptable and, hence, the Tribunal's power to decide was withheld, since that it is pacific within the doctrine that, when the parties establish in their arbitration agreement the hearing format, the Tribunal should respect it[18]. On the other side, in CLAIMANT's defense, this arbitral clause was not truly discussed between the parties, but rather copied from the Ross Agreement to the RespiVac Agreement[19] and CLAIMANT was simply told that these was the standard arbitral clause used by RESPONDENT No. 1 in its Purchase Collaboration and License Agreements[20]. Additionally, and far more relevant, at the time of the conclusion of the RespiVac Agreement and of such arbitral clause, the COVID-19 pandemic was not foreseeable[21]. For that reason, CLAIMANT's counsel would start by establishing the Tribunal's power to decide to hold the hearing remotely by proving that the arbitration agreement does not exclude remote hearings and, hence, that the Tribunal has the discretion to decide.

After careful consideration, I decided to defend that in-person hearings are not required, as CLAIMANT's counsel, based on two main premises: the arbitration agreement did not establish the obligation for the hearings to be conducted physically and there is no right to a physical hearing in international arbitration.

<u>The arbitration agreement did not require the physical conduction of the hearing</u>

At the time of the acceptance by CLAIMANT of such arbitral clause, the COVID-19 pandemic was not foreseeable[22], and thus, one could not predict that it would be very difficult or impossible to gather all participants in the same hearing room. For that reason, due to this change of circumstances, it was argued that the Tribunal should then attend to the intention of the parties, at the time of the selection of these two venues, to understand which was the reasoning behind it and whether a remote hearing would still comply with it. For that it was necessary to explore the intention of the original drafters of such the clause – RESPONDENT No. 2 and Ross Pharmaceuticals, given that the selection of the two

[18] *Erica Stein, Chapter 9: Challenges to Remote Arbitration Awards in Setting Aside and Enforcement Proceedings', in Maxi Scherer , Niuscha Bassiri , et al. (eds), International Arbitration and the COVID-19 Revolution, Kluwer International Law (2020), p. 172; Maxi Scherer, Chapter 4: The Legal Framework of Remote Hearings', in Maxi Scherer, Niuscha Bassiri, et al. (eds), International Arbitration and the COVID-19 Revolution, Kluwer International Law (2020), p. 77; Yvonne Mak; Do Virtual Hearings Without Parties' Agreement Contravene Due Process? The View from Singapore, Kluwer International Law (2020)*

[19] *The Problem, NofA, p. 8 ¶24, Exh. R2, p. 30, ¶5; PO2, 56, ¶25*

[20] *The Problem, NofA, p. 8 ¶24*

[21] *The Problem, Exh. C3, p. 14, date – 1st January 2019*

[22] *The Problem, Exh. C3, p. 14, date – 1st January 2019*

venues to hold the hearings was discussed and decided by these two parties – and since, RESPONDENT No.1 decided to use the Ross Agreement as the template for the RespiVac Agreement and, consequently, maintain the same arbitral clause[23], its intentions were the same as the original drafters of the clause. RESPONDENT No. 2, in the discussions with Ross Pharmaceuticals, first suggested a document-only arbitration and then compromised for the present arbitration agreement,[24] which would only force one party to travel to attend the virtual hearings (Ross Pharmaceuticals is based in Vindobona and the hearing would either be there or in RESPONDENT 's place of business). Thus, the real intention behind this provision was to select convenient places for the parties to have the hearings – as a reflection of the efficiency concern, which was the real *rational* of the Hearing Provision. Therefore, a remote hearing would still comply with the parties' intention of having efficient proceedings, given that only such format would prevent adjournments and extensions to the arbitral proceeding original schedule.

Nevertheless, this argumentation was extremely complex and not persuasive in the oral stage, which forced me to adjust it. Thus, in the oral rounds of Vienna, in regard to the interpretation of the arbitration agreement, I selected the following argument to present.

The decision to add the Hearing Provision to the SCAI model clause merely showed the parties intention to hold hearings in case of a dispute, but not the obligation for such hearings to be physical. The parties did not even discuss virtual hearings at the time of the signing of the RespiVac Agreement[25], so they could not have excluded the option for remote hearings – attributing to the silence of the parties such meaning would be abusive. Furthermore, when the parties agreed on the arbitral clause, the COVID-19 pandemic was not predictable and, consequently, the arbitration agreement would have to be read in accordance with the current exceptional circumstances and from its literal wording remote hearings were not excluded. In fact, a remote hearing would still comply with the parties' agreement, since the hearing could still be held from Vindobona or Equatoriana (RESPONDENTS' place of business) remotely, in the same way that the virtual hearing that was being held to discuss the conduction of the proceedings, even though remote, had a physical location allocated, which was Danubia, according to the PO1[26].

[23] *The Problem, NofA, p. 8 ¶24, Exh. R2, p. 30, ¶5; PO2, 56, ¶25*
[24] *The Problem, PO2, p. 57, ¶32*
[25] *The Problem, PO2, p. 57, ¶32*
[26] *The Problem, PO1, p. 52, IV*

Since this argument led to a lot of questions from the arbitrators, it was necessary to explain to the Tribunal that the Hearing Provision had the main goal of excluding document-only arbitrations and that there was no indication of exclusion of remote hearings, since selecting two venues can still allow the parties to have the hearings conducted remotely, by simply arrange the virtual meeting from one of those locations (creating the link in one of those and following its local time). Even if the Tribunal would not be convinced, the final argument would generally erase any remaining doubts: according to article 4.6 UNIDROIT Principles, the *contra proferentem* rule, if the contract terms supplied by one party are unclear, an interpretation against that party is to be adopted. Therefore, CLAIMANT interpretation must prevail since RESPONDENTs are the drafters of the arbitral clause[27].

There is no right to a physical hearing in international arbitration

Many scholars[28] and a recent study conducted by ICCA[29] defend that there is no general right to a physical hearing in arbitration but only a right to a hearing, without specifying its format. In particular, in the ICC Guidance Note[30] this view was expressly shared, since the ICC felt the need to clarify the "in-person" concept of art 25.2 ICC Rules, *"as the parties' opportunity for a live audience, which does not preclude the chance of "in-person" by virtual means"*. Furthermore, the Danubian Procedural Code allowed for remote hearings if required by public interest[31], which was the case, given that a physical hearing would raise public health issues, that could be prevented by the online setting.

As a consequence, CLAIMANT argued that the Tribunal had the power to decide on a remote hearing and such power would arise out of the general discretion of the Tribunal to conduct the proceedings in a matter that it believes to be most appropriate, under art. 15.1 Swiss Rules and its similar art. 19.2 UNCITRAL Model Law. Art. 25.4 Swiss Rules, which allows the Tribunal to examine witnesses and experts trough means of video-

[27] *The Problem, PO2, p. 57, ¶32; Exb R2 p. 30, ¶¶5/7*
[28] *Maxi Scherer, Chapter 4: The Legal Framework of Remote Hearings', in Maxi Scherer, Niuscha Bassiri, et al. (eds), International Arbitration and the COVID-19 Revolution, Kluwer International Law (2020), pp. 74/75;*
Alvaro Galindo, "Arbitration Unplugged Series – Virtual hearing: Present or Future?", Georgetown University Law Center, Kluwer International Law (2020)
[29] *In the ICCA research project on "Does a Right to a Physical Hearing exists in International Arbitration?" the conclusion reached so far, in the majority of analyzed jurisdictions, is that there is no right to a physical hearing in their arbitration laws. Most of them are contracting countries of the UML and NYC*
[30] *ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic, p. 5, ¶23*
[31] *PO2 p. 57, ¶37*

conference, could also be argued. However, this article, if read strictly, only allows semi-remote hearings[32] - only the witnesses and experts would be attending remotely - which is not what CLAIMANT was defending. Therefore, every time counsel for CLAIMANT would bring this argument, either the arbitrator or the opposing counsel refuted it. Thus, in the oral stage of the competition, I simply relied the Tribunals' power to conduct the hearing remotely on art. 15.1 Swiss Rules and art. 19.2 UNCITRAL Model Law.

In the opposite sense, when drafting RESPONDENTS' written memoranda, I based my case on the following key point:

The arbitration agreement excluded the option for remote hearings

To defend that the arbitral clause demands for the physical conduction of the hearing, the criteria of interpretation first used was the literal wording of the Hearing Provision. In fact, if the parties only wanted to exclude document-only arbitrations then the statement "*Hearings should be held*" would be enough. However, a selection of the two venues was made by the parties, which requires the parties' physical presence in one of those locations and restricts the Tribunals' discretion to choose either Danubia or Equatoriana for the conduction of the hearing, implicitly excluding any remote setting.

The general question that was made by the arbitrators was if indeed there was an exclusion of remote hearings, since it was not expressly stated and if it was not possible to have the hearing conducted remotely by having the place of the hearing in one of these two locations. My team member, following my line of argumentation, would defend that, even though it is not expressly stated in the clause, considering that remote hearings were not common in a pre-covid context [33], at the time of the drafting of the agreement, the parties would not have to expressly exclude it since, by selecting two physical venues, they were implicitly precluding it. Additionally, defending that it is possible to conduct a remote hearing from one of those locations and complying with the parties' agreement is

[32] Maxi Scherer, *Chapter 4: The Legal Framework of Remote Hearings', in Maxi Scherer, Niuscha Bassiri, et al. (eds), International Arbitration and the COVID-19 Revolution*, Kluwer International Law (2020), pp. 71/72

[33] Gary Born, Analeese Day and Hafez Virjee, *"Chapter 7: Empirical Study of Experiences with Remote Hearings: A Survey of Users' Views', in Maxi Scherer, Niuscha Bassiri, et al. (eds), International Arbitration and the COVID-19 Revolution",* Kluwer Arbitration Law (2020), p.144

an abusive interpretation, by stretching the wording of the clause to fit CLAIMANT's will at the present moment.

Even if the literal wording criteria would not be convincing, the *common intention of the parties* criteria, under art. 4.1.1 and 4.3 UNIDROIT Principles, analysed through the following requirement, would lead to the same conclusion.

- The preliminary negotiation between the parties: CLAIMANT was the one that suggested SCAI as the arbitral institution[34] and accepted the Hearing Provision as fair,[35] thus it would be reasonable to assume that it knew that such addition meant the parties intention to hold physical hearings;

- Parties conduct after the conclusion of the contract: CLAIMANT did not request for remote hearings in its Notice of Arbitration ("NofA"), which was submitted after the outbreak of the pandemic[36], and such clearly showed that CLAIMANT was aware that the arbitral clause excluded the option for remote hearings.

- The meaning commonly given to terms and expression: since remote hearings were the exception until the pandemic[37], it is evident that the term *hearings*, in a pre-covid context, must be read as requiring the physical presence of the parties.

Therefore, in RESPONDENTS' perspective, all factors point that the *common intention of the parties* when drafting the arbitral clause was to have the hearing conducted physically.

However, since the pandemic was not predictable when parties drafted the arbitral clause, the arbitrators would inquire if such change of circumstances would not influence the clause interpretation. At this point, counsel for RESPONDENTS would argue that the COVID-19 did not fit within the concept of force majeure of art. 7.1.7 of the UNIDROIT Principles, because, the present case, is not a non-performance situation. Thus, the COVID-19 unforgeability could not be a reason to read the Hearing Provision as not excluding virtual hearings, which, in fact, would constitute a modification of the arbitral clause, only permissible with the agreement of both parties[38].

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[34] *The Problem, PO2, p. 57, ¶31;*
[35] *The Problem, PO2, p. 57, ¶32;*
[36] *The Problem, NofA, p. 4, date – 15 July 2020*
[37] *Gary Born, Analeese Day and Hafez Virjee, "Chapter 7: Empirical Study of Experiences with Remote Hearings: A Survey of Users' Views', in Maxi Scherer, Niuscha Bassiri , et al. (eds), International Arbitration and the COVID-19 Revolution", Kluwer Arbitration Law (2020), p.144*
[38] *The Problem, Exb. C3, p. 16, Clause 15.3 PCLA*

After asserting the preclusion of remote hearings in the arbitral clause, RESPONDENTS would proceed to demonstrate the prevalence of the arbitral clause over art. 25.4 Swiss Rules, since its predominance over art. 15.1 Swiss Rules was implicit due to the suppletive nature of the latter. In RESPONDENTS' perspective, the arbitral clause excludes fully and semi remote hearings and art. 25.4 Swiss Rules only allows semi-remote hearings, as from the wording of the clause only the examination of witnesses can be conducted remotely. Since CLAIMANT is defending a fully-remote hearing, such format is excluded by the arbitral clause and is not allowed under art. 25.4 Swiss Rules, thus, there is no conflict between the two provisions. But even if art. 25.4 Swiss Rules would permit a fully remote-hearing and a conflict situation would happen, the arbitral clause, as the expression of parties' autonomy, prevails over the Swiss Rules. Thus, the parties by choosing physical hearings were deviating from such article, which is allowed under the Swiss Rules[39].

In conclusion, RESPONDENTS defended that the Tribunal did not have the discretion to decide the hearing format, under arts. 15.1 or 25.4 Swiss Rules. And, if the Tribunal read the arbitral clause as not excluding remote hearings and decided to hold it, it would be deviating the proceedings from what was agreed by the parties, which could lead to the set aside of the award on the terms of art. 34(2)(a)(iv) UNCITRAL Model Law, or to its non-enforcement according to art. V(1)(d) New York Convention.

2. The balancing exercise required to decide on the suitability of a remote hearing

The second main argument, assuming that the Tribunal has the power to decide on remote hearings, relates to whether such format is suitable to the case at hand. For that, and following Professor Maxi Scherer doctrine, the Tribunal should conduct a balancing exercise, in order to determine if the benefits of a remote setting outweigh the potential prejudices to any party resulting therefrom[40]. Following this reasoning, CLAIMANT's counsel defended that the benefits of a remote hearing outweigh any possible risks,

[39] *Micheal Lazopoulos, "Chapter 3, Part II: Commentary on the Swiss Rules, Article 15 [General provisions], in Manuel Arroyo (ed), Arbitration in Switzerland: The Practitioner's Guide" (Second Edition), (Kluwer Law International 2018), pp. 604/605 :"Following the principal of party autonomy, one may conclude that the parties are free to modify any procedural provisions contained in the Swiss Rules in the same way that they are free to create their own set of procedural rules. In cases where the arbitral tribunal disagrees with the procedural provisions agreed by the parties, it has no other choice but to resign."*

[40] *Maxi Scherer, Chapter 4: The Legal Framework of Remote Hearings', in Maxi Scherer, Niuscha Bassiri, et al. (eds), International Arbitration and the COVID-19 Revolution, Kluwer International Law (2020), p. 82*

especially because there would be no prejudice to the parties, while RESPONDENTS' counsel advocated that the prejudices would be enormous and, hence, the postponement of the hearing was the only reliable solution.

Several aspects need to be considered for such comparison, and for a clear analysis, they can be divided into three main groups: (a) relevant circumstances of the case; (b) due process and possible set-aside of the award (c) efficiency v procedural fairness.

(a) The relevant circumstances of the case

The COVID-19 pandemic has stimulated the arbitration community to reflect whether it is possible to conduct a remote hearing with one party objecting. The conclusion reached by many scholars[41] and adopted in several case-law[42] was that, assuming that the arbitration agreement does not exclude the option for remote hearings, the Tribunal has the power to order it over the opposition of one party if it seems appropriate, after carefully assessing the circumstances of the case. In accordance, many arbitral intuitions have issued Notes, Guidelines and Protocols sharing this same perspective[43]. Consequently, counsel for RESPONDENTS' role was to point out the factual aspects of the case that would go against a remote hearing, while CLAIMANT's counsel would elaborate through the solutions and the facts that are favorable to it.

In regard to the examination of witness and experts, remote hearings pose the question of whether it is possible to truly hear the testimonies and assess their credibly, without the "formal hearing room environment", and the pending risk of witness tampering. Such doubts have led to the preference of in-person formats for the examination and cross-examination of witnesses and experts. However, the pandemic has forced the world to re-consider this option, thus, doctrinal divergences exist that can support both RESPONDENTS and CLAIMANT's positions. In RESPONDENTS' point of view the hearing would be for the examination of witnesses and experts – testimonies that would be essential for RESPONDENTS' case, thus these key witnesses should present their testimony face-to-face[44], due to the problems that a remote examination would pose. In fact, according to

[41] *Abayomi Okubote, Advancing Abdel Wahab's Pandemic Pathway: Arbitral Justice as an Interposition Between the Twin Duties of Fairness and Efficiency, Kluwer International Law (2020);*
Verlislava Hristova and Malcolm Robach, Legal and Practical Aspects of Virtual Hearings During (and After?) the Pandemic: Takeaway From the SCC Online Seminar Series, Kluwer International Law (2020)
[42] *Anwar Siraj v Ting Kang Chung; JKC Australia LNG Pty td v CH2M Hill Companies Ltd, OGH Case - No. 18 ONc 3/20s July 2020*
[43] *AAA-ICDR Model Order and Procedures for a Virtual Hearing via Videoconference; ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic;*
[44] *Michaela D'avino and Baha Ezzerlarab; After Covid-19 lockdown will virtual arbitrations become the*

several scholars and a recent study[45], the witness credibility assessment is harder in a virtual setting – body language and face expressions are not perceptible - especially due to the frequent technical issues. Also, the witness coaching[46] – through messages on the computer screen for example - and recording of the online examination to pass to other witnesses and experts is a real risk. CLAIMANT, on the contrary, would state that the screen allows a closer look on the witness face and body expression[47] – for a dramatic element, in the oral stages, the following scenario would be presented to the Tribunal: for the purpose of credibility assessment, is it better to hold a virtual hearing, where is possible to record the testimony and truly look at the witness or expert face and body language closely or to have an in-person hearing where the participants would have to be distant from each other and wear a mask? In regard to witness coaching several options would be available: pan-out the room, 360 degrees cameras or even having a neutral person in the room with the witnesses. Such solutions were presented by the Austrian Supreme Court, in its decision of July 2020, while stating that these options go beyond the available ones to carry out during an in-person hearing, where the same risk exists[48].

Another circumstance that would have to be taken into account is confidentiality and data protection, since remote hearings can be sensitive to cyber-attacks. For that reason, RESPONDENTS would bring the confidentiality argument, especially since it was impossible to guarantee that a third person would not get access and interfere with it[49]. In the oral stage of the competition, in order to emphasize its importance, the zoom platform (which was the one being use in Vienna) was given as an example of a supposed secure platform that had been scrutinized for its lack of cybersecurity and data protection. Opposingly, CLAIMANT would respond that confidentiality should not be overemphasized

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[45] *Alexander Backsmann and Josef Frölingsdorf, "Chapter IV: Science and Arbitration, The Vienna Propositions for Innovative and Scientific Methods and Tools in International Arbitration", in Austrian Yearbook on International Arbitration 2020, p. 422;*
Janet Walker, Virtual Hearings: An Arbitrator's Perspective, 2020, p. 1;
Gary Born, Analeese Day and Hafez Virjee, "Chapter 7: Empirical Study of Experiences with Remote Hearings: A Survey of Users' Views', in Maxi Scherer, Niuscha Bassiri , et al. (eds), International Arbitration and the COVID-19 Revolution", Kluwer Arbitration Law (2020), p.146

[46] *Alex Lo; "Virtual Hearings And Alternative Arbitral Procedures In The Covid-19 Era: Efficiency, Due Process, And Other Considerations", Contemporary Asia Arbitration Journal, Vol. 13, May 2020, p. 90*

[47] *Wendy Miles; "Chapter 6: Remote Advocacy, Witness Preparation & Cross-Examination: Practical Tips & Challenges, in Maxi Scherer, Niuscha Bassiri, et al. (eds), International Arbitration and the COVID-19 Revolution"; Kluwer International Law (2020), p. 129*

[48] *OGH Case - No. 18 ONc 3/20s*

[49] *The Problem, PO2, p. 58, ¶38*

given that the platforms used were encrypted and secure[50] and also because there is always, even in in-person hearings, the risk of a confidentiality breach. In fact, in a remote setting, the parties could even agree on a cybersecurity and data protection protocol.

Additionally, the time-zone differences – a heated topic of discussion between scholars – can force the participants of a remote hearing to attend it out of office hours and possibly at an unreasonable time. If that happens, real due process problems can occur. Following this rational, and given that in this case the time-zone differences was very significant[51], RESPONDENTS would emphasize that one of the parties would have to carry the hearing at an unreasonable and unfair hour when compared to the others. Contrarily and to face the time-zone differences, CLAIMANT would propose a schedule that would accommodate each party [e.g. 11am Danubia, 8 am Mediterraneo, 7 pm Equatoriana] and volunteer to have the hearing one-hour latter for RESPONDENTS' benefit. Also, CLAIMANT would resort to the Austrian Supreme Court decision[52], in which the Tribunal held that, when the parties select a particular venue, they are accepting the geographical consequences of such choice, one of them being the time-zone differences, and even having hearings at unusual hours is less prejudicial to the participants routine than to travel.

One of the characteristics normally pointed out as an advantage of virtual hearings is the cost reduction, given that it is not necessary to bear the travel expenses undoubtably involved with the physical hearings[53]. However, in the case at hand, the costs of the hearing could be even higher if an online setting would be arranged[54], which meant that one of the main advantages of this format would not be applicable to this case, setting off the benefit/prejudice comparison on RESPONDENTS' favor. CLAIMANT would defend itself by stating that it was not guaranteed that the costs of a remote hearing would be higher. Even if that was the case, such would be justified by the parties' effort to guarantee the integrity of the hearing and, if compared to the losses involved with the adjournment, the costs would be a minor setback for a timely decision and a COVID-19 vaccine.

Lastly, the inequality in terms of technical equipment and bandwidth is described by the scholars as one of the characteristics that can truly harm the proceedings (*infra*) and be

[50] *Verlislava Hristova and Malcolm Robach, Legal and Practical Aspects of Virtual Hearings During (and After?) the Pandemic: Takeaway From the SCC Online Seminar Series, Kluwer International Law (2020)*
[51] *The Problem, PO2, p. 57, ¶36*
[52] *OGH Case - No. 18 ONc 3/20s*
[53] *Corina Lefter; "Are We Ready for the Brave New World of Virtual Arbitrations? Insights from the 32nd Annual ITA Workshop", Kluwer International Law (2020)*
[54] *The Problem, PO2, p. 57, ¶35*

decisive for the acceptance of a remote conduct of the proceedings. *In casu*, it is stated that *"all participants potentially involved in an oral hearing have sufficient bandwidth and equipment to guarantee that a hearing can be held, though the technical equipment is better on Claimant's side*"[55]. Therefore, RESPONDENTS would interpret it as inequal technical capacity, putting RESPONDENTS in a weaker and more vulnerable position to technical issues. On the contrary, CLAIMANT would emphasize that its better technical equipment would not lead to inequality, since both have the capacity in terms of bandwidth and equipment to have the hearings conducted remotely, and even CLAIMANT would be willing to provide the tech equipment to RESPONDENTS.

(b) Due process concerns and possible set-aside of the award

One of the main concerns with remote hearings is whether such format incumbers a due process violation. When the tribunal denies an in-person hearing, it is possible that one of the parties claims the hindrance to its right to properly present its case and the right to be treated equally[56], in particular due to the general feeling that remote hearings do not allow the same examination experience of in-person hearings and that IT facilities disparity may exist within the parties. The truth is that the Tribunal's discretion to conduct the proceedings is limited by parties right to be heard or be treated equally, under art. 15.1 Swiss Rules. Thus, the Tribunal has to assess, prior to deciding the hearing format, if there is a real risk of due process violation and challenge of the award based on art. 34(2)(a)(ii), 36(1)(a) UNCITRAL Model Law and V(1)(b) New York Convention or if the party is simple relying on *due process paranoia*[57] to oppose to such hearing format.

Starting on RESPONDENTS side, CLAIMANT's better technical equipment [58], not only was seen as allowing this party to be in a better position to have the hearing conducted remotely, but also left RESPONDENTS more prone to technical issues. Therefore, such would be enough to set-aside or deny enforcement of the award, since the violation of equal treatment would have a direct consequence on the Tribunal's decision on the case, thus, meeting the high threshold required[59].

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[55] *The Problem, PO2, p. 58, ¶38*
[56] *Michaela D'avino and Baha Ezzerlarab; After Covid-19 lockdown will virtual arbitrations become the new normal? Global Legal Post 21 April 2020*
[57] *Abayomi Okubote, "Advancing Abdel Wahab's Pandemic Pathway: Arbitral Justice as an Interposition Between the Twin Duties of Fairness and Efficiency", Kluwer International Law (2020);*
[58] *The Problem, PO2, p. 58, ¶38*
[59] *Yvonne Mak; Do Virtual Hearings Without Parties' Agreement Contravene Due Process? The View from Singapore, Kluwer International Law (2020);*

Additionally, due to the difficulties in examining witnesses and experts, especially when weighting the probable technical difficulties and the time-zone differences, RESPONDENTS alleged that there would be a server harm on parties' right to present their case – which consequently would influence the Tribunal's decision on the merits[60].

On the other hand, CLAIMANT advocated that parties' right to be treated equally would be guaranteed in a remote hearing, given that, even though CLAIMANT had better technical equipment, both parties had the necessary equipment to conduct the hearing virtually[61] and, CLAIMANT would be willing to provide the technical equipment.

In connection to parties right to present their case, in CLAIMANT's view, not only remote hearings enabled the participants an oral and simultaneous exchange of arguments, thus fulfilling the two requirements of a hearing[62], but also the issues of technical difficulties could not be over emphasized. Firstly, it was not likely for them to occur, since the parties have the necessary means, can take appropriate precautions – such as run tests prior to the hearing – and would be assisted by an outside provider[63]. Secondly, even if technical difficulties would occur that does not necessarily mean that both parties right to present their case would be violated, as it was decide by the Federal Australian Court in the *Sino Dragon Trading v Noble Resources*[64]. In that case numerous technical problems occurred during the remote examination and the Federal Court still decided to not set-aside the award, basing its decision on the fact that the technical problems did not exclude the evidence produced by the party challenging the award and the technical difficulties were more a disadvantage to the counter-party, as they arose while cross-exanimating the witnesses. Additionally, the time-zone differences would not be a concern in terms of violating such principle as well since, as CLAIMANT had already suggested, it was possible to have the hearing at a reasonable hour for everyone and such argument was already dispelled by the Austrian Supreme Court[65] (*supra*).

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[60] *Yvonne Mak; Do Virtual Hearings Without Parties' Agreement Contravene Due Process? The View from Singapore, Kluwer International Law (2020)*
[61] *The Problem, PO2, p. 58, ¶38*
[62] *Maxi Scherer, Chapter 4: The Legal Framework of Remote Hearings', in Maxi Scherer, Niuscha Bassiri, et al. (eds), International Arbitration and the COVID-19 Revolution, Kluwer International Law (2020), p. 75*
[63] *PO2, p. 57, ¶35*
[64] *Sino Dragon Trading Ltd v Noble Resources International Pte Ltd, 29 September 2016, Federal Australian Court*
[65] *OGH Case - No. 18 ONc 3/20s July 2020*

In that same decision, the Court refused to set-aside the arbitral award, on the grounds that a remote hearing had violated parties right to present their case, by stating that such format is an alternative that allows access to justice and protect parties' right to be heard.

(c) Efficiency v procedural fairness

In general, since the pandemic has spread worldwide and forced parties to decide to adjourn or virtually continue the proceeding, the main goal of having the hearings conducted remotely is the achievement of procedural efficiency. Thus, *in casu*, there is a potential confrontation between the principles of procedural efficiency and fairness.

Truly, the uncertainty surrounding the possibility to gather all the participants in one room in the middle of a worldwide pandemic would mean the adjournment of the hearing for more than 4 months – such would be the time frame required for the parties to have a compatible schedule, without mentioning the pandemic factor[66]. In this sense, CLAIMANT would insist on the Tribunal's power to rule over the fear of change and truly emphasize the importance of efficiency in arbitration. Thus, CLAIMANT argumentation was based on the fact that remote hearings would be the only option that can guarantee the Tribunal and parties' duty to contribute for the efficient conduct of the proceedings, without jeopardizing the fairness of the proceedings (*supra*). If the Tribunal decided to adjourn the hearing, efficiency would be harmed and consequently, as justice delayed is justice denied, the practical effect of the award would be undermined as well – there is a race for the COVID-19 vaccine, which means that if CLAIMANT would have to wait for an award, that award would have no effect, since other pharmaceutical companies would have reached a vaccine first, and CLAIMANT would see all its investment frustrated.

This was, however, a controversial argument, since the arbitrators would hesitate to believe that this was a situation of justice delay = injustice, given that CLAIMANT was not prevented from continuing its research and production of the vaccine. At this point, CLAIMANT's counsel would reassure the Tribunal that CLAIMANT wanted legal certainty, so it could only be 100% secure on its vaccine when the Tribunal decided that RESPONDENTS had failed to deliver goods free from third-party IP rights.

By contrast, RESPONDENTS, when confronted with such efficiency argument, would always bring up the principle of procedural fairness. If a conflict situation happens between the two principles, in RESPONDENTS' perspective, procedural fairness should

[66] *PO2, p. 58, ¶42a*

prevail, especially because its violation would open the door to possible award challenges[67]. However, in the case at hand, in RESPONDENTS' view there would be no conflict, since a remote hearing would not be efficient. Firstly, due to the circumstances of the case above enumerated, such format would be inadequate and ineffective. Secondly, the due process and parties' agreement violations would jeopardize the integrity of the award - there would be no point in having an expeditious award if it would later on be challenged. Thus, RESPONDENTS would demonstrate that a remote hearing would only raise more issues than the problems that it would be attempting to solve[68] – prioritizing an expeditious award over a fair trial would in the end, due to the challenge of the award, be inefficient. In the oral stage, these was a key argument of RESPONDENTS, because the panel inquired RESPONDENTS' counsel on the need for efficient proceedings and, as counsel for RESPONDENTS, my team member would always highlight that a remote hearing would not contribute for an enforceable award, which is one of the main goals of the arbitral proceedings and, hence, would be inefficient.

[67] *Fabricio Fortese and Lotta Hemmi, "Procedural Fairness and Efficiency in International Arbitration" Groningen Journal of International Law, Vol. 3, No. 1, 2015, May 2015, p. 124*
[68] *Alex Lo; "Virtual Hearings And Alternative Arbitral Procedures In The Covid-19 Era: Efficiency, Due Process, And Other Considerations", Contemporary Asia Arbitration Journal, Vol. 13, No. 1, May 2020, p. 93*

Substantive Issues

Issue C: Is the CISG applicable to the "Purchase, Collaboration and License Agreement" concluded between Claimant and Respondent No. 1?

Martim Mimoso

In order to determine if RESPONDENT No.1 breached the Purchase Collaboration and Licensing Agreement ("RespiVac Agreement") by delivering CLAIMANT the GorAdCAm viral vectors encumbered with an alleged third-party intellectual property claim or right (**Issue D**), one has to previously determine what is the applicable law to the contract at hand. Otherwise, it would be impossible to determine the rights and obligations that each of the parties had under the agreement which, consequently, would prevent the resolution of the dispute. Nevertheless, in order to fully understand this issue and its importance we will start by discussing which laws could hypothetically be applied to the RespiVac Agreement **(1)**, the practical difference between each of their applications **(2)** and, lastly, the relevant arguments that where discussed for the applicability/inapplicability of the CISG **(3)**.

1. Possible solutions

One of the possible answers to the problem of the applicable law comes from the contract itself since the parties expressly determined, under clause 15.2, that the RespiVac Agreement is exclusively the governed by the Danubian Law[69].

Despite Danubia being a fictitious State, the Tribunal provided, in the Procedural Order No. 1, some valuable information about this jurisdiction: **(a)** The general contract law of Danubia is a *verbatim* adoption of the UNIDROIT Principles on International Commercial Contracts ("UNIDROIT Principles") [70] **(b)** Mediterraneo and Equatoriana are Contracting States of the United Nations Convention on Contracts for the International Sale of Goods ("CISG") [71].

Hence, and considering that the contentious point of the dispute is regarding the contractual performance of the RespiVac Agreement, we can easily conclude that one of

[69] *The Problem, Exh. C4, Clause 15.2, p. 16*
[70] *The Problem, PO No.1, p. 52, ¶3*
[71] *The Problem, PO No.1, p. 52, ¶3*

the possible applicable laws to the agreement would be the Danubian Contract Law which, as previously stated, is a *verbatim* adoption of the UNIDROIT Principles.

Nevertheless, as the RespiVac Agreement involves a sale of goods – an element that will be explained *infra* - and all of the involved parties have their place of business in different States which are Contracting States of the CISG (Mediterraneo and Equatoriana), hypothetically, the CISG could also be applicable.

2. Practical distinction between the Danubian Contract Law and the CISG

The UNIDROIT Principles contain provisions that reflect the usages and customs of international trade and have an extensive chapter dedicated to the issue of contractual non-performance [72], as it is one of the most important topics in international contract law. However, it does not have any specific provision regarding the delivery of goods encumbered by third-party intellectual property rights or claims.

In this sense, and if the UNIDROIT Principles were to be applied, CLAIMANT would have to resort to Article 7.1.1 of the UNIDROIT Principles which defines non-performance as *failure by a party to perform any of its obligations under the contract, including defective performance or late performance*. However, it can be rightly argued that RESPONDENT No. 1 did not have the contractual obligation of delivering the GorAdCam viral vectors free from any right or claim since under the representations and warranties section provided under the RespiVac Agreement[73] not only some of them where represented according to RESPONDENT's No.1 best knowledge but also they presupposed the existence of third-party intellectual property right - something that in this case is highly controversial. Accordingly, from a practical point of view, it would be very difficult, if not impossible, for CLAIMANT to prove, under the UNIDROIT Principles, all of the requirements necessary for RESPONDENT No. 1's liability.

On the other hand, the CISG has a specific provision, in the form of article 42, which states that *the seller must deliver goods which are free from <u>any right or claim</u> of a third party based on industrial property or other intellectual property* (…). In this sense, and if it is considered that the obligation that the seller has to deliver goods free from rights and claims arises from the law (CISG), then CLAIMANT would be in a more advantageous

[72] *CHAPTER 7 UNIDROIT Principles 2016*
[73] *The Problem, Exh. C4, Section 11, p. 15*

position when in comparison to the solution that is provided by the UNIDROIT Principles where it would only exist if such obligation was established under the contract.

All in all, we can conclude that this issue was of magnitude importance to the parties since the difference between the possible applicable laws would correspond to a higher probability of each party winning the case and, therefore, justifying their legal positions as to this point, *i.e*, CLAIMANT pleading for the application of the CISG and RESPONDENT's pleading for its inapplicability which ultimately justified, during the oral phase of the competition, a high degree of thoroughness in the questions that were posed by the arbitrators regarding the reason for the applicability/inapplicability of the Convention.

3. Application of the CISG

Given the complexity of the legal questions and arguments that were formulated for the applicability/inapplicability of the CISG, it was decided that it would be beneficial, for organization purposes, that each of the arguments were addressed separately. As such, we will firstly address the argument of the governing law clause **(a)**, secondly, we will make an overview of the contractual clauses and their respective nature **(b)**, thirdly we will address the applicability of article 3 (1) CISG **(c)**, and lastly, the applicability of article 3 (2) CISG **(D)**.

a) The Governing Law Clause

Clause 15.2 of the RespiVac Agreement [74] is the relevant contractual provision as a starting point of a discussion regarding the applicability of the CISG as it states that *this Agreement shall be construed in accordance with and governed exclusively by the laws of Danubia*.

As one of RESPONDENT's initial arguments, it was defended that trough an interpretation of this contractual provision we could conclude that both parties expressly derogated the application of the CISG since the usage of the word "exclusively", in the governing law clause, indicates a clear intention of the parties of preventing any other law than the laws of Danubia - *ergo* the Danubian Contract Law (UNIDROIT Principles) - to govern their rights and obligations, thus derogating the applicability of the CISG.

[74] *The Problem, Exh. C4, Clause 15.2, p. 16*

To support this position, it was cited the *Adex International Case* [75] where a Dutch court held that when parties refer to the "exclusive" applicability of the domestic law of a Contracting State they implicitly excluded the applicability of the CISG.

Despite being an apparent clever interpretative argument, it could be easily deconstructed by a diligent CLAIMANT in a step-by-step approach. As previously stated, Danubia ratified and it is a Contracting State of the CISG. Hence, and according to the vast majority of case law regarding this issue [76], when the governing law clause makes a reference to the laws of Danubia it, consequently, makes a reference to the CISG which is part of the Danubian jurisdiction.

Therefore, as CLAIMANT we adopted a preventive measure that precluded any RESPONDENT to use this exact argumentation. Nevertheless, and since our paired Memoranda, from the University of Peeking, did not make any remarks on this issue, we tried to capitalize by using this exact argument in order to conclude that the CISG would not be applicable.

Irrespectively of the position, it must be considered that the CISG is presumptively applicable to an international contract with a sales element and its application prevails over the domestic law of a State. Hence, it becomes necessary to discuss whether the application requirements of the CISG were indeed met. Furthermore, and as explained *infra*, this contract fell simultaneously under article 3 (1) and 3 (2). Thus, according to Professors Peter Hubber and Alastais Mullis [77], one would have to determine whether the agreement was excluded by each of these articles.

b) Overview and Contractual Clauses

The RespiVac Agreement that CLAIMANT and RESPONDENT No.1 celebrated had the ultimate objective of developing a therapy in the form of a vaccine. Under such agreement two types of obligations gave rise: sales obligations and services obligations.

Regarding the first group, it is generally accepted that the definition of a sales obligation can be inferred from the various obligations that a seller (article 30 CISG and following)

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[75] *Adex International Ltd. v. First International Computer Europe B.V, C0401754*

[76] *For example: Oberster Gerichtshof [Supreme Court], Austria, 26 January 2005; International Chamber of Commerce (ICC) Award No. 7565 of 1994; Bundesgerichtshof [Federal Supreme Court] (BGH), Germany, 25 November 1998; Federal Supreme Court (BGH), Germany, 23 July 1997 (Benetton I)*

[77] *Peter Huber and Alastais Mullis, The CISG A new textbook for students and practitioners, by sellier. European Law Publishers (2007), p.46*

and buyer (article 53 CISG and following) have to perform. Thus, for the purposes of the Convention, a sale of goods implies the delivery of a good – a tangible and movable object- and the respective transfer of the property right associated against a price[78].

This was precisely the case of clause 9.2 [79], which obliged RESPONDENT No. 1 to deliver the first batch of GorAdCam viral vectors in exchange for € 2.500.000 (Two and half million euros), clause 16.1 [80], which established a purchase obligation in case of vaccine production of the necessary HEK-294 cells and cell culture for a price of € 2.000.000/batch (two million euros per batch), and clause 16.2 [81], witch - if exercised by CLAIMANT - would oblige RESPONDENT No.1 to take care of the production process of the vaccines in exchange of a monetary retribution.

Regarding the latter group (services obligations), it includes clause 9.2[82], in its second part, which allowed the usage of the know-how associated with the GorAdCam viral vector – in the form of a License – payed trough royalties (established under article 9.5 and 16.3) and the collaboration activities established under clause 3.1 [83]. Considering that neither of these clauses implies the transfer of a property right, according to the position defended by Professor Ingeborg Schwenzer, they are to be considered services obligations for the purposes of article 3 (2) CISG even though they are not services in nature [84].

Furthermore, both of these obligations involve objects which cannot be classified as goods. In the case of the license it is not a corporeal thing and in the case of the collaboration activities, according to Professors Christoph Brunner and Benjamin Gottlieb[85], the preparation of intellectual research such as scientific research does not constitute goods for the purposes of the convention. As such, clauses 3.1 and 9.2 cannot

[78] *Peter Huber and Alastais Mullis, The CISG A new textbook for students and practitioners, by sellier. European Law Publishers (2007), p.41*
[79] *The Problem*, Exh. C4, Clause 10, p. 13
[80] *The Problem, Exh. C4, Clause 16.1, p. 17*
[81] *The Problem, Exh. C4, Clause 16.2, p. 17*
[82] *The Problem, Exh. C4, Clause 10, p. 13*
[83] *The Problem, Exh. C4, Clause 3.1, p. 13*
[84] *Commentary on the UN Convention on the International Sales of Goods (CISG), Fourth Edition, Oxford University Press, 2016, p.22 – "Article 3(2) contains a special rule for contracts for the supply of goods and services. It should be capable of being applied by analogy to cases in which other elements are agreed that do not consist of services."*
[85] *Christoph Brunner and Benjamin Gottlieb, Commentary on the UN Sales Law (CISG) Kluwer Law International, 2019, p.40*

constitute a sale of goods since no property right was transferred and they do not involve a good in the sense employed by the Convention.

c) Article 3 (1) CISG

Under Article 3 (1) CISG it is stated that *contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production*.

Since clause 16.2 RespiVac Agreement obliged RESPONDENT No.1 to produce and deliver goods which, at the time of the conclusion of the contract, were not produced it became necessary to evaluate whether if in the production of those goods, CLAIMANT (as the buyer) would supply a substantial part of the materials necessary.

Regarding article 3 (1) CISG there are two contentious points. Firstly, despite the consensus surrounding the applicability of an economic criterion - through an economical evaluation of the contribution in comparison to the value of the produced good -, authors diverge in the specific percentage that is to be used (15%, 35% and more generally 50%) [86]. Secondly, after a French court decision[87] there was some discussion surrounding the term "materials" as the Tribunal decided that this concept included the buyer's design specifications despite being an immaterial object.

Since our first Memoranda was CLAIMANT's, we adopted a precautionary position where we defended that this Tribunal should reject the French court position as it was highly criticized by the doctrine and, as a consequence, should adopt a position where the term materials is only composed of corporeal objects. The practical reason for this position was that, if CLAIMANT were to be able to develop the vaccine and exercise its production option established under clause 16.2 RespiVac Agreement, then all of the produced vaccines would be produced according to CLAIMANT's specifications and, if we follow the position adopted by the French court *supra*, then it would lead to the inapplicability of the Convention. Thereafter, we admitted that even though CLAIMANT's contribution, in the case of clause 16.2, corresponded to 50% of the total value of the vaccines

[86] *CISG Advisory Opinion N.º 4, ¶ 2.8 – "by comparing Article 3(1) CISG (substantial) with Article 3(2) CISG (preponderant): substantial being less than preponderant. In this way, legal writers have used the following percentages to quantify substantial: 15%, between 40% and 50%, or more generally 50%."*
[87] *Cour d´appel de Chambéry, 25 May 1993*

(explained *infra*), according to the *indubio pro conventione* principle defended by Professor Pilar Perales Viscasillas, that percentage is not enough to render the CISG inapplicable, especially when considering that this would only occur in only one of various contractual clauses assumed by the parties and, hence, creating a disproportionate result.

On the other hand, RESPONDENT's sustained that for the production of the vaccines (clause 16.2) it was to be used CLAIMANT s HEK-294 cells and cell culture medium valued at a price of € 2.000.000/batch. If we consider that each batch of vaccines would cost € 4.000.000 [88], then CLAIMANT's contribution represented exactly 50% of the value of the produced goods rendering the CISG inapplicable.

d) Article 3 (2) CISG

Having contextualized the agreement, it is understandable why did the controversy exist since, under Article 1 CISG, the Convention is only applicable to international sales contracts. However, and as demonstrated *supra*, since the RespiVac Agreement involves sales and non-sales obligations, it cannot be considered as a pure sales contract. Nonetheless, it is precisely for these cases that, if under a single agreement various types of obligations exist, the Convention has article 3 (2) which states that *this Convention is not applicable to contracts under which the preponderant part of the obligations of the parties who furnishes the goods consists in the supply of labour or other services*.

In this sense, the Convention allows its applicability to "non-pure" sales contracts under the condition that the service or labour part of the agreement is not preponderant – a logical conclusion, as in this case the contract would be a supply contract or a services contract. Therefore, this year's discussion was predominantly based upon CLAIMANT alleging that the preponderant part of the agreement was not the non-sales obligations and RESPONDENT's, which had the burden of demonstrating the inapplicability of the Convention [89], alleging that the preponderant part of the contract was the non-sales obligations.

The topic of how to determine the preponderant part of a contract is highly debated between scholars since some defend that a pure economic quantitative analysis of the obligations is to be preferred - within this first group discussion also exists as to the

[88] *The Problem, Appedix 1, PO 2, para. 7, p. 59*
[89] *Peter Huber and Alastais Mullis, The CISG A new textbook for students and practitioners, by sellier European Law Publishers (2007), p.44*

specific percentage that corresponds to the word "preponderant" : 50%, higher than 50% manifestly higher than 50% - others defend that a qualitative approach based of the interest of the parties is to be adopted and the last group defends a mixed position between both criterions [90].

Given the intense doctrinal discussion, it was beneficial both to CLAIMANT and RESPONDENT's since they could opt for the most favorable criterion at their disposal. Under CLAIMANT's initial perspective it was defended that, according to an essentiality criterion, given the subordinate nature of the transfers of know-how in regards to the delivery and manufacture of the goods, such transfers could only be analysed under article 3 (1) CISG (an argument that will be discussed separately *infra*) and consequently prevented such contributions of being preponderant.

Under RESPONDENT's counter argument, it was used an economical criterion with a 50% threshold, which means that if the services to be provided consisted of 50% of the value of the entire contract, then the service part of the agreement is preponderant. Under this criterion, the value of the services provided was of € 7.63 Million, while the total sales obligations corresponded to € 4.5Million Euros. Therefore, the RespiVac Agreement had a total value of € 12.13 Million (€7.63M + €4.5M), from which 62.9% corresponded to services obligations attributable to RESPONDENT s. Consequently, as this figure is higher than the 50% threshold, the CISG must be rendered inapplicable.

This was, without a doubt, one of the points where our position, both as CLAIMANT and RESPONDENT's, progressed the most during the latter stages of the competition for various reasons. Firstly, we made some theoretical errors in our approach and classification of clause 16.2 that invalidated the reasoning *supra*. Secondly, the usage of the economic criterion, despite being the prevailing criterion according to the doctrine, was almost impossible to explain during the oral phase of the competition as any detailed analyses of the math necessary to make the demonstration of the preponderant part of the contract would inevitably lead to the confusion of the Tribunal which costs us valuable time. Thirdly, any economic evaluation of the sales part of the contract was highly volatile since it implied the quantification of the total sales value of the vaccines that were to be produced and as the price range that a single dose could vary from €20 - €40 [91], this would

[90] *All of the positions are fully explained in detail in the CISG Advisory Opinion Nº 4, ¶ 3.4*
[91] *The Problem, Procedural Order No.2, p. 53, ¶6*

inevitably create some uncertainty that would interfere with the usage of the economic criterion. Furthermore, and most importantly, the usage of this criterion was in fact impossible - something that it was only noted by our team (at least to the best of our knowledge) – since, according to Professor Ingeborg Schwenzer, the usage of the economic criterion requires a comparison between the value of all of the services against the value of the entire contract [92]. Considering that the conduction of the joint research activities (clause 9.2 RespiVac Agreement) were a service obligation that were and could not have been economically quantified, then it becomes impossible to use the criterion - at least in the way that it is supposed to be used.

Thus, as CLAIMANT we started to use an essentiality criterion which took into consideration various contractual elements that were highlighted, either by doctrine of case law, as giving importance to the sales obligations of a contract: **(I)** Drafting history of the RespiVac Agreement [93]- During the negotiations it was used a standard Collaboration and License agreement, however parties changed the name to Purchase Collaboration and License Agreement and included a whole new section *named purchase obligations for vaccines vaccine production* (section 16 of the RespiVac Agreement). This section was so important to RESPONDENT No.1 that it made sure to include it in all of its future contracts; **(II)** Recitals of the RespiVac Agreement [94] - Since RESPONDENT No.1 defined itself as a *manufacture organization that produces and sells base materials for the production of innovative treatments* it cannot deny the importance of the sales obligations had; **(III)** Public statements [95] - in an interview to a journal, the CEO of RESPONDENT No.1 declared that the major advantage for RESPONDENT No.1 in these types of deals was the recurring business of the sales obligations, hence evidencing their importance; **(IV)** Logical argument - it was true that without the license CLAIMANT would be deprived of developing the vaccine but the same result would occur if CLAIMANT solely received the license.

[92] *Peter Schlechtriem and Ingeborg Schwenzer, Commentary on the UN Convention on the International Sales of Goods (CISG), Fourth Edition, Oxford University Press (2016). Art3 ¶ 22 - "For the purposes of Art 3(2) the value of the services has to be compared to the value of the entire contract, id est to the combined price for goods and services and any other price components."*
[93] *The Problem, Exh. R2, p. 30, ¶10*
[94] *The Problem, Exh. C3, p. 11*
[95] *The Problem, Exh. C2, p. 10*

On the other hand, RESPONDENT's also used an essentiality criterion and it was defended that: **(I)** Drafting history of the RespiVac Agreement [96]- during the drafting of the agreement one of the templates was rejected, by CLAIMANT, on the base that it did not take into sufficient consideration the Intellectual Property element involved; **(II)** Dispute resolution clause [97] - this clause highlights the importance of the Intellectual Property as the arbitrators that were to be appointed needed to have specific knowledge in the field of intellectual property; **(III)** Name of the agreement [98] - Even though the name was changed to "Purchase Collaboration and License Agreement", the services obligations compose the majority of the name ; **(IV)** Recitals of the RespiVac Agreement [99] – CLAIMANT declared that it was *engaged in the research of innovative immune therapy*. Hence, without the license it could not engage in that same activity.

The last discussion surrounding article 3 (2) CISG was regarding one of its application requirements, more specifically the fact that, in order for referred article to be applicable, it must be demonstrated that the sales and non-sales obligations are agreed under the same contract. However, given page limitations that we had during the Memoranda phase this was something that we could not devote attention. Nevertheless, and given the circumstances under which the contract was celebrated, some arbitrators were very curious and made us questions in regards to this specific issue.

According to the relevant doctrine [100], to determine whether the obligations are contained under a single agreement or two separate agreements is a matter that must be resolved through an interpretation of the contractual dispositions.

As CLAIMANT, in order to conclude that all of the obligations arose from a single agreement, various arguments could be invoked. Firstly, the new name of the agreement "Purchase, Collaboration and License Agreement" indicates that the party's intention was that all of the obligations were contained under a single agreement. Secondly, any other interpretation would be a violation clause 15.3 RespiVac Agreement, which established an entire agreement clause under which it was agreed that *this Agreement represents the*

[96] *The Problem, Exh. C2, p. 10*
[97] *The Problem, Exh. R2, p. 30, ¶7*
[98] *The Problem, Exh. C3, p. 11*
[99] *The Problem, Exh. C3, p. 11*
[100] *Peter Huber and Alastais Mullis, The CISG A new textbook for students and practitioners, by sellier European Law Publishers (2007), p.46; Peter Schlechtriem and Ingeborg Schwenzer, Commentary on the UN Convention on the International Sales of Goods (CISG), Fourth Edition, Oxford University Press (2016), Art3 (2) ¶17*

entire and integrated agreement between the Parties. Lastly, the fact that both parts of the contract are contained in a single document, which is only signed after section 16, is another indication that the RespiVac Agreement is a single and entire contract.

On the other hand, it would be beneficial for RESPONDENT's that two separate agreements existed as it would reduce the probability of the CISG's applicability. As such, their argument took into consideration the drafting history of the agreement, in order to reach this conclusion. This was justified by the fact that during the negotiation process CLAIMANT and RESPONDENT No.1 accepted one of the draft's that were presented (which only included clauses 1 to clause 15.3) but then kept negotiating regarding the inclusion of the conditional purchase offer. Furthermore, one of the elements that is used by the doctrine [101] for the interpretation process needed is whether the parties agreed on a global price or at least a global calculation method, something that by the inclusion of section 16 did not happen.

[101] *Peter Huber and Alastais Mullis, p.46 – "It is submitted that the following factors can (inter alia) be used in order to draw the distinction: Did the parties agree on one global price?"*

Issue D: Has Respondent No. 1 breached its contractual obligations to deliver conforming goods existing pursuant to Article 42 CISG by providing Claimant with the batches of GorAdCam viral vectors?

Catarina de Pedro

Article 42 CISG

The issue D of the 28th Vis Moot Problem followed a very specific structure and logic. It must be addressed bearing the premise that the CISG is applicable, without prejudice to issue C, as it is driven entirely by article 42 CISG, which regulates third-party intellectual property rights and claims. Thus, it is important to carefully analyse the relevant parts of the article, for the purpose of the Vis Moot Problem, which provides that:

(1) the seller must deliver goods which are free from any right or claim of a third party based on (…) intellectual property, of which at the time of the conclusion of the contract the seller knew or could not have been unaware, provided that the right or claim is based on (…) intellectual property

(a) under the law of the State where the goods will be (…) used, if it was contemplated by the parties at the time of the conclusion of the contract that the goods would be (...) used in that State; or

(b) in any other case, under the law of the State where the buyer has his place of business; and that

(2) the obligation of the seller (…) does not extend to cases where

(a) at the time of the conclusion of the contract the buyer knew or could not have been unaware of the right or claim; (…)

When reading the article, one may notice its vague wording. Indeed, this vagueness has led to doctrinal debates regarding the meaning of claim and the threshold of the seller's liability versus the guarantees that must be given to the buyer. However, it is also precisely due to this room for manoeuvre that it was possible to address issue D both from the perspective of the CLAIMANT and the perspective of the RESPONDENTS in such convincing manners.

The Claim

In the context of the Problem, in order to invoke liability under art. 42 CISG, the first requirement is that a third-party intellectual property claim is made. However, the article

does not specify what can indeed constitute a claim that is sufficient to result in the liability of the seller. Thus, this grey area could lead to different interpretations and virtually create a scenario where any claim, even the most unreasonable one, could result in the seller's liability or, on the other hand, a scenario where the seller would have too much ground to reject any serious claim with ease. Consequently, a doctrinal distinction between frivolous and non-frivolous claims has been created.

a) Frivolous and non-frivolous claims

In this regard, it can be argued that even unfounded claims should fall under the seller's liability, based on its better position to assess the nature of the claim[102], but other authors concluded that only founded claims can fall under the scope of the article, for the purpose of assuring legal certainty and avoiding a breach of contract based on unfounded suspicions or allegations[103]. It is precisely in this dichotomy that the positions of the parties diverge: CLAIMANT should demonstrate that the claim is of enough substance to meet the threshold of art. 42 CISG and to hinder its use of the goods and RESPONDENT should prove that the claim is frivolous in nature and that it does not hinder CLAIMANT's quiet possession of the goods.

On behalf of CLAIMANT, the arguments regarding the claim focused on the following points: the hindrance to quiet possession of the goods and the uncertainty that derives from the fear of a lawsuit that may be initiated by Ross Pharmaceuticals; and, at a later stage, the irrelevance of the distinction between frivolous and non-frivolous claims in the present case.

Regarding the first part, CLAIMANTs rationale was that the mere existence of a dispute is enough to hinder the buyer's quiet possession of the goods[104]. This is due to the fact that it is unreasonable for CLAIMANT to bear the risk of litigation and liability to third-parties when entering a sales contract[105]. Thus, in order to consubstantiate the affirmation of a real risk for CLAIMANT, reference was made to the fact that Ross Pharmaceuticals was

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[102] *Peter Schlechtriem and Ingeborg Schwenzer, Commentary on the UN Convention on the International Sales of Goods (CISG), Fourth Edition, Oxford University Press (2016), Article 42, Para.11*

[103] *Anthony VanDuzer, A Seller's Responsibility for Third Party Intellectual Property Claims: Are the UN Sales Convention Rules Better?, Canadian International Lawyer (2001), p. 187; Peter Schlechtriem and Ingeborg Schwenzer, Commentary on the UN Convention on the International Sales of Goods (CISG), Fourth Edition, Oxford University Press (2016), p. 1002*

[104] *Thomas Beline, Legal Defect Protected by Article 42 of the CISG: A Wolf in Sheep's Clothing, University of Pittsburgh School of Law Journal of Technology Law and Policy, Volume VII - Article 9, (2007), p. 8/9*

[105] *Secretariat Commentary, Official Records, p. 35; John Honnold, Uniform Law for International Sales under the 1980 United Nations Convention, Kluwer Law International, 3rd edition (1999), p. 386*

known for its aggressiveness in defending IP rights[106] and its intention of being informed of the proceedings, despite not wanting to participate in them[107]. On the oral stage, arbitrators would frequently pose questions to CLAIMANT on this issue, considering how, despite of its aggressiveness, Ross Pharmaceuticals did not confront CLAIMANT at any point. However, as pointed out by CLAIMANT, Ross Pharmaceuticals did approach RESPONDENT No. 2 several times, even when faced with a threat of litigation that could be initiated by RESPONDENT No. 1[108]. Overall, this gave the Tribunal the necessary elements to conclude that the uncertainties raised by the dispute and the consequent threat of a future lawsuit could affect CLAIMANT's possession of the goods, even if there was not direct contact with the third-party on that regard.

Regarding the second part, the argumentation followed a doctrinal line which sustained that the distinction between frivolous and non-frivolous claims was meant to safeguard the seller's ability to foresee the third-party claims[109]. However, as in the present case art. 42 CISG would also require CLAIMANT to prove that RESPONDENT No. 1 was already aware of the existence of the claim, the reference to the distinction/reduced threshold could not be accepted – if RESPONDENT was already aware of the claim, its ability to foresee it should not be taken into consideration. Even if the Tribunal found otherwise, the CD Media Case[110] would also be mentioned by CLAIMANT, as it ruled that "*If a third party unfoundedly asserts an intellectual property right, the seller will nevertheless be liable under the conditions of Art. 42 CISG*".

On behalf of RESPONDENT, the arguments, due to the responsive nature that must necessarily be adopted, focused on the same topics, from a different point of view: the lack of hindrance to quiet possession of the goods and the inexistence of a claim that could meet the minimum threshold of art. 42 CISG.

On the first part, RESPONDENT's arguments were based on the fact that CLAIMANT was still conducting research as planned, reaching an advanced stage of its vaccine trials[111], thus not being deprived of its use of the goods. Furthermore, dispelling CLAIMANT's argument regarding Ross Pharmaceutical's aggressiveness and the possibility of a future lawsuit was done in the exact same logic – Ross Pharmaceutical's presented a non-

[106] *The Problem, p. 19, Exh C 5 Email Metschnikow, 2 May 2020*
[107] *The Problem, p. 46, Letter by Sinoussi, 4 September 2020*
[108] *The Problem, p. 36, Exh R 5 Email Milstein, 5 January 2020*
[109] *Anthony VanDuzer, A Seller's Responsibility for Third Party Intellectual Property Claims: Are the UN Sales Convention Rules Better?, Canadian International Lawyer (2001)*
[110] *Federal Supreme Court of Austria (Oberster Gerichtshof) 12 September 2006 [10 Ob 122/05x]*
[111] *The Problem, PO2, p. 55, ¶16*

confrontational posture, despite of its reputation, leaving grounds for the Tribunal to have doubts regarding the illegitimacy of its allegations. Furthermore, at a later stage, the witness statements of Peter Doherty (former Director Legal for Respondent No. 2 then head of contracting for Respondent No. 1, who took part in the negotiations of both the Ross Agreement and the RespiVac Agreement) and Rosaly Hubner (Claimants CFO and part of the negotiations for Ross Pharmaceuticals on the Ross Agreement) were also mentioned by RESPONDENTS, since they clearly mentioned that, at the time of contracting, the focus of the Ross Agreement was on malaria[112]. Additionally, reference to Mr. Peter Doherty on RESPONDENTS side would also frequently serve the purpose of refuting CLAIMANTS argument of the RESPONDENTS awareness of the claim through Peter Doherty, as addressed *infra*. Furthermore, opposing counsels and the Tribunals would frequently point out the fact that the addition of "malaria and related infectious diseases" on the Ross Agreement was made against the payment of 600.000 euros from Ross Pharmaceuticals, thus implying that such addition had to be beneficial for Ross Pharmaceuticals. However, the same witness statements of Peter Doherty and Rosaly Hubner and the facts of the case[113] would demonstrate that the only example of a related infectious diseases given by Ross Pharmaceuticals at the time was cholera, another disease that, as malaria, is common in developing countries, unlike COVID-19, which is a world pandemic.

On what concerns the second part, the logic used by RESPONDENTS was the same – Ross Pharmaceutical's attempts to acquire RESPONDENT No. 2 and subsequently to settle the dispute against the grant of a non-exclusive, not-fee-bearing license for respiratory diseases[114] were a proof that Ross Pharmaceuticals was using its interpretation of the Ross Agreement (as including respiratory diseases) in order to get the license that it claimed to – but did not – possess, from RESPONDENT No. 2. Thus, the lack of legitimacy of Ross Pharmaceuticals allegations would then qualify its claim as a frivolous one, which did not meet the necessary threshold for the applicability of art. 42 CISG.

The Seller's Awareness

The second requirement of art. 42 CISG was that at the time of the conclusion of the contract the seller knew or could not have been unaware of the existence of the claim.

[112] *The Problem, page 30, ¶5, Exh R 2, Witness Statement of Peter Doherty; The Problem, p. 21, ¶5/6, Exh C 7, Witness Statement of Rosaly Hübner*
[113] *The Problem, PO2, ¶20*
[114] *The Problem, p. 35, Exh R 4, Email Bordet, 6 December 2018*

On that basis, CLAIMANTs arguments were based on the existence of the ongoing dispute since, at least publicly, 14 December 2018 – 17 days prior to the signing of the RespiVac Agreement[115] of which, therefore, RESPONDENT was aware and could not have been unaware; consequently, also knowing that the goods were targeted by a third-party IP-claim.

Furthermore, CLAIMANT would point out that, as previously mentioned, regardless of any possible attempt to deviate attentions from that fact, RESPONDENT No. 2 could not reasonably expect that the broadening of the scope of the Ross Agreement, that was made against a payment of 600.000 euros to include "related infectious diseases", did not cover respiratory diseases such as COVID-19[116], thus resulting in an obligation of the RESPONDENTs to be aware of the overlap between the licenses, since Peter Doherty, who was RESPONDENT No. 2's Legal Director[117], had a direct participation on the negotiation process of the RespiVac Agreement, on behalf of Respondent No. 1[118]. Thus, even if the Tribunal would not hold the same view, CLAIMANT defended that there was a duty to inquire and to inform the buyer, considering the seller's superior knowledge of the goods and, in the present case, of the previous licences that target the goods[119].

On that behalf, RESPONDENT, on the other side, would sustain that frivolous claims, such as the present one, cannot be foreseen and thus the seller could not be held liable[120]. Thus, RESPONDENT's argument, on prior stage of the Competition, was that the phrase "knew or could not have been unaware" should be interpreted as "actual knowledge", thus not imposing a duty to inquire[121]. However, during the continued development of the arguments, my strategy shifted and as RESPONDENTs we submitted that even if the Tribunal would not agree with the view that the dispute could not be seen as a claim to be aware of, due to its frivolous nature, RESPONDENT's liability was subject to a Territorial Limitation.

The Territorial Limitation was my core argument as counsel for RESPONDENT and served

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115 *The Problem, p. 18, Exh C 4, Biopharma Science, 19 December 2019*
116 *The Problem, PO2, ¶23*
117 *The Problem, Exh R 2, Witness Statement of Peter Doherty, p.30, ¶1*
118 *The Problem, PO2, p. 55, ¶24*
119 *The Problem, p. 32-34, Exh R 3, Collaboration and License Agreement – Ross Pharmaceuticals; Peter Schlechtriem and Ingeborg Schwenzer, Commentary on the UN Convention on the International Sales of Goods (CISG), Fourth Edition, Oxford University Press (2016), p. 284*
120 *Anthony VanDuzer, A Seller's Responsibility for Third Party Intellectual Property Claims: Are the UN Sales Convention Rules Better?, Canadian International Lawyer (2001), p. 187-190*
121 *John Honnold, Uniform Law for International Sales under the 1980 United Nations Convention, Kluwer Law International, 3rd edition (1999), p. 395*

the purpose of proving that the RESPONDENTS had no duty to be aware of the claim *in casu* and that in fact that duty would lie on the CLAIMANT, which failed to fulfil it.

The Territorial Limitation

Another requirement of art. 42 CISG is a specification of which IP laws are relevant to determine whether the seller has breached its obligation to supply goods free from IP rights or claims of a third party - to the state where the goods will be used or resold, if contemplated by the parties at the time of contracting, or where the buyer has its place of business[122].

This geographic limitation is intended to assure that the seller is in a position to ascertain whether any third party has intellectual property rights or claims pursuant to the laws of the States in question[123]. Thus, and since the RespiVac Agreement, under the clause 5.2, determines that RESPONDENT No. 1 granted to CLAIMANT a worldwide, perpetual, non-exclusive license, the question of whether the worldwide scope can be accepted under art. 42 CISG was raised. During the Memorandums phase, this point was discussed both for CLAIMANT and RESPONDENT. However, during the Orals stage, it became apparent that teams would avert this point, due to its peculiar and complex nature. Nonetheless, it did not lack relevance, as it was mentioned by arbitrators such as Ingeborg Schwenzer and also by the arbitrators of the final round in Vienna to both finalist teams. As such, I will address the Territorial Limitation from both CLAIMANT's and RESPONDENT's perspectives.

Oh behalf of CLAIMANT, the rationale to defend that there was no Territorial Limitation to the Seller's Awareness was that, even though one could wonder whether there would be a maximum limit for the number of laws under the scope of Art. 42º of the CISG, since the article uses the singular form "state", art. 6 of the CISG allows the parties to form or vary the effect of any of its provisions. Thus, since the parties have agreed upon the term "worldwide", the principle of autonomy of the contracting parties would determine that there would be no territorial limitation to the seller's awareness and, therefore, to its liability. Even worse, seeking refuge under a Territorial Limitation after agreeing with the worldwide scope could be seen as bad faith on RESPONDENT's behalf. Thus, the Tribunal should accept such scope under art. 42 CISG, rejecting the Territorial Limitation.

122 *Secretariat Commentary, Official Records, p. 36*

123 *Peter Schlechtriem and Ingeborg Schwenzer, Commentary on the UN Convention on the International Sales of Goods (CISG), Fourth Edition, Oxford University Press (2016), p. 1003*

On the contrary, RESPONDENTs submission was based on the territorial nature of IP rights[124], aligned with the idea that art. 42 CISG itself does not allow for multiple jurisdictions, either through its wording (using the singular form "state"), either through the *rationale* of its drafters and commentators, such as Professor Ingeborg Schwenzer, who defend that the seller should not provide a worldwide protection[125]. Thus, RESPONDENTs sustained that although the parties agreed to the worldwide scope, they also agreed that the governing law should be the Danubian Law. However, and since CLAIMANT was now asking for the applicability of the CISG, the Territorial Limitation was a rule that had to apply as well. In this sense, the *rationale* was that since what was agreed by the parties - the worldwide scope - could not be accepted, the article required the Tribunal to resort to the law of the state where CLAIMANT had its place of business. Thus, RESPONDENTs would merely have to investigate and be liable to third-party claims under the Mediterranean Law, and since that is not the place of business of Ross Pharmaceuticals and is also different from the governing law agreed by the parties, there would be no room for reasonable expectation on RESPONDENT's behalf to be aware of or liable for what CLAIMANT would now consider to be a third-party claim from Ross Pharmaceuticals.

The Buyer's Awareness

Article 42 (2) (a) of the CISG determines that the obligation of the seller does not extend to cases where, at the time of the conclusion of the contract, the buyer knew or could not have been unaware of the third-party IP right or claim.

In this sense, it was CLAIMANT's role to demonstrate that it was unaware of such and that it informed RESPONDENT as soon as it became aware, therefore fulfilling all of its obligations. On the other hand, RESPONDENT was required to demonstrate that CLAIMANT was in fact aware and that it failed to inform RESPONDENT of such awareness.

On CLAIMANT's behalf, as previously mentioned, during the continued development of the arguments, the arguments related to the duty to inquire on both parties were set aside

[124] *Alexander Peukert, Territoriality and Extraterritoriality in Intellectual Property Law in Günther Handl, Joachim Zekoll & Peer Zumbansen (eds), Beyond Territoriality: Transnational Legal Authority in an Age of Globalization, Queen Mary Studies in International Law, Brill Academic Publishing, Leiden/Boston , (2012), p. 189*

[125] *Peter Schlechtriem and Ingeborg Schwenzer, Commentary on the UN Convention on the International Sales of Goods (CISG), Fourth Edition, Oxford University Press (2016), p. 1003, ¶9; Huber, Peter and Mullis, Alastair "The CISG A new textbook for students and practitioners", European Law Publishers (2007), p. 175*

in order to reach a more solid and comprehensive discussion. Even so, allusion was made to the fact that, according to Professor Schwenzer, there is no duty to investigate on the buyer because it will often be unaware of any details regarding the goods[126]. However, the debate focused on the actual awareness of the buyer according to the facts of the Records. Regarding the supra mentioned News Article from 14 December 2018 – 17 days prior to the signing of the RespiVac Agreement[127], which publicly gave notice of the dispute, CLAIMANT submitted that its CEO had to terminate its subscription to that same Journal in order to cut expenses[128] and also that, even if that were not the case, CLAIMANT at the time already had access to the previous RespiVac Agreement templates which established a Good Faith Clause and the Representations and Warranties Section. Therefore, CLAIMANT's knowledge of such template would have dispelled any doubts concerning the existence of any dispute.

On what concerns the RESPONDENTs' position on this matter, the strategy also suffered a shift. The initial argumentation was also based on the threshold of knowledge that was required, placing a higher obligation on the buyer by mentioning two courts in France that ruled in favour of that[129]. However, also according to the actual awareness of the buyer and to the facts of the Records, RESPONDENT's submissions were that despite of CLAIMANT terminating its subscription, the Tribunal should always bear in mind the professional entity nature of CLAIMANT, specifically dedicated to the pharmaceutical industry, resulting in a professional capacity obligation that should have led it to become aware of what it now believed to be a claim when it first became public[130].

Furthermore, and following the Territorial Limitation rationale, the RESPONDENT's case regarding this issue focused on the prior conclusion that the protection that ought to be granted to CLAIMANT was limited to one relevant law, the law of Mediterraneo. Thus, RESPONDENTs resorted to the Mussels Case[131] and sustained that the buyer can be expected to have an expert knowledge of the conditions in his own country and to inform the seller accordingly. Thus, the RESPONDENTs could lead the Tribunal to the conclusion that CLAIMANT was not aware but ought to have become aware, and consequently to

[126] *Peter Schlechtriem and Ingeborg Schwenzer, Commentary on the UN Convention on the International Sales of Goods (CISG), Fourth Edition, Oxford University Press (2016), p. 1006, ¶18*
[127] *The Problem, p. 18, Exh C 4, Biopharma Science, 19 December 2019*
[128] *The Problem, PO2, p. 54, ¶8*
[129] *Counterfeit Furniture Case; Printed Textile Fabric Case*
[130] *Thomas Beline, Legal Defect Protected by Article 42 of the CISG: A Wolf in Sheep's Clothing, University of Pittsburgh School of Law Journal of Technology Law and Policy, Volume VII - Article 9, (2007), p. 16*
[131] *Germany Federal Supreme Court, 8 March 1995, Bundesgerichtshof Case - No. VIII ZR 159/94*

inform the RESPONDENTS, losing the right to rely on art. 42 CISG by not doing so.

Conclusion

It makes little to no sense to have a law degree that does not resemble, or takes into consideration the daily challenges of a legal practitioner. For that reason, it is urgent to bring both of these worlds together, the theoretical upon which students' foundations are established and the practical one where an important set of advocating skills are imperative. This is precisely what the 28th edition of the Willem C. Vis Moot represented for us, an outstanding opportunity to learn about the legal issues that are currently being discussed and a first-hand experience of the different stages of a dispute resolution process that requires a close contact with a Tribunal.

Given the high degree of professionalism upon which this process is conducted and replicated by the organization, all of the team members benefited from an exponential learning curve. Discussing legal questions in front of highly specialized and reputed professionals, writing legal arguments in a foreign language, structuring a coherent and persuasive speech and defending a position that we did not fully believe on were some of the fears that we had to face and, in the end, they became an exciting part of our days.

We were extremely happy to be the first Portuguese team to reach the round of 32 and that was only possible with the contribution of NOVA School of Law. We are also very grateful to Professor Francisco Pereira Coutinho who kindly accepted to guide us through this Work Project. Additionally, all of this would not be possible without the exciting support of Professors Mariana França Gouveia and Nevin Alija throughout the competition. Lastly, we are very grateful to have had the opportunity to be coached by André Pereira da Fonseca and Rute Alves whom, with their valuable expertise and experience, provided an essential assistance.

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Appendix I

TWENTY-EIGHT ANNUAL

WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT

VIENNA, 10TH DECEMBER 2020

NOVA UNIVERSITY OF LISBON, SCHOOL OF LAW

MEMORANDUM FOR CLAIMANT

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

COUNSEL FOR CLAIMANT

ANA SOUSA • ANDREAS MAXIMILIAN • CATARINA DE PEDRO • MARTIM MIMOSO

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TABLE OF ABBREVIATIONS

¶/¶¶	paragraph/paragraphs
AA	Arbitration Agreement
AAA-ICDR Model Order	AAA-ICDR Model Order and Procedures for a Virtual Hearing via Videoconference
ANofA	Answer to the Notice of Arbitration
Art./Arts.	Article/Articles
CISG	United Nations Convention on Contracts for the International Sale of Goods
ed.	Edition
et al.	Et alii (and others)
Exh. C	CLAIMANT's Exhibit
Exh. R	RESPONDENT's Exhibit
i.e.	*id est* (that is)
ICC	International Chamber of Commerce
ICC Guidance Note	ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic
in casu	in the case at hand
Infra	Below
IP	Intellectual Property
Ltd.	Limited

Model Law	UNCITRAL Model-Law on International Commercial Arbitration
Mr. / Ms.	Mister / Miss
No.	Number
NofA	Notice of Arbitration
NYC	Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York 1958)
p. / pp.	page / pages
PCLA	Purchase, Collaboration and License Agreement
Quod non	Not the case in the present issue
R&D	Research and Development
Ross P.	Ross Pharmaceuticals
SCAI	Swiss Chamber of Arbitration Institution
Supra	See above
The Vienna Protocol	The Vienna Protocol – A Practical Checklist for Remote Hearings
Tribunal	Arbitral Tribunal
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL 2012 Digest	UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration
UNIDROIT Principles	Principles UNIDROIT Principles of International Commercial Contracts (2016)

US	United States
v.	*versus* (against)

STATEMENT OF FACTS

RespiVac plc ("**CLAIMANT**"), is a biopharmaceutical start-up, based in Mediterraneo, with an established reputation in the development of vaccines for respiratory diseases.

CamVir Ltd ("**RESPONDENT No. 1**"), located in Equatoriana, is the Contract Manufacturing Organisation of the Roctis Group for the production of base materials for various vaccines.

VectorVir Ltd ("**RESPONDENT** **No. 2"**), is an Equatoriana based company, deriving from a governmental funded research project, dedicated to the development and commercialisation of several patents, including the promising GorAdCam viral vector. It is presently owned by Roctis Group, one of the biggest pharmaceutical companies in the world.

15 June 2014	RESPONDENT No. 2 entered a Collaboration and License Agreement with Ross Pharmaceuticals ("Ross Agreement") for the exclusive use of the GorAdCam viral vector, to develop and produce vaccines for malaria and related infectious diseases.
2015	Ross Pharmaceuticals ("Ross P.") began their research into MERS.
Summer 2018	After abandoning the malaria vaccine research project and focusing all its resources into the MERS research, Ross P. proposed the purchase of RESPONDENT No. 2, while also raising the issue of the scope of the Ross Agreement.
25 August 2018	Roctis AG acquired RESPONDENT No. 2.
10 September 2018	RESPONDENT No. 2 entered an exclusive License Agreement with RESPONDENT No. 1, in the scope of which it has permission for the production, sale and sublicensing of the GorAdCam viral vector.
6 December 2018	After taking over the negotiations with CLAIMANT, on behalf of RESPONDENT No. 1, Mr. Doherty was contacted by Ms. Bordet, Head of Contract and IP of Ross P., where she vigorously expressed, once again, that the scope of the Ross Agreement included respiratory infectious diseases.
14 December 2018	The ongoing dispute regarding the scope of the Ross Agreement was first mentioned on Biopharma Science journal.

1 January 2019	Failing to inform CLAIMANT about its already existing conflict with Ross P., RESPONDENT No. 1 entered into a Purchase Collaboration and License Agreement ("PCLA"), for the non-exclusive use of the GorAdCam viral vector for respiratory diseases, using as a template the Ross Agreement.
January 2019	In a meeting with Ms. Bordet, Mr. Doherty made his view clear, once again, on the terms of the Ross Agreement, while expressing the RESPONDENT No. 1's willingness to conclude a new license agreement with Ross P..
13 January 2020	Mr. Milstein, COO of Roctis AG, disagreed and rejected the proposal presented by Ms. Bordet. So far, no agreement has been reached regarding the terms of the Ross Agreement.
April 2020	CLAIMANT successfully completed the Phase I trial of a vaccine candidate against COVID-19.
1 May 2020	CLAIMANT's COO became aware of the dispute between Ross P. and RESPONDENT No. 2, giving notice of his knowledge to RESPONDENT No. 2 in the following day.
4 May 2020	RESPONDENT No. 2's CEO answered and tried to belittle the ongoing dispute with Ross P..
June 2020	CLAIMANT CFO's contacts confirmed the persistent dispute between Roctis Group and Ross P..
15 July 2020	CLAIMANT submitted its Notice of Arbitration ("NofA").
14 August 2020	RESPONDENTS filled their Answer to the NofA ("ANofA") asking for the joinder of Ross P., against its will.
4 September 2020	The Arbitral Tribunal, in light of the COVID-19 pandemic and the difficulty to hold a hearing in-person, proposed a remote hearing to the parties, to which RESPONDENTS then objected.

SUMMARY OF ARGUMENTS

Priorities over conveniences. The health of the world's citizens cannot stand aside because of Respondents' dilatory manoeuvres and commercial ambitions.

ISSUE A: The Tribunal has no jurisdiction to decide the conflict between Ross P. and RESPONDENTS, since Ross P. is not part of the Arbitration Agreement ("AA") signed between CLAIMANT and RESPONDENT No. 1, and the theories commonly used to extend contracts to non-signatories are not applicable to the present case. Even if the Tribunal understands that it has jurisdiction, the joinder of Ross P. should not be determined, since it would raise issues regarding the confidentiality and efficiency of the proceedings, while also creating basis for the future set aside and/or unenforceability of the award.

ISSUE B: The Tribunal has the power and should decide to hold the hearing remotely. Firstly, the respect for the right of the parties to a hearing does not entail their physical presence. Secondly, the Tribunal's wide discretion allows for the choice of the hearing's *modus operandis* against one of the parties' objection and, in particular, all the relevant circumstances of the case demand for a remote hearing. Finally, with no prejudice for parties right to present their case and be treated equally, the efficiency of the proceedings depends upon the Tribunal's decision to hold a hearing remotely.

ISSUE C: The CISG is applicable to the PCLA. The agreement celebrated between CLAIMANT and RESPONDENT No. 1 involves the delivery "*goods to be produced/manufactured*" in exchange for money, thus constituting a "*contract for sales of goods*" for the purposes of the CISG, according to arts. 1, 3 (1). Additionally, RESPONDENT No. 1´s preponderant part of obligations did not consist in the supply of labour or other services. Hence, it is not excluded by virtue of art. 3 (2) CISG. Lastly, the PCLA has an international character and was celebrated after the entry into force of the Convention.

ISSUE D: The Tribunal should find that RESPONDENT No. 1 has breached its contractual obligations by providing CLAIMANT with the batches of GorAdCam viral vectors, pursuant to art. 42 CISG. Firstly, a third-party IP claim, from Ross P., constitutes a hindrance to CLAIMANT's peaceful use of the goods, especially considering the possibility of a future lawsuit. Secondly, RESPONDENT No. 1 cannot rely on the limitation to its liability set forth in art. 42 CISG, since, unlike CLAIMANT, it was aware of the claim prior to the end of the negotiations of the Contract, an awareness not subject to any territorial limitations. Lastly, CLAIMANT has respected the time notice requirement of art. 43 CISG.

ARGUMENTS

ISSUE A – ROSS PHARMACEUTICALS SHOULD NOT BE JOINED TO THE ARBITRATION PROCEEDINGS

1. The Tribunal should not allow the joinder of Ross P. to the proceedings because the Tribunal has no jurisdiction over the conflict between RESPONDENTS and Ross P. **(A)** and, even if it did, **(B)** article 4.2 Swiss Chambers' Arbitration Institution ("SCAI") Rules should not be interpreted as an incentive to disregard the consent of the parties **(1)**. Furthermore, the present joinder would raise issues regarding confidentiality **(2)** and efficiency **(3)**, while also creating basis for the set aside or the non-enforcement of the award **(4)**.

A. The Tribunal Has no Jurisdiction Over the Conflict Between the RESPONDENTS and Ross Pharmaceuticals

2. Arbitration is a consensual dispute resolution mechanism [*Born, p. 250; Voser, p. 350; Gilbert, p. 455*], in which the jurisdiction of the Arbitral Tribunal is derived from the agreement of the parties [*Voser, p. 350*]. For those reasons, an Arbitral Tribunal has no jurisdiction if the parties have not agreed to arbitrate with each other. In cases where a third party is to be joined in an ongoing arbitration, there must exist an agreement to arbitrate between all the involved parties or at least a proof of the consent of these parties regarding a possible future joinder, express or implied [*Meier, p. 2505*].
3. *In casu*, there is no agreement between CLAIMANT and Ross P. and there is no consent, expressed or implied from CLAIMANT, regarding the joinder. As stated by the US Supreme Court, arbitration "*is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit…*" [*Volt Information Sciences v. Leland Stanford Junior Universities*].
4. When signing the same agreement with the same arbitration clause, parties are deemed to have agreed to the possible joinder of other signatory parties [*Voser, p. 369*]. However, we are dealing with two different contracts, and, until recently, CLAIMANT was not aware of the existence and the terms of the contract involving the third party [*PO2, p. 54, ¶8*].
5. Since Ross P. is not a signatory of the PCLA, the Arbitral Tribunal would not, as a rule, have jurisdiction to render a binding decision [*Girsberger/Voser, p. 71/72*]. Some theories are recognised to extend the AA to non-signatories. However, the present case does not fall into any of the hypothesis.

1. The General Theories to Extend the Arbitration Agreement to Non-Signatories are not Applicable

6. Scholars use a number of theories to extend AAs to non-signatories [*Voser, pp. 372-379*]. Nevertheless, as CLAIMANT will demonstrate, none is applicable to the present case. Therefore, the AA cannot be extended to Ross P..
7. The "*Group of Companies*" doctrine dictates that, if a company is part of the same group of companies than one of the signatory parties, the contract may be extended if the "*circumstances make it reasonable to conclude that related companies were sufficiently involved to be reasonably assumed by all to be subject to arbitral rights and obligations*" [*Waincymer, p. 523*]. This theory is not applicable, for obvious reasons. Not only Ross P. is not a company related to the parties, but it was also not involved in the negotiations of the present contract.
8. In the cases involving Representation or Agency, "*a non-signatory to an arbitration agreement may be considered a principal who is bound to that arbitration agreement if it was entered into by a person acting as its representative or agent*" [*Voser, p. 376*]. Given that Ross P. did not act as a representative or agent of any of the parties, this theory also does not apply.
9. A party may try to extend an arbitration clause to non-signatories in cases where a guarantee exists by the non-signatory party, explicit or implied. However, for the extension to occur, the guarantor must have a significant role in the history and the conduction of the transaction [*Waincymer, p. 522*]. Since Ross P. is not a guarantor, nor it was involved in the transaction negotiated between CLAIMANT and RESPONDENT No. 1, this theory also cannot be applied.
10. Likewise, the "*Piercing of the Corporate Veil*" theory is used in cases of fraud or abuse of rights to disregard a separated legal entity of a corporation and hold its owners accountable for the corporation's actions [*Voser, p. 378*]. As Ross P. is a third company that has no relation with the parties, other than RESPONDENT No. 2, the theory is inapplicable.
11. The last theory that could be mentioned is the assumption of consent to arbitrate based on conduct. Generally, to join a third party, it is important to asses if there is an agreement to arbitrate, or not, between the involved parties [*Roos, p. 430*]. Occasionally, the tribunals consider the conduct of a non-signatory to be an expression of its intention to be bound by the AA [*Voser, p. 372*]. In this case, not only did Ross P. not agree to arbitrate with CLAIMANT, only with RESPONDENT No. 2 [*Exh. R3, p. 33, Clause 14.1*], but also never acted in any way that made its consent to be implied. On the contrary, Ross P. expressly stated that it does not want to take part in the present arbitration [*Records, p. 24, ¶4*].
12. For these reasons, it is not possible to extend the present AA to Ross P. and, therefore, the Tribunal has no jurisdiction to issue a binding decision regarding that third party.

B. Even if the Tribunal Understands that it Has Jurisdiction, it Should Not Order the Joinder of Ross Pharmaceuticals

13. Even if the Tribunal understands that it has jurisdiction, it should not allow the joinder of Ross P. because art. 4.2 SCAI rules is not an incentive to disregard the consent of the parties **(1)**; the joinder of Ross P. would raise confidentiality issues in the present case **(2)**; would be harmful to the efficiency of the proceedings and **(3)**; if the Tribunal decides to render a decision about the limits of the IP rights of Ross's agreement, the arbitral award would be set aside or deemed to be unenforceable **(4)**.

1. Article 4.2 SCAI Rules Should Not be Interpreted as an Incentive to Disregard Party Consent

14. The consent is an absolute element for joinder, since the party's agreement to arbitrate is one of the cornerstones of arbitration [*Choi, p. 33*]. The will of the parties is of utmost importance and must be considered when analysing a possible joinder [*Koller/Oberhammer, p. 74*].

15. When analysing a potential joinder under the UNCITRAL Model Law ("Model Law"), the Assistant Registrar understood in the *Titan Unity case* that "*the only premise in which a joinder will take place under the framework envisaged by the drafters of the Model Law is upon the agreement of parties; consent is, in the minds of the drafters, a necessary condition for there to be a joinder.*"

16. The open wording of art. 4.2 SCAI Rules may give the Tribunal the power to allow the joinder of a third party, even with the objection of the opposing party and the third party itself [*Roos, p. 424; Hanotiau, p. 333*]. However, that does not mean that the Tribunal should do so, as such article does not substitute the consent of the parties, given it only lays down the procedural framework for joining a third person [*Voser, p. 396; Habbegger, p. 280*].

a) CLAIMANT has not Consented to the Joinder in Any Way

17. The RESPONDENTs argue that the fact that the two Collaboration and License Agreements are very similar and that all parties concerned agreed to the Swiss Rules are sufficient to allow the joinder of Ross P. in the present proceedings [*Answer to NofA, p 28, ¶22*]. This is simply not true. The mere fact that the parties generally accepted the Swiss Rules cannot be deemed as consent to the consolidation or joinder of third parties and, particularly, may not be seen as an agreement to arbitrate with each other [*Born, pp. 2600/2601*]. Even in cases where the arbitration clause is similar, the Tribunal must analyse whether, by inserting similar arbitration clauses, the parties have demonstrated their common intention to submit the entire operation to the same Arbitral Tribunal [*Meier, p. 2513; Habegger, p. 280*].

18. *In casu,* it is clear that that the parties´ intention is not to submit the entire operation to the present Tribunal. Firstly, CLAIMANT only became aware of the dispute between RESPONDENT No. 2 and Ross P., regarding the scope of their agreement, on 1st May of 2020 [*NofA, p. 7, ¶19; PO2, p. 54, ¶8*]. Before that, RESPONDENT No. 1 never mentioned the dispute, omitting it during the negotiations and the drafting of the contract.

19. Secondly, RESPONDENT No. 1 declared, on its contract with CLAIMANT, that it was "*not a party to or otherwise bound by any oral or written contract or agreement that will result in any person or entity obtaining interest in, or that would give to any entity or person any right to assert any claim in or with respect to, any of Licensee's rights granted under this Agreement*" [*Exh. C3, p. 15, Clause 11*] and 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*" [*Exh. C3, p. 15, Clause 11*].

20. Consequently, and considering that the agreement was signed in good faith [*Exh. C3, p. 16, Clause 15.1*], the joinder of Ross P. was not predictable to CLAIMANT [*Girsberger/Voser p. 90; Schramm, p. 499*]. Furthermore, CLAIMANT did not choose the SCAI Rules directly, it only suggested that the arbitration should occur under the rules of "*respected and neutral international arbitration institutions*" [*PO2, p. 57, ¶31*].

21. On the contrary, the party that opted for the SCAI Rules was RESPONDENT No. 1, who was already aware of the conflict with Ross P. [*Answer to NofA, p. 27, ¶12*] and also decided, coincidently or not, to use the Ross Agreement as a template for the PCLA [*PO2, p. 56, ¶ 25*]. Moreover, the dispute regarding the scope of the Ross Agreement was raised a second time by Ross P., just one month before the drafting and signing of the contract with CLAIMANT [*Answer to NofA, p. 27, ¶11*].

22. From these facts, it is clear that CLAIMANT did not intend to submit the whole operation to this Tribunal and, therefore, also did not consent to the joinder, expressly or impliedly.

b) Ross Pharmaceuticals Cannot be Forced to Join the Present Proceedings

23. It is important to notice that doctrine is reluctant regarding joinders expressly rejected by the parties, especially if the third person is not a party of the AA [*Roos, p. 430, Meier, p. 2505, Carrión, 497/498/504*], as that could lead to a future challenge of the award. In the present case, not only CLAIMANT is objecting the joinder, but also Ross P., the involved third person [*Records, pp. 24/37/46*].

24. In this sense, the Court of Appeal of the Republic of Singapore decided *"that '[t]he forced joinder of non-parties is (...) a major derogation from the principle of party autonomy, which is of foundational*

importance because all arbitrations must proceed in limine from an agreement to arbitrate." [*Astro Nusantara International BV and ors v. PT First Media TBK and ors, ¶188*].

25. Compelling a third party to a joinder moves arbitration as a whole to a direction closer to the state courts, which is clearly not the objective of arbitration [*Kroll, p. 389; Redfern, p. 91; Girsberger/Voser, p. 140; Carrión, p. 481; Voser II, p. 178*], since "*the very nature of arbitration proceedings, an agreement to arbitrate with specific parties in private proceedings, is at risk. If arbitration is to be a real alternative to court proceedings, this nature must be upheld, and no arbitrator should be given a "tool" to disregard the necessity of the consent of all parties*." [*Voser, p. 405*].
26. In light of the above, it is therefore clear that the lack of consent from CLAIMANT and Ross P. cannot be ignored and that the Tribunal should not order the joinder of an unwilling third party to the present proceedings.

2. The Joinder of Ross Pharmaceuticals Would Raise Confidentiality Issues

27. As CLAIMANT will demonstrate, the joinder of Ross P. would harm the confidentiality of the proceedings, an essential aspect given the nature of the PCLA.
28. Article 4.2 Swiss Rules determines that the Tribunal will decide the joinder "*taking into account all relevant circumstances*". Similarly to what has been analysed regarding the consent, another relevant circumstance that must be considered by the Tribunal is whether or not the joinder would raise issues of confidentiality [*Meier, p. 2508; Schramm, p. 494*].
29. It is common for parties involved in international businesses to seek out the privacy and confidentiality of the arbitral process [*Born, p. 90, Voser, p. 351*], and therefore the confidential character of arbitration is one of the most attractive features in the eyes of the parties.
30. In this context, the loss of confidentiality that comes from a particular joinder of third parties [*Born, p. 2568/2569*] must be measured in order to assess the impact to the parties.
31. This case deals with the IP rights regarding the use of a viral vector to produce a vaccine for the biggest pandemic witnessed by the world in the last few decades. Hence, in abstract, any information regarding a potential cure is highly sensitive and therefore protected by art. 2.1.16 UNIDROIT Principles.
32. Furthermore, contracts involving IP rights cherish the protection of information, and the contract between CLAIMANT and RESPONDENT No. 1 is no exception, since Clause 10.1 PCLA expressly states that "*Each party acknowledges that confidentiality and know-how protection is of the paramount importance for the other party*" [*Exh. C3, p. 15*].
33. Moreover, it is also known that Ross P. is a direct competitor of CLAIMANT regarding the development of a vaccine for COVID-19 [*PO2, p. 54/55, ¶¶13/16*].

34. Therefore, if the joinder of Ross P. is allowed, the company would have access to crucial data about the present status of the research and about the development of the vaccine, data that not only the parties vowed to protect within the contract, but also that could be very useful to Ross P., whose vaccine is still in the pre-clinical phase [*PO2, p. 55, ¶16*].
35. Adding this information to the fact that Ross P. has a policy to vigorously enforce its IP rights [*PO2, p. 54, ¶15*], it is not impossible to see a scenario where, after getting useful information from the proceedings, Ross P. could try to delay CLAIMANT's development process, either by setting back the present proceedings or initiating a demand against CLAIMANT. This line of thinking is corroborated by the fact that Ross P. wants to be informed about the progress of the proceedings, even without joining [*Records, p. 46*].
36. As proved above, the joinder of Ross P. would hinder the confidentiality in an unreasonable manner, which also goes against the very nature of the contracts involving IP rights. This reason alone must be held as enough for the Tribunal to decide that Ross P. should not be joined in the present proceedings.

3. The Joinder of Ross Pharmaceuticals Would be Harmful to Procedural Efficiency

37. Usually, allowing the joinder of a third party on an ongoing arbitration often aims at improving the efficiency of the proceedings, but that is not always true. RESPONDENTS want to kill two birds with one stone, *i.e.*, to solve a problem with a third party, while at the same time resolving the present conflict. This may be seen as efficiency in the eyes of RESPONDENTS, but in this particular case it is quite the opposite [*Voser, p. 353/354*].
38. According to article 15.7 SCAI Rules "*All participants in the arbitral proceedings shall act in good faith and make every effort to contribute to the efficient conduct of the proceedings and to avoid unnecessary costs and delays.*". Therefore, not only the parties, but also the Tribunal should avoid unnecessary costs and delays.
39. There are indeed cases where it is more efficient to conduct the arbitration with only two parties, rather than transforming the arbitration into a more complex proceeding [*Smith, p. 174*]. Additionally, the Tribunal should take into account the delay created [*Schramm, p. 500*] and the fact that the joinder may complicate the proceedings [*Gilbert, p. 460; Voser/Meier, p. 177*]. Thus, allowing the joinder of Ross P. would only delay the proceedings unnecessarily.
40. As stated before, CLAIMANT is on a race for the development of the vaccine against COVID-19. The joinder of Ross P. would therefore inevitably delay the procedure since this third person does not share interests with any of the parties and would be brought to the present arbitration to discuss the scope of a different agreement. That would incur on a much more

extensive production of evidence since Ross P. would certainly need to produce evidence to defend its own point of view.

41. Moreover, the Tribunal already holds enough elements to decide the present dispute without Ross P.'s direct involvement. In fact, the contract between RESPONDENT No. 2 and Ross P. has already been presented by RESPONDENTS [*Exh. R 3, pp. 32-34*], which, whilst objecting to the virtual hearings, admitted that it has the means to produce evidence without the joinder of Ross P. [*Records, p. 49, ¶4*].

42. Lastly, Ross P. has already declared that it does not want to be a part of the present proceedings [*Records, pp. 24/37/46*]. The efficiency of the proceedings can only be achieved if the parties cooperate [*Schlaepfer/Paralika, p. 337*]. Hence, it is not absurd to consider that a party that does not want to be in the arbitration would not devote its efforts to guaranteeing procedural efficiency, especially if that sort of conduct could harm one of its direct competitors in the race for the vaccine.

43. In conclusion, the joinder of Ross P. would only delay the proceedings while not bringing any information that RESPONDENT No. 2 could not provide by itself. Such delay could even compromise effectiveness of the future award, since there is an urgency to develop the vaccine. For these reasons, the joinder of Ross P. should be denied.

4. The Joinder of Ross Pharmaceuticals Could Lead to Difficulties with the Enforcement or the Setting Aside of the Award

44. Even if confidentiality and efficiency would not represent an obstacle for the joinder, the integrity of the award could be compromised, given that the joinder would raise grounds for the setting aside, based on arts. 34, 2, (a), III or IV Model Law, or lead to the unenforceability of the decision, according to arts. V, 1, (c) or (d) New York Convention ("NYC").

45. RESPONDENTS want the joinder of Ross P. to "*determine conclusively the scope of the exclusive license granted*" [*Answer to NofA, p. 28, ¶22*], as a way of using the arbitration *"to finally resolve the dispute about the scope of the Ross Agreement*." [*PO2, p. 57, ¶33*]. By deciding the scope of the Ross Agreement, against the will of one of the parties and the potential third party, rather than focusing only on the PCLA, the Tribunal would create the possibility of a challenge of the award, and also could create enforceability difficulties [*Voser, p. 352; Kroll, p. 409*].

a) The Tribunal Would be Deciding Beyond the Scope of the Submission to Arbitration

46. Article V, 1, (c) NYC states that the enforcement of the award may be refused if the Tribunal decides beyond the scope of the submission to arbitration. The limits of the scope of the

Ross Agreement are irrelevant in this case [*infra ¶159*]. By introducing a third party in the proceedings to discuss a subject that only has relevance to RESPONDENTS and Ross P., the Tribunal would be deciding beyond the scope of the submission to arbitration, therefore, violating article V, 1, (c) NYC, which was adopted by all the involved countries [*PO1, p. 52, ¶3*].This would lead either to the non-enforcement of the award [*Gilbert, p. 480*], or to a challenge based on art. 34, 2, (a), III Model Law, which is a verbatim reproduction of art. V, 1, (c) NYC.

b) The Composition of the Arbitral Proceedings Would Not Be in Accordance With the Agreement of the Parties

47. Also, allowing the joinder of Ross P. could lead to the violation of art. V, 1, (d) NYC, that establishes that the enforcement of an award could be denied if the composition of the arbitral proceedings is not in accordance with the agreement of the parties. As previously proven, CLAIMANT could not foresee the future joinder of Ross P. [*supra ¶¶19-21*], since that conflict was omitted by RESPONDENT No. 1 when drafting the contract. Moreover, given the COVID-19 context, it is clear that the parties had in mind proceedings that would not delay the production of the vaccine in an unbalanced manner [*infra ¶57-59*]. Therefore, the joinder would be a clear violation of how the parties envisaged the arbitral procedure.
48. Likewise, this context creates the possibility of the challenge of the award based on art. art. 34, 2, (a), IV Model Law, that has the same text as art. V, 1, (d) NYC.
49. For these reasons, the joinder of Ross P. would undermine the integrity of the award.

CONCLUSION OF ISSUE A

In conclusion, the joinder Ross P. must be denied since the Tribunal has no jurisdiction to render a binding decision regarding the scope of the Ross Agreement. Moreover, the present joinder would raise issues regarding the confidentiality and efficiency of the proceedings, whilst putting into risk the enforceability of the award.

ISSUE B: THE EXAMINATION OF WITNESSES AND EXPERTS SHOULD BE CONDUCTED REMOTELY

50. A remote hearing should be held, contrary to RESPONDENTS' submission, since the parties have no right to a physical hearing **(A)**, the Tribunal has the power to decide on this matter, even without the parties agreement, which is indeed the best suited decision for the present case **(B)**. Lastly, the efficiency of the proceedings depends upon that decision **(C)**.

A. There is No Right of the Parties to a Physical Hearing, Merely to a Hearing

51. Party's right to a hearing, even though not absolute [*BGer 4A_220/2007*], is a fundamental principle of arbitration [*Born, pp. 2263/3512; Caron/Caplan, p. 601; Redfern/Hunter p. 400*].

52. Art. 15.2 SCAI Rules establishes that "*at any stage of the proceedings, the arbitral tribunal may hold hearings for the presentation of evidence by witnesses, including expert witnesses, or for oral arguments*". However, the suppletive nature of the provision implies that the parties' agreement prevails over the Tribunal's discretion [*Lazopoulos, p. 608*].

53. In the present case, the AA [*Exh. C3, p. 11, Clause 14*] expresses the parties' intent on holding hearings in the arbitral proceedings. This is particularly relevant when considering that the prevailing view under the SCAI Rules is that "*the arbitral tribunal is bound by that agreement*" [*Lazopoulos, p. 608*]. In accordance, art. 24 Model Law allows parties to agree on holding a hearing.

54. Nevertheless, CLAIMANT will demonstrate that the parties' right to a hearing is granted in a remote setting, by proving that, firstly, no obligation for a physical hearing exists, since the AA does not require an in-person hearing **(1)**, secondly, there is no general principle for such **(2)** and, thirdly, the rules applicable do not require the physical presence of the parties **(3)**.

1. Due to the Change of Circumstances, the Parties' Choice of Places to Hold the Hearings Does not Necessarily Demand for a Physical Hearing

55. Although the AA explicitly expresses parties' intention to hold hearings and foresees the selection of two alternative places [*Exh. C3, p. 11, Clause 14*], it is important to consider the change of circumstances caused by the COVID-19 pandemic and the arising of the dispute.

56. At the time of the draft of the AA, it was not predictable that a pandemic would force the world to social distancing and restrain freedom of movement [*PO2, p. 57, ¶34*]. It is, for this reason, understandable that the selection of locations would probably not be discussed, if, at the time of the drafting, the parties would have known about these restrictions.

57. Thus, the change of circumstances requires an interpretation of the will of the parties when deciding on the places for the hearings. Given that the AA was not discussed by the parties, but rather presented to CLAIMANT as a standard clause [*NofA, p. 8, ¶24*], after being negotiated with Ross P. [*PO2, p.57, ¶32*], CLAIMANT's will is not entirely reflected in this AA.

58. On the other hand, during the discussions with Ross P., RESPONDENT No. 2 initially suggested a document-only arbitration and afterwards compromised for the arbitration clause present in the Ross Agreement, which only required one of the parties to travel [*PO2,*

p. 57, ¶*32*]. Consequently, RESPONDENT No. 2'S efficiency concerns were explicit in its standard dispute resolution clause [NofA, p. 8, ¶*24*].

59. Given that Peter Doherty decided to use the Ross Agreement as template for the PCLA [*Exh. R2, p.30,* ¶*4*] RESPONDENTS' efficiency concerns are materialized in the arbitration clauses of both contracts. Thus, RESPONDENTS' will, at the time of the conclusion of the present AA, would not be violated in case the Tribunal decides for a remote hearing, since it is a more efficient alternative.

60. Moreover, it is worth pointing out that parties tend to act in a less cooperative manner after a dispute takes place. This *rationale* can be found in the present case, given that RESPONDENT No. 2, during the negotiations for the standard dispute resolution clause, intended for a document-only-arbitration [*PO2, p. 57,* ¶*32*]. Now, conveniently, after an abrupt change of heart, RESPONDENTS are pleading that the examination of witnesses and experts, concerning a third person has to be physical [*Record, p. 49,* ¶*5*]. Therefore, RESPONDENTS' argument that the hearing provision in the AA refers to an in-person hearing [*Record, p. 49,* ¶*4*], appears to be a mere dilatory tactic that should not prevail.

61. Hence, CLAIMANT has so far established that the selection of places cannot be interpreted as an obligation for the hearing to be in-person, given that the circumstances have changed and the will of the parties will not be violated by a remote hearing.

2. In Arbitration There is no Right to a Physical Hearing

62. Parties' right to a hearing does not necessarily means a physical hearing [*Scherer, pp. 74/75; Galindo,* ¶*6; Hristova/Robach* ¶*4*]. Thus, this right would be guaranteed by a remote hearing.

63. A hearing "*includes any mechanism (e.g. audio and visual) to hear counsel in real time and provides the opportunity for a witness to deliver testimony directly to the tribunal in real time*" [*Galindo,* ¶*6*]. *In casu*, considering that the exchange of arguments and evidence will be granted in simultaneous throughout a remote hearing, the two main features of orally and immediacy would be fulfilled [*Scherer, pp. 74/75*]. Accordingly, the *ICC Guidance Note*, interprets the "in-person" concept, in art 25.2 ICC Rules, "*as the parties' opportunity for a live audience, which does not preclude the chance of "in-person" by virtual means*".

64. Thus, CLAIMANT has proven that there is no general right for an in-person hearing since a fully remote audience meets the necessary threshold requirements [*Scherer, pp. 74/75*].

3. The Applicable Rules Do Not Require a Physical Hearing

65. The Model Law does not demand a physical hearing [*supra* ¶¶*2/4*], as assumed by RESPONDENTS, it merely states that the Tribunal has to hold hearings at an appropriated

stage when requested [*Records, p. 49, ¶3*]. Also, the Danubian Procedural Code and the respective case-law do not rule over an obligation for in-person hearings -quite the opposite. Such rules allow for remote hearings "*if required by public interest*" [*PO2, p. 57, ¶37*]. *In casu*, there is no doubt that the public interest requires a remote hearing given that a physical hearing can raise many public health and sanitary issues, due to the social proximity and travels that it involves [*Capic v. Ford Motor Company of Australia Limited*].

66. Furthermore, art. 25.4 SCAI Rules allows for the examination of witnesses and experts to be done by video conference. This rule was established in 2012, and, although the common practice is to hear witnesses in-person, particular cases such as travel restrictions or sickness, justify the witness examination to be held remotely [*Pfisterer/Nater-Bass, p. 697*]. Hence, RESPONDENTS' argument that the Swiss Rules are based in the assumption of in-person hearings [*Records, p. 49, ¶2*] does not preclude the legal option for a remote hearing to be held. If the SCAI Rules had already envisaged this option prior to a COVID-19 context, it is even more reasonable to argue that it must be applied in such an abnormal context.

67. Moreover, the High Court of Equatoriana, RESPONDENTS' place of business and one of the possible places to enforce a final award, has already ruled on the possibility of remote hearings in state courts proceedings, even without all parties' consent [*PO2, p. 58, ¶35*].

68. This *rationale* can also be found in the *CSFK v. HWH Case*, where remote hearings were defended to be an evidence production procedure that attends the parties' right to a hearing.

69. In conclusion, in the present case, there is no general right or rule that demands for the hearing to be physical. Thus, the Tribunal must decide on a fully remote hearing, since no violation of parties' right to a hearing would occur.

B. The Tribunal Is Empowered to Decide on a Remote Hearing, Even Without the Parties' Agreement

70. CLAIMANT will demonstrate that the Tribunal has the necessary power to decide on a fully remote hearing [*Records, p. 48, ¶4*] based not only on art. 25.4 SCAI Rules [*supra ¶66*], but also on the Tribunal's broad power concerning procedural conduct, under art. 15.1 SCAI Rules. Thus, the Tribunal's discretion to conduct the proceedings allows for a remote hearing ruling, without the parties' consent **(1)**, which is the most suitable decision for the case **(2)**.

1. The Tribunal's Broad Power to Conduct the Proceedings Allows for a Remote Hearing Without the Parties' Consent

71. Art. 15.1 SCAI Rules "*provides the arbitral tribunal with a wide discretion to adopt – in accordance with parties agreement and within the framework of the Swiss Rules – the procedural rules that it considers best suited to the individual case*" [*Lazopoulos, p. 603*] and art. 19.2 Model Law *"allows the tribunal to tailor the conduct of the proceedings to the specific features of the case*" [*UNCITRAL Digest 2012, p. 100*].

72. In accordance, the Tribunal has the power to order a remote hearing over the opposition of one party if it seems appropriate, after carefully assessing the circumstances of the case and the parties' rights to be heard and treated equally. Many scholars defend this theory and several supportive case-law has been rendered [*Okubote, ¶14/15; Davidson/Bloomfield, pp. 2,3*; *Mak, ¶¶ 9,10*; *Hristova/Robach, ¶3; Anwar Siraj v Ting Kang Chung; JKC Australia LNG Pty td v CH2M Hill Companies Ltd; OGH Case No. 18 ONc 3/20s*].

73. Moreover, Arbitral Institutions have published Notes, Guidelines and Protocols to guide parties and Tribunals throughout the difficulties caused by COVID-19. In many of them, [*e.g. ICC Guidance Note; AAA-ICDR Model Order; The Vienna Protocol*] the Tribunal's discretion to determine a remote hearing without parties' consent is stipulated. In particular, the *ICC Guidance Note* refers that, if a Tribunal decides on a remote hearing against one party objection, it should consider the relevant circumstances and the enforceability of the award.

74. In conclusion, pursuant to art. 15.4 SCAI Rules and 19.4 Model Law, the Tribunal should find that it has the power to determine a fully remote hearing against one party's objection, when the relevant circumstances of the case so require, as they do in the present proceedings.

2. The Suitable Decision for the Present Proceedings Is to Hold a Hearing Remotely

75. CLAIMANT will prove that a remote hearing is the most suitable option for the present proceedings, in contrast to its postponement, since the relevant circumstances of the case so require **(a)** and the parties' rights to be heard and treated equally would not be harmed **(b)**.

a) The Relevant and Exceptional Circumstances of the Case Require a Remote Hearing

76. Considering the relevant circumstances, it is firstly important to comprehend the reasons for the hearing to be held remotely [*Scherer, p. 83*, *ICC Guidance Note, ¶18*]. In the present case, those reasons are obviously related to the travel restrictions and social distancing measures, as well as the participant's founded fear to travel [*PO2, p. 57, ¶34*]. Accordingly, the Tribunal stated that the "*uncertainty development of the COVID-19 pandemic*" would make "*a hearing in-person impossible*" [*Records, p. 46, ¶7*]. Hence, there are good reasons to decide for a remote hearing [*Indus Water Kishenganga; Compãnia de Aguas del Aconquija SA v Republic of Argentina*].

77. Secondly, the content of the hearing is a key factor [*Scherer, p. 82; Masters QC/Ambrose/Davies, ¶15-17*]. Although some authors have raised issues with the remote taking of evidence, particularly regarding the assessment of the witness' credibility [*Scherer, p. 83*, *Lefter, ¶11*; *Miles, p. 129*], remote hearings have been successfully conducted for years [*Tetra Pak Marketing Pty Ltd v Musashi Pty Ltd; Société Générale de Surveillance S.A. v. Republic of Paraguay*].

78. Nevertheless, RESPONDENTS' concerns on this issue [*Record, p. 49, ¶5; PO2, p. 58, ¶38*] must be dispelled. RESPONDENTS' apprehension regarding the taking of evidence relates to Ross P., *i.e.*, a non-party to this arbitration. Moreover, testimony evidence can be found as fallacious [*Kirby, p. 403; Miles, p. 128*], and it is generally outweighed by documentary evidence, a more reliable source [*Pfisterer/Nater-Bass, p. 693*]. In this case, the written witness statements and documents already attached to these proceedings are decisive as the dispute primarily concerns to legal questions on uncontested facts [*Record, p. 49 ¶5*]. Therefore, the oral testimony will not be as essential as RESPONDENTS argue [*Miles, p. 124; Douglas-Henry/Sanderson, p. 12; Lim/Market, ¶18*].

79. Regardless, the examination and cross-examination of witnesses and experts can be efficiently done virtually [*Hristova/Robach ¶6/10; Miles, p. 130; Galindo ¶15; Polanski v Conde Nast Publications*].

80. CLAIMANT also highlights the benefits of the virtual document/screen sharing and editing features that video-conference platforms allow [*Bateson, p. 164*]. Furthermore, in a remote environment, verbal cues, face expressions and body language can be better observed than in physical hearing rooms, given the focus on the testifying person that the screen provides [*Miles, p. 129; Lee/Ning, ¶37*]. Furthermore, in case of recording, replay is an additional possibility [*Scherer, p. 85*]. As a matter of fact, given the COVID-19 circumstances, an in-person hearing would necessarily involve face masks, which would undermine the assertiveness that the analysis of the witness credibility requires.

81. Moreover, the possibility of witnesses being coached can be avoided with 360º view cameras, multiple cameras or the obligation to turn the camera around the room [*Douglas-Henry/Sanderson, p. 12*]. Although the possibility of witnesses using multiple screens can be seen as a risk, that should not be overstated, since these risks also exist in a physical hearing and such dishonest behaviour would be noticed by the Tribunal [*Miles, p. 127*]. In addition, considering that witness's testimony is crucial for RESPONDENTS defence [*Records, p. 49, ¶5*], the cross-examination, which is the most challenging part [*White & Case-Queen Mary, p. 32*], would lie with CLAIMANT, which is favourable to the virtual hearings.

82. Thirdly, the access to technology has to be equally evaluated [*ICC Guidance Note; Masters QC/Ambrose/Davies, ¶15-17; Bassiri, p. 110*]. In this case, both RESPONDENTS and CLAIMANT have technical means for a remote hearing [*Records, p. 48 ¶5*], such as bandwidth and hardware equipment. Moreover, in terms of remote connections [*Scherer, p. 88; Bassiri, p. 113*], nor the number of participants or the number of locations would be a concern. Thus, technical issues are not expected to occur.

83. Although the time zones of the parties are not the same [*Records, p. 47, ¶3; PO2, p. 57, ¶36*], it is possible to determine a reasonable hour in each jurisdiction to hold the hearing – *e.g.* 11am Danubia, 8 am Mediterraneo, 7 pm Equatoriana. If RESPONDENTS object to these suggestions, CLAIMANT would be willing to hold the hearing an hour early. Moreover, shorter hearings are also an option [*Galindo, ¶12; Douglas-Henry/Sanderson, p. 11*].

84. Fourthly, the timing and costs should be taken into account. Both options would only have the same economic impact in order to guarantee that the hearing will run smoothly by being managed from an outside professional provider [*PO2, p. 57, ¶35*]. Additionally, the postponing of the hearing would mean a delay of at least 4 months just to combine schedules [*PO2, p. 58, ¶42a*] and it is obvious that with the pandemic situation, the temporal prejudice would be considerably higher. As a result, a huge uncertainty for both parties would be created, as well as a denial of justice, given that the effectiveness of the arbitral award would be compromised [*Aghababyan/Hokhoyan/Habib ¶5; Fan ¶28; Stein, p. 176*].

85. Finally, even though cybersecurity should be addressed [*Bassiri, p. 119*], it should not be overrated, since the platforms used are secure [*Hristova/Robach ¶19*]. Furthermore, CLAIMANT is willing to take the necessary steps to ensure the integrity of the hearing, not only by agreeing to hire an outside provider that deals with the cyber-security and data protection measures [*PO2, p. 57 ¶35*], but also by adopting a cyber-protocol [*Fan, ¶9/10*]. Hence, confidentiality, a fundamental feature of arbitration, and, under art. 44 SCAI Rules and Clause 10 PCLA, a key element to these proceedings, would not be jeopardised.

86. In addition, not only remote hearings are compatible with the cornerstones of flexibility and innovation of arbitration [*Lee/Ning ¶18*], but also most stages of arbitration are digitalized [*Stein, p. 171*]. Hence, due to COVID-19, national and arbitral tribunals are indeed deciding for remote hearings [*Born/Day, Virjee, pp. 140/141; Vidak-Gojkovic/McIlwrath, p. 193*].

87. In summary, after contemplating all circumstances, CLAIMANT has demonstrated the suitability of remote hearings. As such, the Tribunal has the opportunity to set the future standard, deciding for a remote hearing and ruling over the fear of change [*Miles, p. 131*].

b) Parties' Rights to Be Heard and Treated Equally are Granted in a Remote Hearing

88. In the present case, if the Tribunal decides for a remote hearing, no violation of parties' rights to present their case and be treated equally would occur. Thus, there would be no grounds for the set-aside and/or the non-enforcement of the arbitral award.

89. CLAIMANT is well aware that the wide procedural power of the Tribunal is limited by parties' right to be heard and treated equally, under article 15.1 SCAI Rules [*Bateson, ¶6*]. However, *in casu,* there would be no risk of having the award challenged in enforcement and set-aside, based on the violation of due process, under arts. 34(2)(a)(ii), 36(1)(a) Model Law and V(1)(b) NYC [*Mak, ¶15; Stein, p. 171*].

90. Indeed, no violation of RESPONDENT's right to be heard takes place if the Tribunal decides to hold the hearing remotely. Firstly, there is no right to a physical hearing [*supra ¶¶55-69*] and parties can effectively present their case [*supra ¶¶79-81*]. Secondly, technical issues are not likely to occur, given that both parties have the necessary means [*PO2, p. 58, ¶38*] and will take the necessary precautions to ensure the integrity of the hearing [*supra ¶85*; *Bassiri, p. 105; Lee/Ning, ¶12*]. Thirdly, should the remote testimony be affected by technical difficulties, the Court should not set aside the award, even if there are several technical issues, as it was decided in the *Sino Dragon Trading v Noble Resources International Case*. Lastly, witness tampering also exists in physical hearings and, for that issue, CLAIMANT has provided reliable solutions [*OGH Case No. 18ONc 3/20s; supra ¶81*].

91. Conversely, the refusal of the Tribunal to hold a remote hearing and the consequent postponement for an undetermined time, would irreversibly undermine CLAIMANT's right to present its case and access to justice [*Scherer, p. 99*]. Considering that CLAIMANT urges protection against IP enforcement possible future actions, any postponement would endanger the Research and Development ("R&D") of CLAIMANT's vaccine.

92. Accordingly, parties' right to be treated equally would be granted in a remote hearing. Firstly, all the participants would be in a remote setting. Secondly, both parties have the necessary internet connection and hardware equipment, which prevent technical issues [*PO2, p. 58, ¶38*]. Lastly, the time zone difference can be dealt with [*supra ¶83*] and, when selecting the seat of arbitration, parties accepted the difficulties of the geographical distance and the probable time differences to be faced [*OGH Case No. 18 ONc 3/20s*].

93. It is true that RESPONDENTS may attempt to challenge the award by invoking the violation of the parties' right to present their case and equal treatment principles, but those grounds

are rarely successful, based on the high threshold that is generally set [*Scherer, p. 99; Stein, p. 170; Trademark Remodeling Inc v Rhines; Research & Dev. Ctr. 'Teploenergetika,' LLC v. EP*]. Thus, the Tribunal should not adjourn the hearing based on *due process paranoia* [*Lefter, ¶9; Okubote, ¶7*]. Following this *rationale*, as response to the challenging of an award regarding remote hearing in the COVID-19 context, the Austrian Supreme Court rejected the set aside, dispelling the due process concerns, by stating that remote hearings are an alternative that allows access to justice and protects parties' right to be heard [*OGH Case No. 18 ONc 3/20s*]. In addition, the different time zones and the risk of witness tampering were not considered concrete issues, but rather general allegations, for the reasons mentioned [*supra ¶¶90/94*].

94. Considering the balancing exercise on the possible benefits resulting from a remote hearing with the potential prejudice [*Scherer, p. 82; Blackfriars Ltd*], it is clear that, in this case, a remote hearing would have significant benefits and would not harm the integrity of the award. Furthermore, RESPONDENTS bear the burden of proving that a remote hearing would be prejudicial [*Born, pp. 2313/2314*]. In conclusion, there is no reason to postpone the hearing.

C. The Efficiency of the Proceedings Depends Upon the Tribunal's Decision to Hold a Hearing Remotely

95. The Tribunal's duty to conduct the proceedings efficiently [*Brandeis Ltd v Black*] will only be fulfilled if a remote hearing is held. The adjournment would completely hinder the efficiency of the proceedings, and would lead to a denial of justice for CLAIMANT.

96. By stating that "*All participants in the arbitral proceedings shall (...) make every effort to contribute to the efficient conduct of the proceedings and to avoid unnecessary costs and delays",* art. 15.7 SCAI Rules provides the tools to achieve procedural efficiency [*Lazopoulos, p. 614*], since it is a fundamental principle of arbitration [*Born, p. 86/87*].

97. Even though parties' right to present their case and be treated equally is guaranteed, efficiency is only preserved when deciding on a remote hearing [*Okubote, ¶8; Cyberworks Audio Video Technology Ltd v Mei Ah*], since the delay would be, in the best case scenario, of 4 months [*PO2, p. 58, ¶42a; Mak, ¶13*]. Due to COVID-19, the uncertainty that surrounds the postponement is more concerning than any possible issues that can arise from a remote hearing [*Capic v. Ford Motor Company of Australia Limited*].

98. Besides being a fundamental principle, efficiency is indisputably essential in pursuing justice, given the particularities of this case. The vaccine is extremely needed, since it is the only reliable option to end the pandemic, allowing for the reestablishment of normality.

Moreover, there is a race for a vaccine between several pharmaceutical companies [*NoA, p. 25, ¶1*]. These factors increase the urge for a timely decision.

99. If the hearing is postponed, all CLAIMANT's efforts into the development of this promising vaccine and the award itself will have no practical effect. While waiting for a physical hearing to be schedule, other pharmaceutical companies may sell their vaccines first, leading to the frustration of CLAIMANT's investment. Furthermore, CLAIMANT, by the time the award is rendered, may also have been already harmed by IP enforcement actions from Ross P..

100. In conclusion, as justice delayed is justice denied, the effect of the arbitral award would be jeopardised by a postponement of the hearing. Thus, the respect for the efficiency of the proceedings and the pursue of justice demands for a remote hearing.

CONCLUSION ON ISSUE B

Both parties granted the Tribunal the power to conduct the proceedings for a fair and efficient resolution of the dispute. For that reason, parties' right to a hearing should be enforced by the Tribunal, in the most suitable manner. All the circumstances of the case demand for a remote hearing and therefore the Tribunal's decision should not be other.

ISSUE C: THE CISG IS APPLICABLE TO THE PURCHASE, COLLABORATION AND LICENSE AGREEMENT

101. The Tribunal should apply the CISG to the PCLA, since it is a Sales Agreement for the purposes of the Convention **(A)**, not excluded either by art. 3(1) CISG **(B)**, or art. 3(2) CISG **(C)**. Lastly, the PCLA has an international character, and was celebrated after the Convention´s ratification **(D)**.

A. The Contract Constitutes a Sales Agreement Under the CISG

102. In order for the CISG to be applicable, the contract celebrated between both parties must be considered a "*contract of sales of goods*" in the sense employed by the CISG, according to arts. 1 (1) and 3 CISG, irrespectively of the label given by the parties [*Uncitral Digest 2016, Art.1, ¶21*]. Given that the PCLA involves the delivery of goods **(1)**, the GorAdCam license is classified as such **(2)**, the contract has a mixed nature **(3)** and the CISG can be applied to mixed contracts **(4)**. Hence, understanding the concrete obligations, and their relevance in the contractual dynamic, will have a direct impact on the applicability of the CISG.

1. The Purchase, Collaboration and License Agreement Involves the Delivery of Goods

103. The PCLA requires, at different stages of the agreement, that three types of objects may be delivered by RESPONDENT No. 1: a) GorAdCam vectors and the respective licenses [*Exh. C3, p. 13, Clause 9.2*]; b) HEK-294 cells and cell culture medium [*Exh. C3, p. 17, Clause 16.1*]; **c)** Vaccines [*Exh. C3, p. 17, Clause* 16.2].

104. Since the CISG does not give a definition of "*goods*", an autonomous interpretation must be done according to art. 7 (1) CISG [*Uncitral Digest 2016, Art.* 7, ¶9], leading to conclusion that all of the objects previously mentioned, with the exception of the GorAdCam license, can easily be classified as goods, since they are moveable, tangible things [*Schlechtriem, Art.1 ¶20*], which can be commercially sold. Property can be passed on and they are not excluded from the CISG's sphere of application by virtue of Art. 2 CISG [*Diedrich, p. 127*].

2. GorAdCam License Classifies as a "Good"

105. According to the *Construction Equipment Case*, the concept "*goods*" is to be interpreted extensively. This decision is in accordance with both the *Graphiplus Case* and *Corporate Web Solutions Case*, where the Tribunals found that granting, for an indefinite period of time, the usage of software for an agreed price, implied a sale within art. 1 CISG [*Diedrich, p. 66*].

106. Thus, the same *rationale* can be applied in the present case, since the GorAdCam license was granted for an indefinite period of time, in exchange for a one-time payment of 2.500.000€ (Two and a Half million euros) [*Exh. C3, p. 13, Clause 9.2*]. Additionally, it accompanied a tangible object (GorAdCam vectors), which cannot be used without that license.

107. Moreover, art. 4 (b) CISG supports this interpretation, given that the convention disregards the effect which the contract may have on the property rights "*in the goods sold*" [*Larson, p. 468*].

108. Therefore, the GorAdCam's non-exclusive license should be perceived as a good for the purposes of the CISG.

3. The Purchase, Collaboration and License Agreement is a Mixed Contract

109. Having ascertained that these objects are goods, it becomes evident that RESPONDENT No. 1 had to deliver them, while receiving in exchange previously determined amounts of money, thus constituting a contract of sales of goods [*PVC Case; Digest 2016, p. 4; Schlechtriem, p. 29*].

110. In order to start the research plan, CLAIMANT received the first batch of GorAdCam vectors while paying 2.500.000€ (Two and a Half Million euros) [*Exh. C3, p. 13, Clause 9.2; PO2, p. 55 ¶17*]. In the future, if CLAIMANT was to develop a vaccine, Clause 16.1 PCLA establishes

that CLAIMANT would buy exclusively from RESPONDENT No. 1 the supply needed for the production of the GorAdCam vectors for a price of 2.000.000€/batch (Two Million Euros).

111. However, Clause 16.2 PCLA grants an alternative scenario, predicting a production option where RESPONDENT No.1 has the duty to produce and deliver the vaccines, while CLAIMANT pays the price charged at the time of the conclusion of the contract.

112. Irrespectively of CLAIMANTs success to develop a vaccine, each and every one of these delivery obligations relates to goods to be manufactured/produced [*Uncitral Digest 2016, Art. 3(1) ¶2; UNCITRAL Rules, Art. 1.1.1, ¶ 3; Stones Case*].

113. Therefore, the fact that these goods need to be manufactured/produced, as opposed to being "*ready-made*", allows for the exclusion of the CISG, if CLAIMANT was to supply a substantial part of the materials necessary for such [*Art.3(1) CISG*]. However, this is not the case [*infra ¶117*].

114. Furthermore, the PCLA obliges RESPONDENT No. 1 not only to deliver goods, but also to provide know-how [*Exh. C3, p. 13, Clauses 3.1 and 9.2; PO2, p. 55 ¶17*]. Thus, given the different nature of the emerging obligations, this agreement must be categorized as a mixed contract [*Hubber/Mullis, p. 42; CISG Nº. 4, ¶1(2)*].

4. The CISG can be Applied to Mixed Contracts

115. Despite the inexistence of a mixed contracts' specific provision, these situations are to be settled in conformity with the general principles on which the CISG is based [*Art. 7 (2) CISG; Hubber/Mullis, p. 34*]. In this sense, scholars sustain that general principles can be extracted from art. 3 (2) CISG, which rules the Convention's applicability to contracts, that include the supply of labour/other services amongst the obligations of the seller.

116. Consequently, given the complex structure of the agreement, the Tribunal has to consider the transaction as a whole, and determine if the PCLA is not excluded from the CISG by virtue of arts. 3 (1) and 3 (2) [*Hubber/Mullis, p.48*]. Nevertheless, in case of doubt, the application of the Convention is to be preferred, taking into account the *In Dubio Pro Conventione* principle [*Lookofsky, p.263; Cañellas, pp. 130/131; CISG Nº.4, ¶4(4)*].

B. Article 3 (1) CISG Does Not Exclude the Convention´s Applicability to the Purchase, Collaboration and License Agreement

117. The fact that the PCLA involves the delivery of goods that need to be manufactured/produced allows for the possibility of exclusion of the CISG, however that possibility should be discarded.

118. According to art. 3 (1) CISG "*Contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production*".
119. At first, given the particular draft of this article, the Tribunal should favour the application of the convention, since it expresses a general rule (applicability of the CISG) followed by an exception (exclusion of the CISG). [*Schroeter, p.75; Honnold, pp.56-62; CISG N. º4, ¶2(10)*].
120. The touchstone of this provision lies on the substantial supply of materials by the seller. Nevertheless, quantifying this term based on a fixed percentage might be arbitrary due to the disregard of the particularities of each case. Thus, a case-by-case analysis is preferable on the basis of an overall assessment [*CISG Nº4, ¶2(8)*].
121. Additionally, despite RESPONDENT´s burden of proof regarding the inapplicability of the CISG [*Caemmerer/Schletriemm, Art. 3, ¶10; Hubber Mullis, p.44*], CLAIMANT will demonstrate that it did not supply a substantial part of the materials necessary for the manufacture/production of the GorAdCam vectors, HEK-294 cells and Vaccine, following a preferable economical criterion or, when necessary, an essentiality criterion [*Enderlein/Maskow p.35, Art.3 ¶ 3; CISG Nº4 ¶2(7)*].
122. Nevertheless, given the uncertainty surrounding the word *materials*, CLAIMANT will adopt a precautionary position using both interpretations of the term: only raw materials are included **(1)**; Raw materials are included, as well as know-how **(2)**.

1. Exclusively Raw Materials are Admitted

123. If the Tribunal holds correct this interpretation of the word, then any analysis should be based on the preferable economical criterion, where one will have to evaluate if the materials provided by the buyer ought to be higher in value in comparison to those provided by the seller, in order to exclude the CISG [*CISG Nº.4, ¶2(3)*].
124. The GorAdCam vectors and HEK-294 cells analysis can be done jointly, since in either case CLAIMANT did not supply any type of raw materials. Hence, it is logically impossible that CLAIMANT supplied a substantial part of the raw materials necessary for their production.
125. Considering that RESPONDENT No. 1 always knew that it would produce the HEK-294 cells, and could be responsible for the production of the vaccines that would posteriorly be resold at a higher price, the Tribunal´s attention should go a step further then just comparing CLAIMANTs supply value to the production costs of the vaccines.
126. Firstly, in the *Windmills Case*, a Swiss Court rejected the argument that the CISG was inapplicable, on the basis that the materials to be delivered were less valuable in proportion

to the price of the goods. Therefore, the manufacture was seen as the crucial factor. Following the same *rationale*, according to Clause 16.2 PCLA, the production of the vaccines by RESPONDENT No. 1 would imply the usage of the previously purchased HEK-294 cells for a price of 2.000.000€ (Two Million Euros), followed by an acquisition of a batch of vaccines for 4.000.000€ (Four Million Euros) [*Appendix 1 Po2,* ¶*7*]. Thus, CLAIMANT provided a raw material contribution corresponding to 50% of the vaccine acquisition cost.

127. However, RESPONDENT´s No. 1 production cost for the HEK-294 cells and cell culture medium is merely 700.000€ (Seven Hundred Thousand Euros). Hence, this value corresponds to the economical magnitude of CLAIMANT´s supply, which represents 17.5% of the acquisition costs of the vaccines.

128. Secondly, the production of the vaccines by RESPONDENT No. 1 is strictly dependent on CLAIMANT´s will [*Exh. C3, p. 17, Clause* 16.2]. Consequently, if CLAIMANT was to successfully develop a vaccine, it would be plausible that RESPONDENT No. 1's contribution solely resumed to the supply of the HEK-294 cells [*Exh. C3, p. 17, Clause* 16.1]. Moreover, CLAIMANT is a biopharmaceutical start-up facing a fearsome competition, hence one cannot simply argue that CLAIMANT would always exercise the production option due to its higher profitability, as there is a strategical element involved.

129. On the one hand, CLAIMANT has the prospect of diminished risks and effortless profits [*Exh. C3, p. 17, Clause* 16., *Appedix 1, PO2,* ¶*7*], while on the other hand there is the possibility of establishing a solid reputation in the industry, through the development and production of an important therapy, benefiting from a bold investment decision [*PO2, p. 53,* ¶*5*], which is feasible given Khorana Lifescience's financial aid [*PO2, p. 53,* ¶*3*].

130. Lastly, if RESPONDENT No. 1 was to produce a vaccine, it would bear a minimum estimated cost of 320.000.000€ (Three Hundred and Twenty Million Euros) in order to meet CLAIMANT´s minimum demand of 100 annual batches of HEK-294 cells.

131. In conclusion, given the economic significance of RESPONDENT´s No. 1 manufacture and related investment contributions, along with the possibility that CLAIMANT may not exert the production option, CLAIMANT did not deliver a substantial part of the materials necessary for the production of the vaccines. However, if that was to be true the Tribunal should decide favourably to CLAIMANT following the *In Dubio Pro Conventione* principle.

2. "Materials" are Comprised of Raw Materials and Know-How

132. If the Tribunal holds correct this interpretation, any analysis based on the economical criterion relating to know-how is inadvisable, since it cannot be established with sufficient precision the concrete value of the know-how exchanged by the parties.
133. In this sense, the Tribunal should resort to the essentiality criterion, in respect to the know-how, evaluating the nature of the materials and the particular interest of the parties in relation to the goods as a whole [*Schroeter, ¶2(1); Bernard, p.25; München case*].
134. The PCLA was a mean to reach the important goal of developing a therapy exploring the GorAdCam well documented carrier potentialities [*Exh. C2, p. 10; Exh. C3, p. 11, preamble*].
135. As the LiveScience Today publication affirms RESPONDENT No. 1 is among the few companies that has the necessary know-how to *breed* the GorAdCam from an original batch [*Exh. C2, p. 10*]. Furthermore, this know-how is indispensable in order for CLAIMANT to conduct its research, since RESPONDENT No. 1 had to deliver the initial batch of vectors, following CLAIMANT´s specifications [*Exh. C3, p. 13, Clause* 9.2; *PO2, p. 55, ¶17*]. Nonetheless, as stated in the *Tools Case,* the German Federal Supreme Court decided that there is no contribution of a "*substantial part of the materials*" if the seller manufactures the goods according to the specifications of the buyer.
136. Thus, CLAIMANT did not provide raw materials for the production of the vectors, [*supra ¶¶123-131*] and the specifications provided are not deemed to be considered a substantial part.
137. Regarding the production of HEK-294 cells, RESPONDENT No. 1 provided all of the raw materials and know-how necessary, therefore CLAIMANT did not have any contribution for their production [*Exh. C3, p. 17, Clause* 16.1; *Appendix 1, PO2, ¶7*].
138. The hypothetical conclusion that CLAIMANT supplied a substantial part of the materials necessary for the production of the vaccine, throughout its supply of know-how and raw materials, must be analysed with extreme caution.
139. Firstly, the Tribunal should consider that the vaccine was the end result of the interaction between the raw materials provided by both parties [*infra*] and three know-how components: The GorAdCam patent (a); CLAIMANT´s Acquired Knowledge (b); RESPONDENT No. 1's HEK-294 cells and growth medium patent and amplification expertise's (c).

a) The GorAdCam Patent

140. The Genesis of the vaccine lies in the *sacred* Licensed Technology granted to CLAIMANT by RESPONDENT No. 1, where in a biblical analogy it corresponds to the water turn into wine,

since, without this License CLAIMANT would be deprived of starting any research involving the GorAdCam viral vector and subsequently creating a vaccine.

141. This aspect plays an important role in the present discussion considering that the produced vaccine implies the usage of GorAdCam vectors, which themselves embody IP rights. As established in the *Cylinder Case,* these IP rights enhance the value of the goods, leading to their inclusion within the concept of materials [*CISG N°4, ¶2(15)*].

142. However, CLAIMANT cannot be the deemed as the party that supplied this specific material. It is RESPONDENT No. 1 who owns the GorAdCam vector, or any new form generated, considering the PCLA's definition of Licensed Technology [*Exh. C3, p. 11, Clause* 1.6] and Compound [*Exh. C3, p. 11, Clause* 1.2]. Additionally, the control that RESPONDENT No. 1 exerted on the patent involved important and continuous sources of revenue [*Exh. C3, p. 13-15, Clause* 9.2-9.5.1 and 16.3], hence leading to RESPONDENT No. 1's financial enrichment.

b) CLAIMANT´s Acquired Knowledge

143. The prospected vaccine would need CLAIMANT´s acquired know-how on the manipulation of the DNA gene of the virus. However, the PCLA and the granting of the License in particular, are fundamental conditions for the acquisition of such knowledge**.**

144. Besides that, CLAIMANT s know-how is *added-on top* of the GorAdCam vector, which forms the basic structure for a vaccine, such as a house needs its foundations in order not to collapse. Hence, if the vectors were not supplied according to the technical specificities needed to form a basic vaccine structure, all of CLAIMANTs work would be doomed.

c) HEK-294 Cells and Growth Medium Production and Amplification Expertise

145. The production of the vaccine would imply the use of HEK-294 cells provided by CLAIMANT. Nonetheless, their production presupposed the existence of a non-exclusive production license, and at the time of the conclusion of the contract only three of those licenses were available, one of them being owned by RESPONDENT No. 1 [*PO2, p. 53, ¶2*].

146. As stated in the *Cylinder Case*, these rights enhance the value of the goods, especially considering the scarceness of licenses, leading to their inclusion within the concept of materials [*CISG N°4, ¶2(15)*]. Moreover, RESPONDENT No. 1's know-how on the best procedures to amplify the viral vector would still be used [*PO.2, p. 55, ¶17*].

147. *In fine*, CLAIMANT´s know-how is highly dependable on three variables exclusively controlled by RESPONDENT No. 1. Additionally, given the financial importance of RESPONDENT No. 1's manufacture contribution and investment costs, along with the possibility that the outsource production may never happen, CLAIMANT´s know-how on the manipulation of

the DNA gene of the virus cannot be deemed as essential for the production of the vaccine, a conclusion in line with the *In Dubio Pro Conventione* principle.

C. The Preponderant Part of RESPONDENT No. 1's obligations Does Not Consist in the Supply of Services in the Sense of Article 3 (2) CISG

148. Article 3 (2) CISG states that "*This Convention does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services*."

149. Despite RESPONDENTS' burden of proof that the CISG is inapplicable [*Schlechtriem, p. 31*], CLAIMANT submits that the obligations of the seller do not consist in the supply of labour/services **(1)**, but even if they did, they would not constitute the preponderant part of the seller's obligations **(2)**.

1. The Know-how Transfers are Considered Part of the Obligations to Manufacture/Produce Goods

150. In CLAIMANT ´s view, these know-how transfers were necessary and subordinate to the manufacture, thus constituting a contract of sales governed by the CISG, under art. 3 (1). Therefore, they cannot be analysed in light of art. 3 (2) CISG [*Machinery Battery case; Honnold* ¶60(1), *footnote nº4*] or the contract will be considered to be governed by the CISG in virtue of art. 3(1), while simultaneously being excluded by art. 3(2) [*CISG Nº4, ¶4 (3)*].

151. However, only one know-how transfer, regarding the amplification of the HEK-294 cells, could have sufficient autonomy to be considered as an additional service besides the manufacture [*PO2, p. 55, ¶17*]. Nonetheless, the CISG would still be applicable in such case [*infra ¶153*].

2. The Know-how Transfers Do Not Constitute a Preponderant Part of the Obligations of the Seller

152. Even if the Tribunal decided that the amplification of the HEK-294 cells could have sufficient autonomy to be considered as an additional service, from the comparison between paragraph (1) and (2) of art. 3 CISG, one can conclude that the "*preponderant part of the obligations*" expression is stricter than "*substantial part*" [*Enderlein/Maskow, Art.3 note 5*]. Thus, RESPONDENT No. 1 would have to compare the value of the goods and the services rendered [*Schlechtriem pp. 31⁄32*, *Russian Case*], and prove that the services provided clearly exceed 50% of the entire economic value of the goods plus services, in order for the CISG to be inapplicable [*Magnus, Art. 3 ¶25; Schlechtriem, pp. 31⁄32*]. However, not only the additional know-how transfer does not clearly exceed 50% of the value of goods plus services, but also it would be disproportionate to exclude the application of the CISG.

153. Nevertheless, if the Tribunal disagreed with such analysis, a dangerous "*pandora box*" would open regarding the doctrine of severability of contracts [*Honnold, ¶60(2)*]. In that scenario, it would be discussed if the supply of services and the delivery of goods constituted two separate agreements. Hence, from a practical point of view, that would not jeopardise CLAIMANT´s submission, since the CISG would still be applicable to part of the agreement.

D. The Sales Agreement Has an International Character, and Was Celebrated After the Convention´s Entered into Force in Danubia

154. Pursuant to art. 1 CISG, the Convention is only applicable when the contract has an international character, being the essential criterion the place of business, *i.e,* any location at which the parties' business activities are exercised *vis-à-vis* third parties [*Manner⁄ Schmitt, pp. 17-24*]. In the present case it is undisputed that both parties have their place of business in different contracting states. [*Po1, p.52, ¶3*].
155. However, the party's choice of the Danubian law to govern the contract [*Exh. C3, p. 16, Clause* 15.2], cannot be deemed as an exclusion of the Convention [*Holdsworth, Art.1*], since it was ratified by Danubia and, therefore, is part of Danubia´s Law [*Boiler Case; Prefabricated House Case; Automobile Case*]. Thus, the personal-territorial requirement is fulfilled.
156. Additionally, as at the time of the conclusion of the contract [*Exh. C3, p. 11*] the Convention had already entered into force in Danubia [*PO1, p.52, ¶3*], therefore the temporal requirement is also fulfilled [*Art.100 (2) CISG*].

CONCLUSION ON ISSUE C

In conclusion, CLAIMANT hereby pleads before this Arbitral Tribunal that the PCLA is a "*contract of sales of goods*" governed by the CISG, according to arts. 1, 3 (1), 3 (2) and 100 (2).

ISSUE D: RESPONDENT NO. 1 HAS BREACHED ITS CONTRACTUAL OBLIGATIONS PURSUANT TO ARTICLE 42 CISG

157. The Arbitral Tribunal should find that the third-party claim leads to a breach of RESPONDENT's contractual obligations in light of art. 42 CISG **(A)**, as does the RESPONDENT's awareness of said claim prior to the termination of the contract, with no territorial limitations **(B)**, as opposed to the unawareness of CLAIMANT **(C)**, and reinforced by its respect for the time related limitations **(D)**.

A. The Third-party's Claim Constitutes a Hindrance to CLAIMANT's Peaceful Use of the Goods

158. As CLAIMANT has previously demonstrated, the relevant applicable law to the present case is the CISG. Therefore, in order to establish a breach of RESPONDENT No. 1's obligations in the present case, the relevant legal instrument will be art. 42 CISG that refers to IP. This is a matter in which the World Intellectual Property Organisation ("WIPO") includes, in a widely accepted definition, patents as rights protected by law [*Beline, p. 8, WIPO website*].

159. CLAIMANT is now pleading before this Tribunal in the sequence of its awareness of an IP right of Ross P., regarding the goods that RESPONDENT No. 1 has delivered to CLAIMANT, which has led to an ongoing dispute, that conflicts with CLAIMANT's use of the goods [*Records, p. 19*]. This dispute constitutes an IP third-party claim, even if the third-party has no right regarding the goods, or even if a legal action/lawsuit has not been initiated – the mere existence of a dispute is enough to hinder the buyer's quiet possession of the goods [*Beline, p. 8/9*].

160. Considering that the relevant legal instrument applicable to this case, art. 42 CISG, refers that a seller must deliver goods which are free from any right or claim of a third-party based on intellectual property, CLAIMANT will demonstrate that the Ross P.'s claim is, *in casu*, a breach of RESPONDENT's contractual obligations based on these provisions.

161. It is worth noting that CLAIMANT understands the importance of the distinction between claims with merit and frivolous claims for the purpose of the seller's liability. However, this distinction, which is meant to safeguard the seller's ability to foresee the appearance of third-party claims [*VanDuzer, p. 5*], is not relevant in this case, considering that RESPONDENT was already aware of the claim, as CLAIMANT will prove.

162. Furthermore, it is the RESPONDENT's responsibility to prove the claim frivolous and defeat it as such, should that be the case [*VanDuzer, p. 5*]. This is due to the fact that it is the seller who better knows the goods and hence it is part of the seller's sphere of risk to deal with the third party's rights and claims [*Kröll, p. 650*].

163. This *rationale* was upheld by a decision of the Austrian Supreme Court, ruling that "*If a third party unfoundedly asserts an intellectual property right, the seller will nevertheless be liable under the conditions of Art. 42 CISG*", thus widening the application of art. 42. The court based this reasoning on the assumption that it is in the seller's sphere of risk having to deal with the third party's claim in such cases [*supra, ¶162*; *OGH Case No. 10 Ob 122/05x*].

164. In any case, the Tribunal should find that the mere existence of the claim, along with the uncertainties that RESPONDENT No. 1 has failed to assertively address and cannot dispel, hindrances the peaceful use of the goods [*Schlechtriem, p. 37*]. This is particularly relevant considering that until the claim is resolved, CLAIMANT faces a real possibility of litigation.

1. CLAIMANT has Reasonable Grounds to Fear a Future Lawsuit from Ross Pharmaceuticals in Defence of Their IP Rights

165. Ross P. has been conducting research into MERS since 2015 and it has focused all its resources on it since 2018 [PO2, p. 54, 14]. This has led to its ongoing focus on the development of a COVID-19 vaccine as well. As CLAIMANT already emphasised in a communication to RESPONDENT No. 1, Ross P. is known for its aggressiveness in defending IP rights [*Records, p. 19*], which leads to a founded fear of litigation on CLAIMANT's side, even if RESPONDENT No. 1 persists in belittling the situation.

166. This fear is aggravated by Ross P.'s intention of being informed of the present proceedings, despite not being interested in joining them [*Records, p. 37*], which gives CLAIMANT a serious concern regarding future actions [*Beline, p. 8/9; Hannold, p. 289*].

167. Furthermore, not only does a future dispute constitute by itself an unaffordable possibility for CLAIMANT, but it also might undermine the R&D, as well as commercialization, of a future vaccine. This is a prohibitive scenario considering that the small structure of CLAIMANT's company does not allow it to devote resources into defending IP-rights claims or to face uncertainty concerning unrestricted access or use of the goods [*Records, p. 8, ¶28*].

168. Considering this, it is unreasonable for CLAIMANT to bear the risk of litigation and being liable to third-parties [*Secretariat Commentary, p. 35; Schwenzer, p. 685; Honnold, p. 386*].

169. These uncertainties and potential risks, that might certainly affect CLAIMANT's business and prevent him from using the goods, demand clarification of the situation from RESPONDENT No. 1 and allow for a claim of breach of contract even before an action of litigation is initiated by Ross P. [*Kröll, p. 650*].

170. Lastly, CLAIMANT points out that RESPONDENT No. 1's actions are not only risking CLAIMANT's business, but also the possibility to successfully develop a crucial vaccine.

171. Overall, CLAIMANT has proven that the mere claim from Ross P. leads to a breach of RESPONDENT No. 1's contractual obligations.

B. RESPONDENT No. 1's Knowledge of the Ross Pharmaceutical's Claim was Prior to the Signing of the Purchase, Collaboration and License Agreement

172. RESPONDENTS have been trying to paint a mendacious CLAIMANT that does not exist. On the contrary, what does exist, is the certainty that RESPONDENT No. 1 acted in a mendacious way, having knowledge of the third-party claim prior to the termination of the negotiations.
173. Art. 42 CISG, also refers, in order to envisage a limitation of the seller's liability, that the seller is liable to the buyer only if at the time of the conclusion of the contract the seller knew or could not have been unaware of the existence of the third-party claim [*Secretariat's Commentary, p. 58*]. Consequently, CLAIMANT will demonstrate that RESPONDENT No. 1 was not only aware of such claim, but also it intentionally hid that information from CLAIMANT.
174. Firstly, CLAIMANT now is aware that there was an ongoing dispute regarding the terms of the Ross Agreement that would imply the existence of a third-party claim, which became public in 14 December 2018 – 17 days before the signing of the PCLA [*Records, p. 18*]. This is an undeniable proof that RESPONDENT No. 1 not only could not have been unaware but also actively knew that the goods were targeted by a third-party claim.
175. Secondly, after having proven the RESPONDENT No. 1's knowledge, CLAIMANT will demonstrate how RESPONDENT No. 1 actively tried to hide such information, consequently breaching its contractual obligations in the process.
176. Despite the now unquestionable fact that RESPONDENT was aware of Ross P.'s claim, the Representations, Warranties and Covenants section of the contract suggests otherwise. Not only did RESPONDENT No. 1 deny its knowledge of any third-party's IP rights that would have been infringed by the Research Plan, it also denied any knowledge of claims, judgements or settlements pending with respect to the matters of the contract [*Exh. C3, p. 15-16, clauses 11.1-11.1.4, 15.1*]. This reveals a conscientious omission from RESPONDENT No. 1 and certainly implies a violation of CLAIMANT's trust and of the Agreement.
177. However, even if RESPONDENT No. 1 would not have been aware of the claim, there is a due diligence duty to do so, as RESPONDENT No. 1 is obliged at least to inform himself about the possible industrial or other IP rights of third persons with regard to the goods sold. Considering the seller's superior knowledge on the components of the goods and, in the present case, of the previous licences [*Exh. R3, p. 32-34*] that target the goods, this enables it to foresee possible IP rights problems [*supra, ¶162*; *Schelechtriem, 284*].
178. Thus, considering that RESPONDENT No. 1 knew where the goods are intended to be used, i.e. "*worldwide*" [*infra ¶183, 185, 186*], then it will be expected to have taken measures to inquire about the existence of third-party IP rights [*Beline, p. 10-11*].

179. Hence, the first limitation of the RESPONDENT No. 1's liability set in art. 42 (1) CISG does not apply, as at the time of the conclusion of the contract, RESPONDENT No. 1 knew and could not have been unaware of the existence of the third-party claim.

1. There is No Territorial Limitation to RESPONDENT No. 1's Awareness of Third-party Claims

180. As it will be shown next, RESPONDENT No. 1 does not have the possibility to rely on a territorial limitation of its liability, considering that it itself has agreed to a worldwide extension of such.

181. The second limitation of the seller's liability is achieved by specifying which IP laws are relevant to determine whether the seller has breached its obligation to supply goods free from IP rights or claims of a third party - where the goods will be used, if contemplated at time of contracting, or where the buyer has its place of business [*Art. 42 (1) (a) CISG; Secretariat Commentary, p. 36*].

182. This geographic limitation on the general requirement of art. 42 is intended to assure that the seller is in a position to ascertain whether any third party has IP rights or claims pursuant to the laws in respect of the goods he proposes to sell [*Secretariat Commentary, p. 36*]. This is an understandable rule, meant to allow the seller to conduct research regarding IP rights in the laws of the States in question. However, as previously demonstrated, RESPONDENT No. 1 was already aware of a third-party claim, which diminishes, if not nullifies, the need for such a limitation of its liability.

183. CLAIMANT and RESPONDENT No. 1, under the Clause 5.2 PCLA, with respect to the Licensed Technology, have agreed that RESPONDENT No. 1 granted to CLAIMANT a worldwide, perpetual, non-exclusive license. This implies, and gives CLAIMANT a legitimate expectation, that the goods ought to be free of any rights or claims of a third-party wherever it intends to use them and that such use will not be obstructed by third-parties, which demands protection under all the states it determines.

184. Although it is recognized that it is reasonable to wonder whether there is a maximum limit for the number of laws in question basing solely on the wording of the art. 42 CISG, limiting the scope of such provision could result in allowing the seller to choose which laws to inquire about the existence of IP rights or claims in relation to the goods [*Beline, p. 13/14*].

185. Furthermore, even if the Tribunal understands that the wording of the CISG does not intend for a broader interpretation of the scope of art. 42 (1) (a), according to art. 6 CISG, the parties may form or vary the effect of any of its provisions. Considering that the parties have

agreed upon the term "*worldwide*", the parties' autonomy principle allows for this derogation and, more importantly, for the CLAIMANT's expectation of the respect for an *inter pars* established provision [*Honnold, p. 48*].

186. Beyond this, the mere nature of the goods in question requests for a widening of the scope of the article. Considering the carrier purpose of the GorAdCam viral vector, it embodies the basic structure of a vaccine [*Records, p. 4 ¶3*]. As such, and considering that it is only reasonable that a vaccine is to be used "*worldwide*", the viral vectors must enjoy the same understanding and consequent protection.
187. Furthermore, a derogation of the limitation of liability only respects the principle of *volenti non fit iniuria*, thus not allowing the RESPONDENT No. 1 to escape of a provision that it agreed upon.
188. Thus, CLAIMANT established that the limitations of the RESPONDENT No. 1's liability set in art. 42 (1) CISG do not apply to the present case, proving that RESPONDENT No. 1 failed to deliver goods which are free from any right or claim of a third party based on IP which consubstantiates a breach of contract.

C. CLAIMANT Was Not Aware of the Third-party Claim Nor Had He a Duty to Do So

189. CLAIMANT will now demonstrate that its unawareness of the third-party claim, besides being justified, should not be deemed as a limitation to the RESPONDENT No. 1's liability.
190. Art. 42 (2) (a) CISG determines that the obligation of the seller does not extend to cases where at the time of the conclusion of the contract the buyer knew or could not have been unaware of the right or claim.
191. Regarding CLAIMANT's awareness of the third-party claim, it is firstly important to comprehend that CLAIMANT's obligations are not comparable to the RESPONDENTS'. Should that be the case, liability of the seller under art. 42 CISG would be rare [*VanDuzer, p.10*]. Instead, it has been argued that the buyer, rather than a duty to investigate, has a duty not to ignore IP rights that are well known or in relation to which they have "*serious reasons to believe that a right may exist*" [*Rauda, Etier, p. 55/56; Van Duzer, p. 10*].
192. As CLAIMANT will prove in the section bellow, none of those scenarios were true and CLAIMANT had absolutely no reasons to suspect, or ignore, what is now proven to be a third-party IP claim.

193. Furthermore, regarding CLAIMANT's alleged awareness of the News Article that reported the dispute between RESPONDENT No. 1 and Ross P., CLAIMANT's CEO had to understandably terminate its subscription to the Biopharma Science journal, in January of 2018, in order to cut expenses [*PO2, p. 54, ¶8*], given the small size and structure of CLAIMANT, which prevented it from becoming aware of Ross P.'s claim.
194. At the time of the publication of the Article, CLAIMANT already had access to the previous PCLA templates which established a Good Faith Clause and the Representations, Warranties and Covenants section [*Ex. R3, p. 34, clause 15.1; Ex. R2, pp. 30-31, ¶7/8*].
195. Hence, even if the Tribunal finds that CLAIMANT's due diligence should have led to its awareness of the discussions, CLAIMANT's prior knowledge of the template would have dispelled those doubts. This is based on CLAIMANT's understandable trust in RESPONDENT No. 1, a much bigger company, with experience in this sort of contracts, regarding its denial of awareness of a third-party claim based on the Good Faith Clause of the contract. CLAIMANT had no reason to doubt the RESPONDENT No. 1's good faith, a decision that is now proven to be naïve.

D. CLAIMANT Has Respected the Timely Notice Requirement of Article 43 CISG

196. In order to finally prove the full applicability of art. 42 CISG and the breach of contract that RESPONDENT No. 1 has incurred in, CLAIMANT's submission is that it has respected the time related limitations to the RESPONDENT No. 1's liability.
197. The relevant legal instrument applicable to this case sets a final requirement, temporal in nature. According to art. 43 CISG, the buyer loses the right to rely on the provisions of art. 42 CISG if it does not give notice to the seller specifying the nature of the right or claim of the third party within a reasonable time after he has become aware or ought to have become aware of the right or claim.
198. The definition of a reasonable time under art. 39 CISG is interpreted as a short period, and depends upon the circumstances of each case [*Enderlein, Maskow, p. 159*]. The same interpretation can be applied to art. 43 CISG. The "*noble month approach*" defines one month as the reasonable time period for the buyer's notice pursuant to art. 39 CISG [*Schwenzer, p. 109; Kröll, p. 666*], and thus can legitimately be applied to this case. With these terms in mind, the timely notice requirement was respected.
199. Firstly, one must take into account that the clock starts running when the buyer has become aware of the claim. The expression "*ought to have become aware*" does not require the buyer to

make any inquires, but rather it suggests that the buyer cannot actively ignore those matters in third countries [*supra, ¶191*; *Zeller, p. 13-14*].

200. As such, CLAIMANT became aware of the claim on the 1st of May 2020 through an article of the Biopharma Science journal [*Exh. C4, p. 18*]. Urgently in the following day, that awareness was made known to RESPONDENT No. 1 through email, along with a request for clarification, given CLAIMANT's concerns regarding such news [*Records, p. 19*]. RESPONDENT No. 1 gave notice of such email two days later, trying to dispel such concerns [*Records, p. 20*].

201. Thus, CLAIMANT made its awareness known to RESPONDENT No. 1 in only a one-day period. Furthermore, RESPONDENT No. 1's quick reaction in trying to dispel CLAIMANT's concerns shows that RESPONDENT No. 1 was already aware of this situation. As such, RESPONDENT No. 1's statement of having done a confirmation of the situation "*once more over the weekend*" with both RESPONDENT No. 2 and Roctis AG is undeniable proof that its awareness of the situation was prior to CLAIMANT's notice of such. Thus, not only was the timely notice requirement respected but also overruled by RESPONDENT No. 1.

CONCLUSION ON ISSUE D

In conclusion, CLAIMANT hereby asks this Arbitral Tribunal to find that RESPONDENT No. 1 has breached its contractual obligations to deliver conforming goods pursuant to art. 42 of the CISG by providing the GorAdCam viral vectors batch, subject to a third-party IP claim.

REQUEST FOR RELIEF

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

1. The joinder of Ross Pharmaceuticals should be denied;
2. The examination of witnesses and experts should be conducted remotely;
3. The CISG is applicable to the Purchase, Collaboration and Licensing Agreement;
4. RESPONDENT No. 1 breached its contractual obligations by providing CLAIMANT with the GorAdCam vectors not free from claims of third parties.

CLAIMANT reserves the right to amend its prayer for relief as may be required**.**

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CERTIFICATE

We hereby certify that this Memorandum was written only by the persons whose names are listed below and who signed this certificate:

Lisbon, 10 December 2020,

ANA SOUSA | ANDREAS MAXIMILIAN | CATARINA DE PEDRO | MARTIM MIMOSO

Appendix II

TWENTY-EIGHT ANNUAL

WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT

VIENNA, 28TH JANUARY 2020

NOVA UNIVERSITY OF LISBON, SCHOOL OF LAW

MEMORANDUM FOR RESPONDENTS

On behalf of:

CamVir Ltd

RESPONDENT NO 1

112 Rue L. Pasteur, Oceanside

Equatoriana

VectorVir Ltd

RESPONDENT NO 2

67 Wallace Rowe Drive, Oceanside

Equatoriana

Against:

RespiVac pls

CLAIMANT

Rue Whittle 9, Capital City

Mediterraneo

COUNSEL FOR RESPONDENTS

ANA SOUSA • ANDREAS MAXIMILIAN • CATARINA DE PEDRO • MARTIM MIMOSO

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TABLE OF ABBREVIATIONS

¶/¶¶	paragraph/paragraphs
AA	Arbitration Agreement
ANofA	Answer to the Notice of Arbitration
Art./Arts.	Article/Articles
CISG	United Nations Convention on Contracts for the International Sale of Goods
DAL	Danubian Arbitration Law
DCL	Danubian Contract Law
ed.	Edition
et al.	Et alii (and others)
Exh. C	CLAIMANT's Exhibit
Exh. R	RESPONDENT's Exhibit
GL	Governing Law
i.e.	*id est* (that is)
in casu	in the case at hand
Infra	Below
IP	Intellectual Property
Ltd.	Limited
Mr. / Ms.	Mister / Miss
No.	Number

NofA	Notice of Arbitration
NYC	Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York 1958)
p. / pp.	page / pages
PCLA	Purchase, Collaboration and License Agreement
Ross P.	Ross Pharmaceuticals
Ross Agreement	Collaboration and License Agreement between Ross P. and RESPONDENT No. 2
SCAI	Swiss Chamber of Arbitration Institution
Supra	See above
Tribunal	Arbitral Tribunal
UNCITRAL	United Nations Commission on International Trade Law
UML	UNCITRAL Model Law
UNIDROIT	Principles UNIDROIT Principles of International Commercial Contracts (2016)
UNIDROIT Note	Principles UNIDROIT Principles of International Commercial Contracts (2016) - Annotatedtext
US	United States
v.	*versus* (against)

STATEMENT OF FACTS

CamVir Ltd ("**RESPONDENT No. 1**"), located in Equatoriana, is the Contract Manufacturing Organisation of the Roctis Group for the production of base materials for various vaccines. VectorVir Ltd ("**RESPONDENT No. 2**"), is an Equatoriana based company, owned by Roctis Group, dedicated to the development and commercialisation of several patents, including the promising GorAdCam viral vector.

RespiVac plc ("**CLAIMANT**"), is a biopharmaceutical company owned by Khorana Lifescience ("Khorana"), based in Mediterraneo, with an established reputation in the development of vaccines for respiratory diseases.

2014	Ross Pharmaceuticals ("Ross P.") tried and failed to acquire RESPONDENT No. 2 and its patents.
15 June 2014	RESPONDENT No. 2 entered a Collaboration and License Agreement with Ross P. ("Ross Agreement") for the exclusive use of the GorAdCam viral vector, to develop and produce vaccines for malaria and related infectious diseases.
Summer 2018	After abandoning the malaria vaccine research project, Ross P. proposed the purchase of RESPONDENT No. 2, while trying to use the issue of the scope of the Ross Agreement as a leverage.
25 August 2018	Roctis AG acquired RESPONDENT No. 2.
10 September 2018	RESPONDENT No. 2 entered an exclusive License Agreement with RESPONDENT No. 1, in the scope of which it has permission for the production, sale and sublicensing of the GorAdCam viral vector.
6 December 2018	After taking over the negotiations on behalf of RESPONDENT No. 1, Mr. Doherty was contacted by Ms. Bordet, representing Ross P., where she tried to impose their interpretation of the scope of the Ross Agreement, while making a subsidiary proposal to obtain a no-royalty bearing license, given the fragile nature of such view.
14 December 2018	The dispute regarding the scope of the Ross Agreement was first mentioned on the popular Biopharma Science journal.

1 January 2019	RESPONDENT No. 1 signed a Purchase Collaboration and License Agreement ("PCLA"), for the non-exclusive use of the GorAdCam for respiratory diseases, using as a template the Ross Agreement.
January 2019	In a meeting with Ms. Bordet, Mr. Doherty made his view clear on the terms of the Ross Agreement, while expressing the RESPONDENT No. 1's willingness to conclude a new non-exclusive license agreement with Ross P..
13 January 2020	Mr. Milstein, COO of Roctis AG, disagreed and rejected the no-royalty bearing license proposal.
April 2020	CLAIMANT successfully completed the Phase-I-trial of a vaccine candidate against COVID-19.
1 May 2020	Following a discussion regarding a closer involvement of Khorana in the production of a vaccine, the CFO of Khorana sent the Biopharma Science Journal article to CLAIMANT's COO.
2 May 2020	CLAIMANT's COO contacted RESPONDENT No. 2 regarding the published news article.
4 May 2020	RESPONDENT No. 2's CEO reassured CLAIMANT that Ross P. had never received an exclusive license for the use of the GorAdCam viral vector for respiratory diseases.
15 July 2020	CLAIMANT submitted its Notice of Arbitration ("NofA").
14 August 2020	RESPONDENTs filled their Answer to the NofA ("ANofA"), asking for the joinder of Ross P..
4 September 2020	TheArbitral Tribunal ("Tribunal") inquiredthepartiesregardingthe possibility of holding the 2nd hearing in a remote setting.
Mid-December 2020	Scheduled time for the start of CLAIMANT's Phase-III-trial for the COVID-19 vaccine.

SUMMARY OF ARGUMENTS

If the value of a contract was the cost of keeping your word, the PCLA would be worthless – CLAIMANT overextends its argumentation as a strategic manoeuvre to deviate from its compromises.

Issue A: The Tribunal should order the joinder of Ross P. as a formal party of the proceedings, since it has jurisdiction and all the involved companies have consented. Moreover, all the circumstances of the case are favourable to the joinder: Ross P.'s opposition has futile motivations; both parties have legitimate interests on the joinder; the joinder is the best option regarding procedural efficiency; it will not raise confidentiality issues; and it will not create basis for the set aside or the non-enforcement of the award.

Issue B: RESPONDENTS submit that the Tribunal should conduct the 2nd hearing physically. Firstly, both parties agreed on in-person hearings, excluding any other format, and, as the overriding rule, the AA must be respected. Secondly, a remote hearing would not be the best decisiongivenitsinadequacytothecircumstances, theviolationofdueprocessprincipleand theerroneousoutweighofefficiencyoverproceduralfairnessthatsuchdecisionwouldentail. Lastly, a virtual hearing would endanger the integrity of the award, since that not only the arbitral procedure would not be in accordance with parties' agreement and the Danubian Law, but also parties' rights to present their case and be treated equally would be violated.

Issue C: The CISG is not applicable to the PCLA. The Tribunal should not undervalue the governing law clause, as it represents the will of the parties. Furthermore, such Clause determines that the agreement shall be *governed exclusively by the Laws of Danubia,* excluding the CISG's applicability to the PCLA. In any case, even if such clause did not exist, CLAIMANT delivered a substantial part of the materials necessary for the manufacture/production of goods. Lastly, RESPONDENT's preponderant part of the obligations consisted in the supply of labour/additional services, thus rendering the CISGinapplicable.

Issue D: RESPONDENTS submit that there is no breach of contract pursuant to art. 42 CISG when delivering the batches of GodAdCam vectors. There is not a claim and, should there be one, its frivolous nature is not sufficient to render the goods non-conforming. Furthermore, CLAIMANT bears the burden of proof of RESPONDENT's liability, which it cannot do since the quiet possession of the goods is assured. Moreover, contrarily to CLAIMANT, RESPONDENT No.1 was not - and had no obligation to be - aware of said claim. Finally, CLAIMANT, when it ought to have become aware of said claim, failed to fulfil the notice requirement. Hence, RESPONDENTS are not liable under art. 42 CISG.

ARGUMENTS

ISSUE A – ROSS P. SHOULD BE JOINED TO THE ARBITRAL PROCEEDINGS

1. The Tribunal should allow the joinder of Ross P. as a formal party of the proceedings since it has jurisdiction over the conflict between the RESPONDENTS and Ross P. **(A)** and the circumstances of the case are favorable to the joinder **(B)**. Ross P.'s objection should not be deemed as a relevant factor **(1)** and both CLAIMANT and RESPONDENTS have legitimate interests on the joinder **(2)**. Furthermore, the joinder would not only be beneficial to procedural efficiency **(3)**, but also it would not cause problems regarding confidentiality **(4)** and it would not lead to the set aside or the non-enforcement of the award **(5)**.

A. The Tribunal Has Jurisdiction Over the Conflict Between the RESPONDENTS and Ross P.

2. CLAIMANT argues that Ross P. should not be joined to this arbitration and that the Tribunal has no jurisdiction over it, because the company has not consented to arbitrate [*MfC, pp. 4-6*] - however, this is not true. Not only Ross P. and CLAIMANT have consented to the joinder **(1)**, but also it is essential that Ross P. is joined as a formal party **(2)**.

1. Both Ross P. and Claimant Have Consented to the Joinder

3. Arbitration is a consensual dispute resolution mechanism [*Born, p. 250; Voser, p. 350; Gilbert, p. 455*] and, in the joinder, the consent of the parties plays an important role [*Waincymer, p. 497, Choi, p. 33*]. However, suchconsent can be, as oftenis, implied[*Meier, p. 2507; Choi, p. 33/34; Waincymer, p. 507; Girsberger/Voser, p. 140; Redfern/Hunter, p. 91*]. In somecases, such as the present one, the rules may not require the parties' agreement for the joinder, since the consent was given when accepting the rules of the arbitral institution.

4. Art. 4.2 SCAI Rules establishes three requirements for the joinder: a request by one of the parties (**i**), the obligation of the Tribunal to consult with all the parties, including the third-person (**ii**), and the obligation to consider all the relevant circumstances of the case (**iii**).

5. The fact that there is no reference to the consent of the parties/third-person, is not a random decision. The *rationale* was to give the Tribunal a high degree of flexibility [*Meier, p. 2517*] and promote procedural efficiency [*Schramm, p. 483*].

6. Thus, parties' choice of this institution, with such a broad provision, should not be ignored.

a) The Similarities Between the Contracts Allow for the Joinder

7. Both the PCLA and the Ross Agreement have twin dispute resolution clauses, and provide for an arbitration under the SCAI Rules, with three arbitrators, all with the same

qualifications, the same seat, the same place for the hearings and the same language [*Exh. C3, p. 16, (Clause 14.1); Exh. R3, pp. 33/34, (Clause 14.1)*]. These circumstances allow the joinder of even an unwilling party [*Schramm, p. 497; Secomb, p. 336*] and are considered sufficient to establish an implied consent [*Born, p. 2583*].

8. In light of this, it is crystal clear that by choosing these rules, the parties have incorporated thejoinderprovisionsintotheirarbitrationagreements[*Roos, p. 415*] andaredeemedtohave impliedly consented to the joinder under those terms [*Smith, p. 176; Waincymer, p. 562*]. Moreover, both contracts refer to the GorAdCam, and since Ross P. is claiming an exclusive patent over it, the decision of the present case will have a direct impact on both contracts.

b) None of the Involved Parties Have Opted Out of Article 4.2 SCAI Rules

9. Neither Ross P. nor CLAIMANT have contested the choice of the SCAI Rules. During the negotiations, Ross P. hadnoobjections[*PO2, p. 57,¶32*], and CLAIMANTsuggestedthe SCAI within the institutions that it would be willing to arbitrate under [*PO2, p. 57, ¶31*].

10. Moreover, art. 4.2 SCAI Rules is not mandatory, and the parties can opt out of this provision when drafting the Arbitration Agreement ("AA"). Since the parties did not opt out, they are deemed to have consented in advance to the possible joinder and the associated consequences [*Schramm, p. 484; Kroll, p. 390*]. Thus, it is clear that the parties consented to any possible joinder that fulfils its requirements.

c) The SCAI Rules Allow Forced Joinders

11. Even if the parties do not consent, it is well established that art. 4.2 SCAI Rules does not require the agreement of all parties involved for the joinder to occur [*Schramm, p. 491; Carrión, p. 497; Meier, p. 2517; Roos, p. 424; Hanotiau, p. 333; Voser, p. 397; Smith, p. 179; Waincymer, p. 566*]. Its wording may not be an incentive to disregard the consent of the parties, but if the circumstancesofthecasearefavourable, thethirdpersonmaybejoinedevenwhenobjecting [*Voser, p. 396; Secomb, p. 336*].

12. CLAIMANT resorts to the *Astro Case* to argue that a forced joinder would be a *major derogation from party autonomy* [*MfC, p. 6, ¶ 29*], whilst conveniently omitting the fact that the Tribunal was analysing a joinder under the SIAC Rules. The Tribunal, when mentioning the SCAI Rules, the applicable ones *in casu*, argued the exact opposite of CLAIMANT, since it expressly stated that: *A joinder under (...) the Swiss Rules has, rather aptly, been termed as a "forced joinder", since a joinder under these rules is possible notwithstanding the objections of a party to the arbitration (...) If there is consent given in any form, either under the arbitration agreement or through subscription to a set of institutional rules which unambiguously permits forced joinders, that would suffice to negative any subsequent*

allegation that there was no agreement to arbitrate with the joined party. Therefore, by agreeing to arbitrate under rules that unambiguously permit forced joinders, the parties and Ross P. have consented to thepossibility of arbitrating with each other, since *theparties shouldbeaware of the consequences of choosing specific arbitration rulesandnational laws* [*Roos, p. 417*].

13. If even in cases where the parties have agreed to the same institutional rules, both contracts deal with the same subject and the decision will have a direct impact on all parties, not granting the joinder, even though the chosen rules blatantly allow so, would be creating an absurd scenario in which the joinder would only be conceded when it pleases all parties.

14. Therefore, since Ross P. consented to art. 4.2 SCAI Rules regarding conflicts involving its license, and since CLAIMANT also consented to joinders under the same rules regarding the same viral vector, both of them have impliedly consented to the present joinder.

2. Ross P. Must be Joined as a Formal Party to the Proceedings

15. CLAIMANT argued that Ross P. couldnotbejoined as a *full party* ofthe proceedings [*MfC, pp. 4-6*]. However, the Tribunal should decide otherwise.

16. Both CLAIMANT and Ross P. have consented to the joinder and the Tribunal has jurisdiction over Ross P. [*supra* ¶¶*2-14*]. Moreover, even though art. 4.2 SCAI Rules does not specify which role the third person will assume after the joinder [*Habegger, p. 278; Schramm, pp. 492/493*], Ross P. must be joined as a formal party.

17. CLAIMANT's entireargumentisbasedontheallegationsmadeby Ross P. regardingthescope of the Ross Agreement [*NofA., p. 8, ¶¶ 26/27*]. Even though those allegations have no foundation, CLAIMANT insists on declaring a breach of contract.

18. Therefore, it is imperious that Ross P. is joined as a formal party, which is the best manner tocreateafullybindingandenforceabledecisionagainstit[*Schramm, p. 492*], preventingthe companyfromcontinuingwiththeoutrageousinsinuations,whilealsoreassuring CLAIMANT that there is no risk of any future lawsuits.

B. The Circumstances of the Case Are in Favour of the Joinder

19. Even if art. 4.2 SCAI Rules is narrowly interpreted, the joinder of an objecting third-person is allowed when - in view of all the circumstances - the balance of interest between the party requesting the joinder and the opposing party is clearly in favour of the first one [*Voser, p. 396*]. This is undoubtedly the case: all the circumstances are favourable to the joinder.

20. Although art. 4.2 SCAIRulesdoes notspecify those circumstances, the doctrine enumerates the following: the third-person's position; parties' legitimate interests; the likelihood of

separate proceedings with the third-person if the Tribunal refuses the joinder; procedural efficiency and confidentiality [*Schramm, pp. 499/500; Meier, p. 2508; Waincymer, p. 575; Koller/Oberhammer, p. 76*].

21. In light of this, RESPONDENTS submit that Ross P.'s opposition should not be a relevant factor **(1)**; that both parties have legitimate interests on the joinder of Ross P. **(2)**; and that the joinder will be the best option regarding procedural efficiency **(3)**, while also not raising issues related to confidentiality **(4)** or the set aside/non-enforcement of the award **(5)**.

1. Ross P.'s Opposition is Not a Relevant Factor

22. If the third-person is unwilling to participate, the Tribunal must analyse whether it has jurisdiction over it and whether the appointment of the Tribunal without the third-person's participation creates a risk regarding the enforceability or the set aside of the award [*Schramm, pp. 499/500*].

a) The Joinder Mets the Necessary Requirements

23. Firstly, the Tribunal has jurisdiction over Ross P. [*supra ¶¶2-14*]. Secondly, the Tribunal was appointed by the arbitral institution and its members fulfil the *good knowledge on the field of intellectual property and the developments of vaccines* requirement stipulated by both contracts [*Exh. C3, p. 16, (clause 14.1); Exh. R3, pp. 33/34, (clause 14.1)*].

24. Furthermore, when the Tribunal is appointed by the institution, there is no violation of the parties' equality principle, since none of them influence its composition and thus, the enforceability of the award is secured [*Schramm, p. 498; Born, p. 2568; Roos, p. 426/427*].

25. For these reasons, CLAIMANT's argument that the joinder would lead to a challenge of the Tribunal's composition becomes baseless [*MfC, p. 10, ¶40*]. Not only has the Ross Agreement stipulated that the institution would appoint the arbitrators, but it also equally established the same requirements regarding the arbitrator's qualifications, which were all met. Moreover, none of the arbitrators have any connections with Ross P. [*PO2, p. 54, ¶15*], which indicates that there is no possible conflict of interest to be raised in the present case.

b) The Motives for Ross P.'s Objections Are Futile

26. Ross P. objects to the present joinder merely because it does not want to be bound by a potential future award that might deviate from its interpretation of the Ross Agreement.

27. Ross P. is known for vigorously enforcing its IP rights against potential offenders [*Records, p. 19, ¶3; Exh. C7, p. 21, ¶7; PO2, p. 54, ¶15*] and has an entire business unit dedicated just to locate them [*Exh. C7, p. 21, ¶7*]. However, so far it has done nothing against CLAIMANT. There is also no notice of Ross P. litigating against any of the other two companies that

receivedsimilarnon-exclusivelicenses,sinceneitherofthemclaimedforabreachofcontract [*PO2, p. 55,¶18*]. Hence, it isreasonabletoassumethat Ross P. alreadyhadknowledgeabout the non-exclusive licenses granted by RESPONDENTs and has opted do to nothing.

28. This controversial behaviour is, in fact, proof of Ross P's. knowledge of the narrow scope of its contract - otherwise, thecompanywould betargeting its competitors, as itusuallydoes. Therewithal, Khorana, the company that acquired CLAIMANT, is a direct competitor of Ross P.[*PO2, p. 54,¶13*], and CLAIMANT's researchisonamoreadvancedstage[*PO2, p. 55,¶16*].

29. Forallof theabovereasons, Ross P's. objectionmust beseen as a strategicmanoeuvre [*infra ¶177*] to get a non-exclusive license [*Exh. R4, p. 35, ¶4*], and therefore its opposition must not prevent the joinder.

2. Both CLAIMANT and RESPONDENTs Have Legitimate Interests on the Joinder of Ross P.

30. When analysing a possible joinder, the Tribunal must consider whether the original parties have legitimate interests regarding the third-person'sparticipation.

a) RESPONDENTs Have a Legitimate Interest on the Joinder

31. In relation to RESPONDENTs, the analysis of the legitimate interest includes assessing if the outcome of the arbitration would affect rights and obligations between the requesting party andthethird-person, or if thereareany close linksbetweenthesubject-matterandanyclaims by or against Ross P. [*Schramm, p. 500*].

32. *In casu*, the outcome of the arbitration will have a direct impact on the rights and obligations between RESPONDENT No. 2 and Ross P., since the future award will affect the ongoing discussions between the two companies. This is upheld by Ross P.'s refusal to participate in the proceedings, despite wanting to be informed about their progress [*Records, p. 46, ¶4*].

33. Also, the subject-matter of this arbitration is completely linked to the alleged claims that Ross P. raised against RESPONDENT No. 2, since the Tribunal will decide if those claims are frivolous or not [*infra ¶179*].

b) CLAIMANT Has a Legitimate Interest in the Joinder

34. Taking into consideration that a binding decision is the best option to protect the company from any lawsuits that could be started by Ross P. - CLAIMANT's main concern [*NofA., p. 8, ¶28*] - one has to assume that the joinder will also be beneficial to CLAIMANT.

35. Given the present circumstances, objecting the joinder would only make sense if CLAIMANT had its interests focused on another aspect of the contract, such as the renegotiation of the purchaseobligation, motivatedbyitsacquisitionby Khorana. That, however, wouldseemto

be a strategy to circumvent Clause 15.3 PCLA, which demands for a consensual and written modificationofitsclausesand- forthatreason- suchhypothesiswill notevenbeconsidered.

36. In conclusion, the joinder is based on legitimate interests of CLAIMANT and RESPONDENTS, being the best alternative to protect both parties from Ross P.'s baseless attacks.

3. The Joinder of Ross P. Will Improve Procedural Efficiency

37. CLAIMANTarguesthatthejoinderof Ross P. wouldgeneratealossofefficiency, byextending the time required for the exchange of submissions and evidence, and by creating the possibility of a challenge of the Tribunal's jurisdiction or an objection to the Tribunal's composition by Ross P. [*MfC, p. 9, ¶ 36*]. None of these allegations can prevail.

38. According to art. 15.7 SCAI Rules *All participants in the arbitral proceedings shall act in good faith and make every effort to contribute to the efficient conduct of the proceedings and to avoid unnecessary costs and delays*. Therefore, in its decision, the Tribunal shall take into consideration the benefits that the joinder will bring in terms of proceduralefficiency.

a) The Joinder Will Not Delay the Proceedings Considerably nor Endanger the Tribunal's Composition

39. Since the Tribunal has jurisdiction [*supra ¶¶2-14*] and its composition was made in accordance with the terms established in both contracts - respecting parties' equality [*supra ¶¶24/25*] - objectionsregardingthe Tribunal's jurisdictionorcomposition can bequicklydismissedand would not imply any delays.

40. Efficiency is deemed to be one of the major advantages of the joinder [*Voser/Meier, p. 116; Born, p. 2567*], and would not be negatively impacted if the proceedings are planned and scheduled in advance [*Voser, p. 353*].

41. In respect to the production of evidence and exchanging of submissions, CLAIMANT itself admitted that the present dispute is *fairly straight forward* with *largely uncontested facts* [*Records, p. 48, ¶ 2*]. Thus, even with the joinder of Ross P., the time spent on the production of evidence will not be overly extended. On the contrary, since the Tribunal will have to determine if there are indeed claims related to the license granted, the joinder will clearly contribute to the award, helping to gather the elements needed for a fair decision.

b) The Joinder Erases the Risk of Conflicting Decisions

42. Another benefit of the joinder is that it avoids the risk of conflicting decisions [*Smith, p. 172; Kroll, p. 378; Borges/Lelyveld/Araújo, p. 117*]. CLAIMANT plays down the risk of conflicting outcomes, alleging that the disputes do not address the same issues [*MfC, p. 8, ¶¶ 34/35*] - a

wrong perception of the situation. It is recognised that the joinder avoids inconsistent results [*Born, p. 2567; Voser/Meier, p. 116*] – a real risk in the present case.

43. Roctis Group already announced that the research conducted by Ross P. is a violation of RESPONDENT No. 1's rights and that the company will enforce its rights in court if needed [*Exh. R5, p. 36, ¶3*]. Since both contracts have the same dispute resolution clause, if the joinder is denied, another arbitration will have to be started against Ross P., and that could lead to a completely different interpretation of the Ross Agreement - *such an outcome should be avoided if at all possible* [*Voestalpine Texas LLC (U.S.A.) v. PHB Weserhütte S.A. (Spain)*].

44. Initiating a second arbitration is obviously less efficient in terms of costs and time [*Waincymer, p. 546*], and such aspect must also be assessed by the Tribunal [*Schramm, p. 500*]. Since the present decision depends on the interpretation of the scope of the Ross Agreement, judging the two disputes separately can have unpredictable consequences.

45. Hence, not only the joinder will not represent a delay in terms of efficiency, but it will also avoid inconsistent results, being the most efficient and cost-effective option [*Smith, p. 194*].

4. The Joinder Will Not Raise Confidentiality Issues

46. Confidentiality is another aspect to be considered [*Meier, p. 2508*], since it is one of the most attractive features of arbitration [*Born, p. 90*]. However, this element should not be overemphasized [*Voser, p. 352*].

47. As stated by CLAIMANT, the case will involve *primarily legal questions* [*Records, p. 48, ¶2*]. That being said, the focus of the present arbitration is the contractual terms/scope of the licenses granted - rather than the researches conducted. It is, thus, safe to assume that the joinder will not create an opportunity for Ross P. to gather confidential information from CLAIMANT's research, since the details of the vaccine production method will not be discussed.

48. Even if that information could be gathered, the Ross Agreement does not include a license for the use of the GorAdCam viral vector in order to reach a COVID-19 vaccine.

49. Also, art. 44 SCAI Rules establishes that all parties undertake to keep the confidentiality of *all the materials submitted by another party* during the arbitral proceedings. Therefore, Ross P. is obliged to respect the confidentiality of all the information obtained after the joinder.

50. For these reasons, the joinder of Ross P. would not raise any confidentiality issues.

5. The Joinder of Ross P. Will Not Create Basis for the Set Aside or the Non-Enforcement of the Award

51. Finally, concerns related to the set aside or non-enforcement of the award cannot be raised. Even though arts. V(1)(c) or (d) New York Convention ("NYC") [*Waincymer, p. 543*] and

36(1)(a)(iii) or(iv) UNCITRALModel Law("UML") encouragecaution, theyshouldnotbe overemphasized [*Voser, p. 352/353; Roos, p. 416*] andmust not be seen as an issue *in casu*.

52. Thejoinderwillnotcreateaviolationofarts.V(1)(c)NYCandart.36(1)(a)(iii)UML,because the Tribunal will inevitably have to determine the extent of the license granted to Ross P.. Forthatreason, thejoinderwillnotleadto an awardthatdealswithasubject *notcontemplated by or not falling within the terms of the submission to arbitration.*

53. Regarding arts. V(1)(d) NYC and 36(1)(a)(iv) UML, none of the parties can claim that the composition of the Tribunal was not in accordance with their agreement, since both contracts provided for the same appointing method and demanded the same requirements forallarbitrators, whichwereallmet[*Exh. C3, p. 16,(clause 14); Exh. R3, p. 32,(clause 14)*].

54. Also, none of the parties could suggest that the arbitral procedure was not in accordance with the agreement of the parties, since both contracts provide for arbitration under the SCAI Rules [*Exh. C3, p. 16, (clause 14); Exh. R3, p. 32, (clause 14)*], and none of the parties have chosen to opt out of the joinder provision [*Schramm, p. 484*].

55. For these reasons, it is clear that the joinder would not raise any concerns regarding the set aside or the non-enforceability of the award rendered by the Tribunal.

CONCLUSION OF ISSUE A

In conclusion, the joinder of Ross P. must be ordered, since the Tribunal has jurisdiction, all the involved parties have consented to the joinder under the terms of the SCAI Rules and the circumstances of the case are all favourable to the joinder, which would attend to the interests ofbothparties, whilealsocontributingtotheproceduralefficiency, maintainingthe confidentiality and securing the integrity of the award.

ISSUE B: THE EXAMINATION OF WITNESSES AND EXPERTS AT THE 2ND HEARING OF 3 TO 7 MAY 2021 SHOULD NOT BE CONDUCTED REMOTELY

56. The 2nd Hearing should be conducted in-person, given that the AA establishes the obligation for physical hearings **(A)** – as agreed by the parties in the arbitral clause **(1)** – and that, as the overriding rule, it prevails over the SCAI Rules and the DAL. Moreover, RESPONDENTS will demonstrate that even if the AA did not exclude remote hearings, such option would not be the most suitable format **(B)**, considering the conclusion of the balancing exercise **(1)**, the

due process violation **(2)** and procedural fairness hindrance **(3)**. Lastly, holding a remote hearing would harm the award's integrity **(C)**.

A. The Arbitration Agreement Establishes the Obligation for Physical Hearings

57. Given that the parties agreed to hold physical hearings **(1)**, and that the AA, as the overriding rule, prevails over the SCAI Rules and DAL **(2)**, RESPONDENTs respectfully submit that the Tribunal must comply with the parties' agreement and conduct the hearing physically.

1. In the Arbitral Clause the Parties Agreed on Holding Physical Hearings

58. Both parties agreed that *Hearings shall be held, at the Arbitral Tribunal's discretion, either in Vindobona or in the city where the Respondent has its place of business*, thus determining the Tribunal's obligation to hold hearings [*art. 15.2 SCAI Rules*; *Lazopoulos*, *p. 608*], and, contrary to CLAIMANT's submission [*MfC, p. 12, ¶44*], restraining its form to in-person hearings.

59. Therefore, from the literal wording of the AA **(a)**, from its interpretation in accordance with parties' intention **(b)** and from the fact that the pandemic did not change the AA **(c)**, it is clear that only holding physical hearings would be aligned with parties' autonomy**.**

a) The Literal Wording of the Arbitration Agreement Excludes Remote Hearings

60. The first criteria when interpreting a contractual provision, such as the *Hearing Provision*, is its literal wording [*Born, p. 1321*]. When the clause is unambiguous, as it is the case, such interpretation would suffice [*ICAC Case; Dooba Developments Ltd v MacLagan Investments*].

61. As CLAIMANT pointed out [*MfC, p. 12, ¶44*], the word *shall* expresses obligation. However, the *Hearing Provision* requires the Tribunal not only to conduct hearings (*The hearings shall be held*), but also to conduct them in a particular form, and venue (*at the Arbitral Tribunal's discretion, either in Vindobona or in the city where the Respondent has its place of business*). The alternative choice of venues entrusted to the Tribunal, implies the obligation of having in-person hearings on a specific location, requiring the participants' physical presence.

62. Hence, the Tribunal's discretion is limited to selecting either Danubia or Equatoriana to conduct the presential hearings, meaning that remote hearings are implicitly excluded. Moreover, and even though a virtual hearing can provide a live and simultaneous exchange of arguments [*MfC, p. 13, ¶46*], it is not sufficient to comply with the parties' agreement.

63. Accordingly, the silence regarding virtual hearings and its implicit exclusion exposes how far the parties were from considering it, especially when reasoning that remote hearings were, and still are, the exception to the *in-person hearings* rule [*Born/Day/Virjee, p. 144*].

b) The Parties' Intention Interpretation Criteria Leads to the Conclusion That Only Physical Hearings Would Be Aligned with the Arbitration Agreement

64. Likewise, the parties' intention when drafting the AA also leads to its interpretation in the sense of demanding for in-person hearings [*ICSID No ARB/06/18 Born, p. 1321*].

65. CLAIMANT misguidedly applied art. 8 CISG [*MfC, p. 12, ¶44*]. However, since the CISG is notapplicable[*infra¶114*],theclausemustbeinterpretedunderarts. 4.1and4.3UNIDROIT.

66. Art. 4.1.1 UNIDROIT imposestheinterpretationofacontract *according to thecommonintention ofthe parties*, and art. 4.3 clarifies that such can be revealed by all circumstances - *preliminary negotiations between the parties; (...) the conduct of the parties subsequent to the conclusion of the contract; (...) themeaningcommonlygiven to termsandexpressionsinthetradeconcerned (...)*.

i) Preliminary Negotiations Between the Parties

67. Regarding the preliminary negotiations, CLAIMANT accepted this dispute resolution clause, after suggesting an *arbitration under the rules of a respected and neutral international arbitration institution, suchas (...) the Swiss Chambers' Arbitration Institution* [*PO2, p. 57,¶31*].

68. Mr. Doherty then decided to use RESPONDENT No. 2's template, based on the Ross Agreement and included the present dispute resolution clause [*Exh. R2, p. 30, ¶5*] - fulfilling CLAIMANT's institutional requirements. Since the institution was suggested by CLAIMANT, its due diligence duty would require it to know the model clause of SCAI, and to recognize that the *Hearing Provision* was an additional feature inserted by the parties [*Records, p. 49*].

69. To understand this extension, one should analyse the negotiation between Ross P. and RESPONDENT No. 2. The latter rejected the unilateral arbitration clause, vindicating its interest in arbitrating in particular circumstances [*Exh. R2, p. 30, ¶4*]. Moreover, RESPONDENT No. 2 insisted that when actions were to be brought against itself, the hearings couldbeheldin Equatoriana, imposingtheparticipants' presence[*PO2, 57,¶32*]. CLAIMANT understood this extension and accepted the AA [*PO2, 57, ¶32*]. Thus, RESPONDENTS' intention of having the hearings held in-person was also shared by CLAIMANT.

ii) Conduct of the Parties Subsequent to the Conclusion of the Contract

70. CLAIMANT submitted its NofA without mentioning virtual hearings, precisely when the pandemic was so much of a concern that CLAIMANT was already researching for a vaccine [*NofA, p. 4*; *Exh. R1, p. 29*]. Likewise, RESPONDENTS' ANofA did not refer remote hearings – as it was firstly raised by the Tribunal [*Records, p. 47*]. If the parties' intention was to allow for remote hearings, CLAIMANT would have requested for them in the first place. Therefore, one can assume that CLAIMANT was indeed aware that the AA excluded remote hearings.

iii) The Meaning Commonly Given to Terms and Expressions

71. Moreover, the meaning commonly given to the expression *Hearing* in the arbitral clauses, in a pre-COVID-19 context requires the physical presence of the participants - until the pandemic, fully remote hearings were the exception [*Lo, p.* 88; *Born/Day/Virjee, pp. 140/144*]. As a consequence, parties did not foresee them as a real alternative to in-person hearings and did not need to specify the format of the hearings, when drafting the AA [*Lefter; Lo, p. 88*].

72. Therefore, no doubts remain regarding the *common intention of the parties* - to hold the hearings physically and, implicitly, to exclude the option of remote hearings. Even if the Tribunal finds that there was no common intention, the *reasonable person criteria* provided in art. 4.1.2 UNIDROIT establishes the same requirements when assessing it (art. 4.3).

73. In light of the above, either via a *subjective test* or a *reasonableness test*, interpreting the provision in accordance with the parties' intention leads to the same conclusion withdrawn from its literal wording - only physical hearings would be in line with the AA.

c) The Pandemic Outbreak Does Not Change the Parties' Agreement

74. Considering the outbreak of the pandemic [*MfC, p. 12, ¶45*], CLAIMANT invokes *business common sense* to interpret the AA as allowing for virtual hearings. However, in *BMA Special v African Minerals Case* and *Jackson v Dear Case*, it was admitted that such criteria is overrated, and also that it cannot be fulfilled by one of the parties' point of view, in a desperate attempt to force the contract to say what it does not, as conducted by CLAIMANT in this case.

75. Wrongly reading the *Hearing Provision* as a non-exclusion of virtual hearings, would not constitute an interpretation, but rather a modification of the AA, only allowed through a mutual agreement of the parties [*Clause 15.3 PCLA; Pryles, p. 6*] - which is not the case.

76. Nevertheless, the AA is unambiguous and thus, its literal wording [*supra ¶60*; *Arnold v Britton*] is sufficient not to resort to the *common business sense* criteria [*Rainy Sky SA v Kookmin Bank*].

77. Even if it was applicable, interpreting the AA as restraining the Tribunal's discretion to hold physical hearings is aligned with the *business commonsense*, given that this format of hearings is the commercial standard practice [*supra ¶63*]. Also, CLAIMANT incoherently did not suggest this supposedly "essential" procedure feature in its NofA [*supra ¶70*].

78. In conclusion, the pandemic outbreak and the *commonbusinesssense* do not contest or challenge the AA interpretation made by RESPONDENTS [*supra ¶60-73*].

2. The Arbitration Agreement, as the Overriding Rule, Prevails Over the SCAI Rules and the Danubian Arbitration Law ("DAL")

79. Parties' autonomy to agree upon the arbitral procedure is key in arbitration [*Redfern/Hunter, p. 35; GUPC v. ACP v. (II)*]. Thus, the AA, overrules the SCAI Rules and the DAL.

80. Byaddingthe *Hearing Provision* tothe SCAImodelclause[*Records, p. 49*], bothpartiesintended to avoid any wrong interpretation of art. 25.4 SCAI Rules - such as the Tribunal's discretion to hold the hearings fully remotely. This article exclusively admits videoconference in circumstances *where a witness is genuinely unable to attend the hearing in-person, be it for reasons of age, sickness, travel restrictions* [*Nater-Bass/Pfistrer, p. 697*], only allowing for semi-remote hearings.

81. Even if art. 25.4 SCAI Rules would allow for fully remote hearings, parties can agree on proceduralprovisionsmodifyingthe SCAIRules, leavingtothe Tribunalthechoicetoresign if it disagrees [*Lazopoulos, p. 604*]. Thus, the *Hearing Provision* determines a procedural matter usually not regulated, which clearly shows parties' intention *to deviate* [*Born, p. 103; Smahi, p. 933/936*] from this article - a feature that the Tribunal accepted under party autonomy.

82. Also, pursuant to arts. 15.1 SCAI Rules and 19.2 UML, the Tribunal's discretion is limited by the parties' agreement [*Lazopoulos, p. 602; Born, p. 2145*] – exclusively with reference to the matters not regulated by the parties and the SCAI Rules [*Lazopoulos, p. 604/605*].

83. Moreover, having the parties agreed to conduct physical hearings, the Tribunal is not empowered to decide otherwise. Consequently, considering the paramount importance of parties' autonomy [*Born, p. 226; Redfern/Hunter, p. 355*], when the AA excludes remote hearings, the Tribunal should follow it and prevent discussions on their format [*Scherer*, p. 77; *Mak*]. Therefore, taking into account that *Hearing Provision* excludes the option of remote hearings, the *rationale* of the OGH decision [*OGHNo. 18 ONc 3/20s*], brought to discussion by CLAIMANT [*MfC, p. 16, ¶54*], is inapplicable.

84. In conclusion, since the AA excludes remote hearings from the Tribunal's discretion and it is the overriding rule on procedural matters, the Tribunal must hold an in-person hearing.

B. Even If the Arbitration Agreement Did Not Exclude Remote Hearings, it Would Not be the Most Suitable Decision on a Case-By-Case Basis

85. Even if one interprets the AA as not excluding remote hearings, such option would still not be the most suitable decision on a case-by-case basis, given the conclusion of the balancing exercise **(1)**, the violation of the parties' rights to be treated equally and to present their case **(2)** and the risk of overestimating efficiency at procedural fairness' expense **(3)**.

1. **The Balancing Exercise Dictates the Inadequacy of Remote Hearing**

86. If it was within the Tribunal's power to decide on the hearing format, a balancing exercise would have to be done, analysing whether the circumstances of the case are compatible [*Scherer, p. 82; StoresOnline, Okubote*]. *There will be cases where the court cannot be satisfied that a fair resolution can be achieved by way of a remote hearing* [*Municipio de Mariana v. BHP Group*]. *In casu,* the conclusion would be the inadequacy of virtual hearings, due to its concerning prejudices.

87. Firstly, witness and expert's testimony would be hampered in a remote context. The risk of coaching is higher [*Goins/Guillet*; *D'Avino/Ezzelarab; Lo, p. 90; Simson*] and CLAIMANT's suggestion [*MfC, p. 17*, ¶*58*] – appointment of a supervising agent – would not be possible in all circumstances. Thus, considering CLAIMANT's concern regarding travel restrictions [*MfC, pp. 15/16,* ¶*53/54*], such solution still poses the same risk, showing its incoherency.

88. Also, witnesses' credibility is hard to assess in a remote hearing [*Backsmann/Fröhlingsdorf, p. 422; Walker, p. 1; Lee/Ning; Sunstate Airline v. First Chicago*], especially when considering the technical difficulties that will likely occur [*Jiangsu Shagang v. Loki Owning*] and the common overlaps of conversations – forged freeze moments can be an excuse for more time to answer [*Mirani*; *Newton/Butt/Fraser; Lo, p. 90*].

89. Users rate virtual hearing less effective in terms of witnesses and experts' examination, [*Born/Day/Virjee, p. 146*], hence, key witnesses, such as RESPONDENTs' ones, should present their testimony face-to-face [*D'Avino/Ezzelarab; Humbary*]. CLAIMANT further sustains that if there is visual contact, body language can be observed [*MfC, p. 17,* ¶*57*]. However, this is not comparable: the camera's small recording target limits the Tribunal's ability to read the witnesses and experts' expressions [*Correia/Abdalla/Mateus; Martins da Silva, p. 194*].

90. Regarding experts' testimony, CLAIMANT defends that due to the arbitrators' knowledge, the Tribunal can understand the complex evidence [*MfC, p. 16,* ¶*56*]. Nonetheless, not only *hot tubbing* is extremely difficult in a remote setting [*Knowles*; *Wilmot/Connolli/Coen*], but also experts find it more challenging to engage arbitrators [*Papaionnau; Correia/Abdalla/Mateus*]. Besides, only RESPONDENTs have shown interest in examining witnesses [*Records, p. 49*], which might be the reason why CLAIMANT views virtual testimony as effective as in-person.

91. Secondly, if a remote hearing is held, confidentiality will be endangered [*Singer; Rab; Saunders, p. 110*]. Since there is not 100% certainty that no third person will interfere and get access to the hearing [*PO2, p. 57,* ¶*35*], the Tribunal should be sensitive to RESPONDENTs' concerns on data protection and confidentiality [*Clause 10 PCLA*].

92. Thirdly, one of the most recognized advantages of remote hearings is the costs reduction [*Lefter; Goins/Guillet*]. However, inthiscase, noteventhatbenefitwouldbeachieved, given that the costs will likely increase in a remote hearing [*PO2, p. 57, ¶35*].

93. Fourthly, the time zone differences [*PO2, p. 57, ¶35*] makes it impossible for all participants tobeinanequalpositionto presenttheircase[*Stein,p. 174,Walker,p.1;Lee/Ning,Hambury*]. If a hearing is held at 16:00 pm Danubia time, such schedule would correspond to 00:00 in Equatoriana – an unreasonable hour to hold hearings and expect the participants to be focused throughout the entire, and usually long, hearing day, or better said, night.

94. Lastly, the inequality of technological means between the parties [*PO2, p. 58, ¶38*], purposely omitted by CLAIMANT [*MfC, p. 17, ¶58*], is reason alone for the Tribunal not to hold remote hearings [*Stein, p. 174, Backsmann/Fröhlingsdorf; Lefter*]. RESPONDENTS would be harmed by CLAIMANT's superior tech capacity, triggering a possible future challenge of the award.

95. Thus, the Tribunal's decision cannot be other than to deem remote hearings inadequate.

2. A Remote Hearing Would Violate Parties' Rights to Present their Case and Be Treated Equally

96. Given the unsuitability of a remote setting, if the Tribunal decides to hold the hearing virtually, a severe violation of due process would occur. Pursuant to art. 15.1 SCAI Rules, therightstobeheardandtreatedequallylimitthe Tribunal'sdiscretion[*Lazopoulos, pp. 605; Smahi, p. 935*]. Hence, aremotehearing can onlybeheldifsuchviolationdoesnottakeplace.

a) The Technical Disparities Lead to an Unequal Treatment of the Parties

97. Since CLAIMANT's tech equipment is superior [*PO2. p. 58, ¶38*], inequality is evident [*Bateson, p. 161, Backsman/Fröhlingsdorf*] - CLAIMANT would be in a better position to have the hearing held online and RESPONDENTS are more vulnerable to tech difficulties. Hence, only one of the parties would be jeopardized and subject to the violation of its right to be treated equally.

98. Moreover, the coaching risk [*supra ¶87*] is higher in a virtual setting, which favors one of the parties at the other's expense [*Scherer, p. 100*]. Nevertheless, coincidently or not, the party withthe better technical means [*PO2. p. 58, ¶38*] is the one agreeingwith the virtual hearing.

b) Parties' Right to Present Their Case Would Also Be Endangered

99. The hearing is the opportunity for the parties and the tribunal to produce and test evidence - *the hearing can make it or break it the party's case* [*Douglas-Henry/Sanderson*]. Hence, the difficulties involved in the online examination [*supra ¶¶87-94*] can negatively affect parties to *express themselves and present their case* [*Smahi, p. 938*], in particular due to the different time zones.

100. Furthermore, the likelihood of technical issues [*R v. Macdonald; R v. Edward Obeid; R v. Moses Obeid*], would endanger the parties' participation and the relevance of their submissions in the decision-making process [*Lazopoulos, p. 607*]. Therefore, depending on the hearing format, the award can go in a completely different direction [*Aghababyan/Hokhoyan/Habib; Trustees of Rotoaira Forest Trust v. Attorney-General*].

101. *In fine*, a physical hearing must be held in order to respect due process. Also, since SCAI has not released any Guideline on remote hearings or even signed the Joint Statement and that, in general, practitioners still prefer in-person hearings [*Born/Day/Virjee, p. 146*], the latest international arbitration practice argument [*MfC, p. 18, ¶60*] must be dispelled.

3. Efficiency Must Not Overcome the Fairness of the Proceedings

102. CLAIMANT is blind-sided by the supposed procedural efficiency [*MfC, p. 15, ¶54*] brought by the concept of remote hearings. However, in fact, virtual hearings are not as efficient as CLAIMANT alleges and operate in prejudice of procedural fairness.

103. When balancing the two principles, the Tribunal cannot underestimate procedural fairness, which must prevail in order to render an enforceable award [*Fortese/Hemmi, p. 124*]. Therewithal, even though fully remote hearings have been available for years, the standard practice and preference are in-person hearings [*Ellam/Fitz-Simon/Morrow*], meaning that the pandemic has faded the procedural fairness' prominence. *In casu*, conducting a remote hearing would be *cutting corners* – prioritizing an expeditious award, over a fair trial [*Q v Q*].

104. Moreover, a virtual hearing can have adverse implications on procedural efficiency. For virtual hearings to be efficient, they would have to be effective [*Lee/Ning*], which does not happen. The credibility problems, attention span [*Knowles; Dominick & Dickerman v Wunderlich Securities Inc*], tech inequality and different time zones set off virtual hearings as a poor format.

105. Additionally, the due process violation and the possible challenge of the award would make it extremely ineffective, either because the dispute between the parties would not be solved or because the decision would not be enforceable [*infra ¶108*] - *If these alternative proceduresare not tailored to the circumstances of an arbitration proceeding, they may in fact present far more issues than the problems theyare attempting to solve. At minimum, theymaycreateinefficiencies, incurmorecosts for the parties, and leaveamessforpartiesandtribunals to cleanupafterthedustsettles* [*Lo, p. 93*].

106. Conversely, a physical hearing following the health safety procedures recommended by the World Health Organisation can be arranged, ensuring the use of masks and safety distances.

107. In conclusion, procedural fairness not only prevails, but also can be combined with the principle of efficiency when conducting a physical hearing.

C. A Remote Hearing Would Harm the Integrity of the Award

108. If the Tribunal decides to hold the 2nd hearing virtually, there would be grounds for the set aside and then on-enforcement of the award, contrary to CLAIMANT's view [*MfC, p. 17, ¶59*], since the arbitral procedure would not be in accordance with the parties' agreement, the Danubian Law **(1)** and the parties' rights to present their cases and be treated equally **(2)**.

1. The Arbitral Procedure Would Not Be in Accordance with the Parties´ Agreement and the Danubian Law If a Remote Hearing Is to Be Held

109. Having the parties agreed to hold physical hearings [*supra ¶58*], while exercising their autonomy, a divergent Tribunal's decision would entail a serious and prejudicial violation of the procedural conduct agreed by them, putting the award at risk [*Stein, p. 172; Smahi, p. 936*].

110. Both arts. V(1)(d) NYC and 34(2)(a)(iv) UML set the conduction of the procedure against the agreement of the parties as a ground for the non-enforcement and the set aside of the award. Moreover, given that art. 34 UML derived from NYC, its authorities are applicable to art. 34 UML [*Corporación Transnacional de Inversiones v. STET Int'l SpA*; *Born, p. 3179*].

111. *In casu*, a remote hearing would mean *a serious violation of a significant procedural term of the parties' arbitration agreement (...) justifying non-recognition of an award* [*Born, p. 3564*] – *a contrario* to *Tongyuan Group v Uni-Clan*, in the present case, the hearing venue is of critical importance, since the parties decided to add the *Hearing Provision* to the SCAI model clause [*Records, p. 49*]. Also, it carries *a material prejudice* [*Born, p. 3565*; *supra ¶¶85-101*], in comparison to physical hearings.

112. Furthermore, since the arbitral procedure would not be in accordance with the Danubian Law in case of a remote hearing, another ground for the challenge of the award would be raised. The Procedural Code only allows for remote hearings if both parties agree or if it is required by public interest [*PO2, p. 57, ¶37*], which is not the case, as RESPONDENTs are objecting. Lastly, the adjournment is not against public interest, especially considering that CLAIMANT is not deprived from continuing its research on the vaccine.

2. The Violation of Parties' Right to Present Their Case and Be Treated Equally Can Lead to the Set Aside and Refusal to Enforce the Arbitral Award

113. The violation of RESPONDENTs' rights to be treated equally and present their case [*supra ¶96-101*], fulfills arts. 34(2)(a)(ii) UML and V(1)(b) NYC, would give grounds for the set aside and unenforceability of the award. [*Stein, p. 161*]. Hence, scholars highlight the importance of the parties' consent on this matter, due to the challenge award risk [*Bateson, p. 168; Saunders*].

CONCLUSION ON ISSUE B

In conclusion, the Tribunal must holdaphysical hearing, notonlytocomplywiththe parties' agreement and the balancing exercise required, but also to guarantee the due process principle, the fairness of the proceedings and, consequently, the integrity of the award.

ISSUE C: THE CISG IS NOT APPLICABLE TO THE PURCHASE, COLLABORATION AND LICENSE AGREEMENT

114. The CISG is not applicable to the PCLA, since the governing law clause expressly states that it is governed by the Danubian Law **(A)** and, given its unified nature, it is exclusively ruled by such law **(B)**. Nonetheless, even if the PCLA did not have the governing law clause, pursuant to arts. 3(1) **(C)** and 3(2) **(D)**, the CISG would still be inapplicable.

A. The PCLA is Expressly Governed by the Danubian Law

115. According to the freedom of contract principle, the PCLA is a valid and binding contract **(1)**, whichpartiesintendedtobeexclusivelygovernedbythelawsof Danubia **(2)**. Therefore, the substantive Danubian Law governs all of the obligations under the PCLA.

1. The PCLA is Valid, and the Parties Are Bound by its Clauses

116. Bothpartiesenteredacommercialrelationship, whichcameoffas thoroughlynegotiatedand signed contract (the PCLA), as CLAIMANT admits [*MfC, p. 21, ¶72/73*].

117. Article 1.1 UNIDROIT establishestheprincipleoffreedomofcontract as *thepartiesarefree to enter into a contract and to determine its content.* This principle allows parties to agree, with respect to the mandatory rules [*UNIDROIT Note 1.4, ¶1-4*], on the terms of their transactions [*UNIDROIT Note 1.1, ¶1, 3*].

118. Therefore, as a visible expression of such principle, the PCLA must be deemed valid as it does not violate any mandatory rules. In addition, parties arebound to it - *ergo* its provisions- giventha*tacontractvalidlyenteredintoisbindinguponthepartie*s*(...)* [*UNIDROIT1.3*].

2. Parties Intended to Exclusively Apply the Danubian Law to the PCLA

119. The PCLA is exclusively governed by the Danubian Law, this result is achieved either through a subjective interpretation **(a)** or an objective one **(b)**. Consequently, CLAIMANT's submission that the PCLA is governed by the CISG violates party autonomy **(c)**.

a) Following a Subjective Interpretation Method

120. It is irrelevant whether one resorts to the rules of interpretation set by the CISG - *equally applicabletotheinterpretation of thecontract* [*Digest 2016, p. 54, ¶3*] - orthe UNIDROIT, which

corresponds to the DCL [*PO1, p. 52, ¶3*], since both approaches are identical [*Schlechtriem/Schwenzer, Art.3, Note 64; DCL Art. 4.1(1); Art.8 (3) CISG*].

121. According to a preferred subjective method [*Digest 2016, p. 54, ¶6*], the contract shall be interpreted according to the *common intention of the parties* [*UNIDROIT, Art. 4.1(1)*]. *In casu*, both parties agreed that *this Agreement shall be constructed in accordance with and governed exclusively by the laws of Danubia* [*Exh. C3, p. 13, Clause 15.2*]. Furthermore, the wording of the clause is specific as it only refers to "*This agreement",* and it was drafted by the parties with extreme precision by using the word "*exclusively*" when referring to the Governing Law ("GL").

122. Thus, according to the *rationale* established in the *Adex International Case*, the use of the word *exclusively* when referring to the GL of a Contracting State, demonstrates a clear intention to implicitly exclude the applicability of the CISG [*Digest 2016, p. 34, ¶11*].

123. Moreover, and despite the inexistence of a CISG provision regarding this aspect, implied exclusions must be admitted [*Glue Case, House Case, Cisterns Case*]. This results from the rejection of the drafting proposal that would only permit the exclusion if done *expressly* [*CISG Records*]. Hence, one can *exclude its application with express or tacit agreement* [*Bulletproof Case*].

b) Following an Objective Interpretation Method

124. The conclusion would be the same pursuant to an objective method. Indeed, the understanding of a reasonable person, in the same circumstances [*Digest 2016, p. 54, ¶1*] when analyzing the drafting history (**i**), the contractual arrangements (**ii**) and the importance of certainty (**iii**), points to the same interpretation.

i) Drafting History - The PCLA Was Inspired by a Non-Sales Contract

125. Considering its drafting history, the PCLA was highly inspired by the Ross Agreement [*Exh. R.2, p. 31, ¶8*], leading to the same GL clause in both contracts [*Exh. R3, p. 34, Clause 15.2*].

126. However, given that the Ross Agreement does not have any sales obligations, it is simply not possible for the CISG to govern such contract [*Arts. 1 and 3 CISG; Digest 2016, p. 6, ¶21*].

127. Hence, a reasonable person would conclude that parties exclusively wanted for the DCL to be applicable as it is *a codification of trade usages and an expression of the general principles of contract law* [*UNIDROIT Case*], compatible with both contracts (Ross Agreement/PCLA).

ii) Contractual Arrangements - Warranties and Covenants Section

128. In Clauses 11.1.3 and 11.1.4 PCLA, RESPONDENT No.1 ensured that *Licensor is not aware of any Third Party's Intellectual Property that might be infringed by conducting the Research Plan (...)* and *There are to Licensor's Knowledge no claims, judgements or settlements pending with respect to the Licensed Technology (...)*. Therefore, despite the inexistence of an IP provision in the DCL [*Zeller,*

p.290], theadditionofsuchclausesgranted CLAIMANT contractualprotectionagainsttherisk of receiving objects encumbered by third-party IP rights.

129. A reasonable person would not have included these clauses if it intended for the CISG to be applicable, since the IP aspect is already looked after by the CISG [*Infra ¶171*]. This is, in fact, coherent with the intention to submit the PCLA to the DCL, as parties made a contractual effort to solve existent gaps in the desired GL (DCL).

iii) Importance of Certainty - CISG is an Unsought Legislation

130. Parties agreed to deviate from the general rule of informality [Art. 1.2 UNIDROIT, ¶*1*], submitting the PCLA to a written form and the signature of their legal representatives [*Exh. C3, p. 17*], while including an Entire Agreement Clause [*Exh. C3, p. 16, Clause 15.3*] which only allowed written amendments/modifications. Furthermore, the precision of the word *exclusively* in the GL clause, assures the parties as to the applicable Law that regulates their rights/obligations under the PCLA. Consequently, these formalities illustrate the intention and the importance of certainty attributed by the parties regarding the existence, the scope and parties' rights and obligations under the PCLA.

131. Thus,giventhelegal *maze* surroundingthequantificationofRESPONDENT No.1's obligations and its relation to the *preponderant part/substantial part* element [*MfC, p. 22-28*], any reasonable person would deem CLAIMANT's argument a preclitant one, therefore violating parties' intention. Additionally, this would lead to a scenario that parties wanted to avoid through the inclusion of the GL clause: The application of an unsought Convention.

c) CLAIMANT's Submission Violates the Party Autonomy Principle

132. Art. 6CISGcontainsabroadprincipleofpartyautonomy[*Digest 2016, p. 3, ¶2*],as *theparties may exclude the application of this Convention (...).* By allowing parties to exclude the Convention's applicability, thedraftersacknowledgeitsnon-mandatorynatureandaffirmpartyautonomy as the source of rules for international contracts [*Digest 2016, p. 33, ¶3*].

133. Inevitably, CLAIMANT's submissionthatthe PCLA *isgovernedbythe CISG* [*NofA, p. 8,¶25*] should not prevail as it does not take in consideration the parties' intent to exclude the CISG, thereforeviolatingtheCISG's overridingprincipleofpartyautonomy[*Commentary, p. 35*].

B. The PCLA is a Unified Contract

134. Moreover, given the different obligations' nature, one shouldinterpret theparties' intention, according to a subjective **(1)** or objective **(2)** method, and determine if they arise out of a single/separate contract, as it interferes with the applicable law [*Brunner/Gottlieb, p. 41*].

1. Subjective Interpretation Method Points to the Fact that All of the Obligations Arose Out of the PCLA

135. The parties' intention was made clear during the subsequent interactions, specifically when CLAIMANT made an explicit reference to the *whole contractual structure* [*Exh. C5, p. 19*] and admitted that the obligations arose out of the PCLA [*NofA, p. 6, ¶11*]. These are undisputed facts by RESPONDENT No.1, who could not have been unaware of their existence.

2. Likewise, An Objective Interpretation Method Leads to the Same Conclusion

136. Theheadingofthecontract- *Purchase, Collaborationand License Agreement* -thewordingofthe relevantcontractualclauses[*Exh. C3, p. 12-17, Clauses 2-5 and 16*]andtheEntireAgreement Clause [*Exh. C3, p. 13, Clause 15.3*], would lead to the conclusion that the obligations arose out of a single agreement. Therefore, the doctrine of severability is inapplicable [*Honnold, ¶60 (2)*], sincethedifferentobligationscannotbeconsidered as separatecontracts[*Ferrari, Art.3 (2) CISG*]. Consequently, they can only be regulated by the DCL [*supra ¶131*].

C. Regardless of the Governing Law Clause, the CISG Would Still be Inapplicable

137. All of the contracts regulated by the CISG involve a sale of goods, however not all sales of goods are regulated by the CISG - this is precisely the case, since the PCLA involves a sale of goods (1), which is excluded by virtue of art. 3(1) CISG **(2)**.

1. The PCLA is a Mixed Contract

138. The PCLAisamixedcontract, sinceitinvolvesthesaleof Goods **(a)**, as well as theexecution of additional services **(b)**.

a) The PCLA Involves a Sales of Goods

139. For the CISG to be applicable, the contract must involve a sale of goods [*Digest 2016, p. 6, ¶21*] which, according to an autonomous interpretation [*Digest 2016, p. 43, ¶9*], implies an exchange of moveable and tangible things against a price [*Huber/Mullis, p. 43*].

140. Firstly, the PCLA requires that three types of objects may be delivered by RESPONDENT No. 1: GorAdCamvectorsandtheirlicense[*Exh. C3, p. 13, Clause 9.2*]; HEK-294 cells[*Exh. C3, p. 17, Clause 16.1*]; and Vaccines [*Exh. C3, p. 17, Clause 16.2*]. Consequently, with the exception of the GorAdCam license, all of the objects are deemed as goods under the CISG.

141. Secondly, for the delivery of the GordAdCam vectors and the HEK-294 Cells, RESPONDENT No. 1 would receive previously determined amounts of money [*Exh. C3, p. 13/17, Clauses 9.2/16.1*]. Therefore, the PCLA undoubtedly involves a *sale of goods* [*PVC Case*].

b) The PCLA Involves the Execution of Additional Services

142. It is true that RESPONDENT No. 1's obligations did not solely resume to the above, since it wouldalsograntanon-exclusiveaccesstothe GorAdCampatent[*Exh. C3, p. 13, Clause 9.2*], and collaborate on the joint research plan [*Exh. C3, p. 13, Clauses 3.1*].

143. On the one hand, the patent is not considered a good under the CISG [*supra ¶140*] and RESPONDENT No.1 allowed its usage by CLAIMANT without transferring its property [*Exh. C3, p. 13, Clauses 5.2*]. On the other hand, RESPONDENT No. 1's collaboration had an intellectual nature, as it referred to know-how transfers [*PO2, p. 55, ¶17*].

144. Hence, these obligations must be considered as *other services* since they do not involve the delivery of goods or transfer of property. As such, the Tribunal must determine if the PCLA is not excluded by virtue of arts. 3 (1) and 3 (2) CISG [*Huber/Mullis, pp. 42/48*, *infra ¶148*].

c) Nature of the Production Option

145. Clause 16.2 PCLA granted CLAIMANT *The option to request Licensor to produce the vaccines under GMP-conditions using the purchased HEK-294 cells and the cell culture medium at a price to be agreed by the parties reflecting the price generally charged at the time of the conclusion of the contract.*

146. If requested by CLAIMANT, RESPONDENT No.1 would have to supply CLAIMANT with HEK-294 cells [*Clause16.1 PCLA*] but also to produce the vaccines, receiving *the price generally charged at the time of the conclusion of the contract.* Therefore, this clause involves either a sale of goods that need to be produced [*infra ¶148*], or an additional service, since RESPONDENT No.1 would have the laborious task of *assembling* CLAIMANT's cells and its developed know-how [*Enderlein/ Maskow, p. 37*]. However, in either case, the Convention is inapplicable.

2. Art. 3 (1) CISG Excludes the Conventions Applicability to the PCLA

147. Given that part of the goods needed to be produced **(a)**, and that CLAIMANT supplied a substantial part of the materials necessary for their production **(b)**, art. 3(1) CISG excludes the Conventions applicability to the PCLA.

a) Part of the Goods Needed to be Produced

148. CLAIMANT's research to achieve a therapy presupposed the production of a first batch of vectors according to CLAIMANT's specifications [*PO.2, p. 55, ¶17*]. Additionally, if RESPONDENT No. 1 were to produce the vaccine [*Exh. C3, p. 17, Clauses 16.2*], there would also be a production of goods - instead of them being *ready-made* [*Digest 2016, p. 20, ¶2; Stones Case*]. Nonetheless, the CISG is also applicable to such cases [*Digest 2016, p. 6 ¶23*].

b) GorAdCam Vectors Were Substantially Produced with CLAIMANT's Materials

149. According to art. 3 (1) CISG *Contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production*.

150. The substantial part of the materials provided, should be quantified based on an economic criteria, or, subordinately, an essentiality criteria [*Enderlein/Maskow p. 35; CISG N°4 ¶2(7)*]. According to the economical criteria, one will have to evaluate if the materials provided by the buyer ought to be higher than 15% than those provided by the seller [*Honnold, p. 56*].

151. In the analyses of the vectors, it is impossible to resort to such criteria as CLAIMANT exclusively provided RESPONDENT No. 1 with the adequate production specifications, a contribution which is not possible to economically quantify. Therefore, one must resort to the essentiality criteria by evaluating the nature of the materials and the particular interest of the parties in relation to the goods [*Schroeter, ¶2(1); Bernard, p. 25; München case*].

152. Nonetheless, according to the *Adapters Case* the delivery of specifications from the buyer to the seller constitutes a substantial part of the materials necessary for the production of the goods under art. 3 (1) CISG [*Digest 2016, p. 20, ¶3*]. Thus, *in casu*, since the produced GorAdCam vector followed CLAIMANT's specifications [*PO2, p. 55, ¶17*], it was RESPONDENT No.1 who provided the substantial part of the materials for their production.

c) The Vaccine is to Be Substantially Produced with CLAIMANT's Materials

153. The purchase obligation requires CLAIMANT to buy exclusively its supply need for the HEK-294 Cells and cell culture medium from RESPONDENT No. 1 for 2 M Euros [*Exh. C3, p. 17, Clause 16.1, CISG N°4, ¶2.7*]. Thereafter, CLAIMANT has two alternative scenarios: produce the Vaccine with HEK-294 cells; or delegate the vaccine production to RESPONDENT No. 1 whichuses *thepurchased HEK-294 cellsandthecellculture* [*Exh. C3,p. 17,Clause 16.2*].

154. Regarding the latter, CLAIMANT argues that *though the vaccines are produced with HEK-294 cells and cell culture medium purchased by Claimant, these materials are not supplied by Claimant* [*MfC, p. 25, ¶81*]. Nevertheless, this argument is deceiving since one cannot simultaneously: argue that one of the main obligations of a seller of goods is to *transfer their property* [*MfC p. 19, ¶63*]; sustain that there was a sale of HEK-294 cells, as they were *purchased by* CLAIMANT*;* and conclude that despite the sale of such cells, property has not been transferred.

155. In this sense, one must conclude that CLAIMANT contributed by allowing its cells and cell culture medium, to be used/incorporated in the production of the vaccine. Furthermore, as the production costs of the vaccine amounted 4 M Euros [*Appedix 1, PO2, ¶7*], CLAIMANT's HEK-294 contribution represents exactly 50% of that value [*supra ¶153*].

156. Accordingly, the cells contribution is significantly higher than the 15% threshold and will decisively influence the finished product [*Resitrix Case*]. Thus, CLAIMANT has definitely delivered asubstantial part ofthe materials necessary fortheir production [*Honnold, p. 56*].

D. Art 3 (2) CISG Excludes the Conventions Applicability to the PCLA

157. If the production option is seen as an additional service, RESPONDENTs will demonstrate that it must be considered under the CISG **(1)**. Additionally, the preponderant part of RESPONDENT's No.1 obligations consists in the supply of labour/other services **(2)**.

1. The Vaccine Production Option Must be Considered

158. CLAIMANT, arguing that the production option is not an absolute obligation, and that the relevant moment to calculate its value was at the conclusion of the contract, infers that the production option would be *irrelevant* under art. 3 (2) CISG [*MfC, p. 23, ¶78*].

159. Art. 3 (2) CISG establishes that *This Convention does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services*.

160. Hence, the CISG does not distinguish between *absolute obligations* [*MfC, p. 23, ¶73*] or others. The fact that the production obligation only takes effect under a condition - depending on CLAIMANT's decision - does not influence the obligation's existence.

161. Furthermore, consideringthatin CLAIMANT's viewcontractsaresignificantlylessimportant than 50% discount prices [*PO2, p. 53, ¶3*], its choice would be to not exercise the production option. However, CLAIMANT, a company with commercial purposes, conveniently forgets that the *commercialbusinesssense* - previouslyinvokedbyit[*supra¶76*]- requirestheexerciseof such production option, as it is the most profitable and does not involve any further investments [*PO 2, p. 53, ¶5; Exh. R2, p. 31, ¶13*].

162. Lastly, one has to bear in mind that parties had provided a costs estimation dating 1st January 2019 - the date of the signing of the PCLA [*Appedix 1, PO2, ¶7*]. Hence, since such estimations are shared by both parties, with the same production costs (4 M Euros), there is no reason not to use them, as they clearly reflect a consensual valuation of the additional services to be provided [*CISG Nº4, p. 6, ¶2.6*].

2. The Preponderant Part of RESPONDENT No. 1's Obligations Consists in the Supply of Labour and Other Services

163. Finally, to rule the CISG inapplicable, one has to compare the economical value of RESPONDENT No.1's supply of labour/services obligations with the obligations regarding sales of goods, concluding that the supply of labour/service part exceeds 50% of the total

value of the party's obligations [*Schroeter, p. 76*]. Being the Milestone payments **(a)** and royalties **(b)** attributable to the GorAdCam patent, RESPONDENT'S No. 1's preponderant part of obligations consisted in the supply of labour/service **(c)**

a) Milestone Payments Are Due for the Successful Use of the Patent

164. CLAIMANT argues that it is impossible to attribute the 3 M Euros in Milestones Payments, either to a sale of goods or to a supply of services [*Mfc, p. 23, ¶76*] - this is not the case.

165. Firstly, clause 9.4 PCLA sates that *Licensee shall pay to Licensor the following one-time, non-refundable, non-creditable development milestone payments (...) with respect to a Compound (...)*. Hence, there is no indication that the milestone payments are owed in exchange for the delivery of goods/transferofproperty-distinguishingfactorsofasalesofgoods[*supra¶139*]. Secondly, these payments are due when CLAIMANT completes different stages of the development phase, using *vectorownedorcontrolledby Licensor* (…) [*Exh. C3, p. 11, Clause 1.2*].

166. Therefore, such payments must be considered as further license payments, which are dependent on the fulfilment of particular milestones.

b) The Royalties Payments Are Related to the Use of Patent Protected Goods

167. Clause 9.5.1 PCLA states that *Licensee shall pay to Licensor the following royalties on Annual Net Sales*. Additionally, Clause 1.9 defines a Product as *any final drug product which includes all or part of a Compound*. In this sense, such payments are a consequence of the use of the patent protected viral vectors, as acknowledged by CLAIMANT [*NofA. p. 6, ¶17*].

c) RESPONDENT NO. 1'S Preponderant Part of the Obligations Consisted in the Supply of Labour/Services

168. On the one hand, in CLAIMANT's best-case scenario, the sum of the production option value [4M; *supra ¶162*], royalties [0.63M; *Appedix 1, PO 2, para. 7*], milestone payments [3M; *supra ¶164*] and initial patent access [Zero; NoA p. 6, ¶*16*], would be 7.63M Euros. On the other hand, the total sales obligations of the initial GorAdCam batch [2.5M], HEK-294 cells and cell culture medium [2M] is 4.5M Euros.

169. Therefore, the PCLA had a total value of 12.13 M, from which 62.9% correspond to the supply of Labour/Services obligations attributable to RESPONDENTS. Consequently, as this figure is manifestly higher than the 50% threshold, the CISG must be rendered inapplicable.

CONCLUSION ON ISSUE C

In conclusion, the CISG is not applicable to the PCLA. Indeed, given the existence of the Governing Law Clause, the PCLA is exclusively governed by the Danubian Law. However,

even if such clause did not exist, the CISG would still be inapplicable pursuant to art. 3 (1) and 3 (2) CISG.

ISSUE D: RESPONDENT NO. 1 HAS NOT BREACHED ITS CONTRACTUAL OBLIGATIONS AND HAS DELIVERED CONFORMING GOODS WHEN PROVIDING CLAIMANT WITH THE BATCHES OF GORADCAM VIRAL VECTORS, PURSUANT TO ARTICLE 42 CISG

170. The Tribunal must find that the allegation upon which CLAIMANT has based these proceedings is not sufficient to render the goods non-conforming **(A)** and that the possible existence of a claim, should there be one, must be proven by CLAIMANT **(B)**. In any case, the contractual use and quietpossessionof the goods are assured **(C)**. Finally, CLAIMANT cannot rely on RESPONDENT's alleged awareness of such allegation in order to invoke art. 42 CISG **(D)**, nor can it escape from the provisions of art. 42 (2) (a) **(E)** and art. 43 CISG **(F)**.

A. There is Not a "Claim" in the Meaning of Article 42 (1) CISG and, Even If Found Otherwise, its Frivolous Nature Cannot Render the Goods Non-conforming

171. For CLAIMANT to invoke the RESPONDENTS' liability under art. 42 CISG, it should be clear that a third-party right/claim based on IP exists over the goods. RESPONDENTS will now demonstrate that CLAIMANT's allegations should not be understood as proof of the assertion of a third-party claim (1) and that, even if such claim existed, its frivolous nature must not lead to the RESPONDENTS' liability nor to a non-conformity fable accusation (2).

1. The Parties Have Established a Valid Claim Definition and Ross Pharmaceutical's Abusive Interpretation of the Scope of the Ross Agreement Cannot Be Deemed as an Assertion of a Claim

172. Art. 42 CISG's vague wording has given rise to the expression of divergent understandings, which means that the threshold of the seller´s liability varies from one case to another, thus violating the main objective of the CISG – an uniform application [*Rauda/Etier, pp. 30-33; VanDuzer, p. 187; Shinn, p. 115*]. In thissense, Section 1 PCLAestablishesthemeaningsthat the parties have agreed upon regarding the terms used, to avoid such discussions.

173. In Clause 1.13 PCLA, the parties have felt the need to clarify and elaborate on the requisites of a valid claim, thus exercising the principle of freedom of contract in the terms of art. 6 CISG [*supra ¶132*]. A clear effort of the parties attempting to clarify what a claim must be seen as cannot be disregarded only because CLAIMANT now argues that Ross P's abusive interpretation of the scope of the Ross Agreement should be considered as such.

174. According to CLAIMANT, Ross P.'s allegations in 2018 and 2019 regarding the scope of its Agreement areto beconsidered as an assertionof a claim[*MfC, p. 30,¶100*], whichissimply unreasonable - an abusive interpretation that has not given rise to a judicial claim or any direct action against CLAIMANT whatsoever cannot, and must not, be enough for this Tribunal to accept CLAIMANT's view on what a claim is for the purpose of art. 42 CISG**.**

a) Ross P.'s Abusive Interpretation of the Scope of the Ross Agreement is a Strategic Manoeuvre to Get a No-royalty Bearing License

175. During the second Ross P's failed attempt to acquire RESPONDENT No. 2, in the summer of 2018, an *offer* to settle the alleged issue against the grant of a non-exclusive, not-fee-bearing license for respiratory diseases was made by Ross P. [*ANofA, p. 27, ¶13; Exh. R4, p. 35*].

176. Such *offer*, coming from a company known for its IP rights aggressiveness [*infra ¶191*], is a clear proof that: i) Ross P. does not truly believe in its allegations, otherwise it would have never made such offer to settle, and ii) Ross P. is trying to use an abusive interpretation of the scope of the Ross Agreement - granted for malaria and related infectious diseases - in order to pull off a better deal with a no-royalty bearing license for respiratory diseases, after realizing that the GorAdCam has potential for it [*Exh. C2, p. 10*].

177. Thus, RESPONDENTs request this Tribunal to carefully assess Ross P.'s allegation, which seems to be a strategic manoeuvre that conceals the true intention behind the dispute - to impose pressure upon RESPONDENTs to get a better deal from the negotiations - something that in no way constitutes an actual claim that could affect CLAIMANT.

2. RESPONDENT No. 1 Cannot Be Expected to Foresee Frivolous Claims

178. Even if the Tribunal decides that the allegation upon which CLAIMANT bases these proceedings is to be considered a claim, RESPONDENTs cannot be held liable for an unfounded and frivolous claim which cannot be foreseen [*VanDuzer, p. 187*].

179. Placing claims such as this one within the RESPONDENT's liability constitutes indeed its extension under art. 42 CISG, thus destroying the balance of interests of the parties, neglecting the seller's interest in not being responsible for random claims and distorting the core purpose of the article [*Saidov, pp. 195/217; VanDuzer, p. 190*].

a) Ross P.'s Interpretation of the Scope of the Ross Agreement is Abusive

180. The interpretation that Ross P. uses to be able to research into COVID-19 is abusive, given that it is an aspect that could not have been predicted nor by RESPONDENTs nor by Ross P. itself at the time of the conclusion of the Ross Agreement – 15 June 2014 [*Exh. R3, p. 32*].

181. Firstly, the Ross Agreement refers to *malaria and related infectious diseases*, in which respiratory diseases such as COVID-19 are not included [*PO2, p. 55, ¶¶20-21*]. Secondly, there was a lack of scientific evidence at the time, which only became a reality in 2018 [*Records, p. 10*] and, coincidently or not, it was precisely thereafter that Ross P.'s allegations first started.

b) The Mere Suspicion of a Claim is Not Enough to Invoke Article 42 CISG

182. CLAIMANT argues that the mere suspicion of a claim, as it believes to be the case, is sufficient to invoke art. 42 CISG [*MfC, p. 30, ¶99*]. However, such approach also clearly misrepresents the balance of interests of the parties, extending the RESPONDENTS' liability beyond measure [*Saidov, pp. 214-215*], which is precisely the opposite of the article's objective.

183. *In fine*, there is not a *claim* under art. 42 CISG and, even if found otherwise, its frivolous nature cannot lead to the RESPONDENTS' liability nor deem the goods non-conforming.

B. CLAIMANT Bears the Burden of Proof Regarding its Allegations in These Proceedings and, In Any Case, RESPONDENTS Are Not Liable

184. CLAIMANT has tried to convince this Tribunal that RESPONDENTS bear the burden of proof on the inexistence of a claim regarding the GorAdCam vectors and, consequently, that the failure to comply with it would imply the existence of a claim [*MfC, p. 29, ¶96*]. However, as RESPONDENTS will demonstrate, not only does the burden of proof lie with CLAIMANT, but also the latter failed to fulfil such burden, regarding the existence/nature of the alleged claim.

185. The buyer bears the burden of proof regarding the existence of an IP right or claim and regarding the seller's alleged awareness of such at the time of the conclusion of the contract. Furthermore, it is the buyer's duty to demonstrate that the IP relates to the object of sale in question [*Schwenzer, p. 1008*].

186. CLAIMANT has failed to do so, and invokes the *CD Media Case* in a futile attempt to shift the burden of proof, based on a proof proximity principle and a lack of expertise on its part [*MfC, p. 29, ¶94*] that cannot be accepted. CLAIMANT fails to prove in what possible way one could be standing before the *exceptional circumstances* required to such shift [*CD Media Case*]. In fact, the same ruling determines that the burden of proving the existence of third-party IP claims and establishing *the lack of conformity is on the [buyer], being the party relying on the breach*.

187. In any case, even if the Tribunal finds that the seller bears the burden of proof, leaving such claim within the RESPONDENTS' sphere does not imply its liability. Other requirements, such as the RESPONDENT's and CLAIMANT's awareness of the claim must be met, which is not true *in casu* [*infra ¶¶194, 206*]. Indeed, under art. 42 CISG, the real intention in placing the

burden of proof within the RESPONDENT's sphere is to guarantee the availability of RESPONDENT's assistance if CLAIMANT hastodefenditselfagainstthethird-party[*Saidov, p. 195*] - which is not, and clearly will never be, a concern.

188. In conclusion, not only does CLAIMANT bear the burden of proof, but also none of its arguments regarding a possible shift can prevail. In any case, RESPONDENTs are not liable.

C. The Contractual Use and Quiet Possession of the Goods Are Assured and RESPONDENT has Delivered Conforming Goods

189. In order to apply art. 42 CISG, CLAIMANT invokes art. 35 CISG, justifying the assumption that a third-party IP claim has been raised on the impaired use of the goods delivered by RESPONDENTS [*MfC, pp. 31-32, ¶105*].

190. Art. 35 (1) CISG determines that the seller must deliver goods which are of the quantity, quality and description required by the contract, and art. 35 (2) (a) CISG determines that the goods do not conform with the contract unless they are fit for the purposes for which goods of the same description would ordinarily be used.

191. *In casu*, the contractual use and quiet possession of the goods are assured and the batches of viral vectors are conforming. CLAIMANT has been conducting research and has started a Phase-III-trial in mid-December 2020 [*PO2, p. 55, ¶16*] thus not being deprived of any form of use of the goods, nor have its expectations been affected in any way [*MfC, p. 31, ¶105*].

192. Furthermore, CLAIMANT's concerns regarding Ross P., a company that is well-known for its aggressiveness in the defence and enforcement of IP rights [*Exh. C7, p. 21, ¶7*], must not be overemphasised, consideringthatithasnottakenanyformofaction, apositionthatindicates the lack of foundation its allegations have.

193. Hence, the contractual use and conformity of the goods are assured under the CISG, and CLAIMANT cannot rely on art. 35 CISG to impose the applicability of art. 42 CISG nor to call for a breach of contract.

D. CLAIMANT Cannot Rely on Art. 42 (1) CISG to Invoke for a Breach of Contract

194. Art. 42 CISG, amongst its limitations to the liability of the seller, quotes the situations in which *at the time of the conclusion of the contract the seller knew or could not have been unaware* of the third-party IP rights or claims [*Beline, p. 8*]. In order to determine the seller's liability, it is important to establish the real extension of the seller's knowledge in the sense of Art. 42 CISG, and, as RESPONDENTS will demonstrate, CLAIMANT's attempt to unreasonably broaden the scope of the article cannot be accepted **(1)**.

1. RESPONDENT No. 1 was Not Aware of any Third-party Claim at the Time of the Conclusion of the Contract nor Had it a Duty to Inquire

195. In an international sales context, the seller cannot be expected to guarantee a broad knowledge of the laws under which IP claims might be raised [*Smythe, p. 535*].

196. Thus, not only the expression *knew* of art. 42 (1) CISG must be interpreted as *actual knowledge* [*Honnold, p. 395; Janal, p. 214*], but also *could not have been unaware* does not impose a duty to inquire [*Honnold, p. 395*]. Additionally, according to the *rationale* established in the *Mussels Case*, CLAIMANT cannot rely upon the RESPONDENT'S knowledge, but rather inform itself and RESPONDENT regarding the conditions upon which a third-party IP claim can be raised.

197. Furthermore, accepting any other view is a hindrance to achieving the true purpose of art. 42 CISG, a limitation of the RESPONDENT's liability [*Janal, p. 214-215*]. In this sense, RESPONDENTS were not, and could not, have been aware of any third-party IP right or claim.

198. In this sense, to RESPONDENT's best knowledge, as proven before, there is no claim to be aware of, nor at the time of the conclusion of the contract nor at present [*supra ¶171*]. CLAIMANT alleges that RESPONDENT No. 1 *turned a blind eye* [*MfC, p. 33, ¶110*] to Ross's attempts of enforcing an abusive interpretation of the scope of its agreement with RESPONDENT No. 2. However, it has always been very clear to both RESPONDENTS that Ross's *uncertainty* regarding the scope of the Ross Agreement is baseless, due to not only the wording of the Ross Agreement but also to the negotiations that took place between both parties at the time [*Exh. R2, p. 30, ¶5*]. The coverage of respiratory diseases by the license granted to Ross is a fallacious argument that cannot be seen as the assertion of a third-party IP claim, nor has it even been seen as such by the RESPONDENTS.

199. Overall, RESPONDENT No. 1 was not aware of any third-party IP claim, nor had it a duty to do so, and CLAIMANT has failed to prove both.

a) RESPONDENT No. 1's Awareness has a Territorial Limitation that Could Never Be Extended to a Worldwide Level

200. IP rights have a territorial nature, meaning that they must be enforced and protected according to the jurisdiction in which they have been granted [*Peukert, p. 189*]. In this sense, art. 42 CISG also limits the seller's liability to the state where the goods will be used or resold, if contemplated at the time of contracting, or where the buyer has its place of business.

201. The *rationale* of the drafters and commentators is that the seller should not provide a worldwide protection against third-party IP rights, considering how unreasonable and onerous such an expectation would be for the seller [*Huber/Mullis, p. 175; Schwenzer, p. 1003,*

¶*9; CDMedia Case*]. Accordingtothewordingofthearticleitself, thesingular *state* indicates thatthesellerisonlyliableforthird-party IP claimsunderonestate[*Shinn, p. 128*], restricting its liability to a certain territory.

202. The most important limitation of the seller's liability of art. 42 CISG [*Metzger, p. 208*], that hasbeencompletelydisregardedby CLAIMANT, cannotbeoverlookedbythe Tribunal. Thus, the *worldwide* scopeofthelicensegrantedto CLAIMANT[*Section 5 PCLA*] cannotbeaccepted as a legitimate contemplation of the parties regarding the state where the goods will be used or resold, since it does not fit the requirements of art 42 CISG.

b) CLAIMANT has Failed to Prove that RESPONDENTs are Liable under the Mediterranean Law

203. At theveryleast, RESPONDENTSwouldmerely beliableforthird-party IP claimsraisedunder the law of the state of CLAIMANT's place of business – Mediterraneo [*Art. 42 (a) CISG*] - something that CLAIMANT has failed to address, even though it bears the burden of proof [*supra ¶185*; *Digest 2016, p. 44, ¶20; Fiberglass Case*]. Consequently, the Tribunal's decision must acknowledge that there is no third-party IP claim under the law of Mediterraneo.

204. Additionally, the fact that CLAIMANThas failed to notify the RESPONDENTs, according to art. 43 CISG [*infra ¶¶216*], means that it cannot rely on art. 42 (1) CISG.

205. For these reasons, RESPONDENT No. 1 was not aware of any third-party claim at the time of the conclusion of the contract nor had it a duty to inquire.

E. RESPONDENTs' Liability is Excluded under Article 42 (2) CISG

206. Art. 42 (2) CISG specifies that the seller's liability is excluded when the buyer *knewor could not have been unaware* of the IP rights or claims at the time of the conclusion of the contract. When applying this article, courts placed a higher threshold of knowledge on the buyer, rather than the seller, when the buyer has brought action against the latter [*Beline, p. 6*].

207. As RESPONDENTs have proven, in order to determine a violation of the PCLA, a claim would have to be raised under the law of CLAIMANT's place of business, and *the buyer can be expected to have such expert knowledge of the conditions in his own country or in the place of destination, as determined by him, and, therefore, he can be expected to inform the seller accordingly* [*Mussels Case*].

208. As such, CLAIMANT would have been expected to know about the existence of a third-party IP claim and to inform the RESPONDENTs accordingly. In failing to do so [*infra ¶219*], CLAIMANT has lost the right to resort to a non-existent RESPONDENTs' liability, in order to call for a breach of the PCLA, a contract that no longer serves its interests.

209. Furthermore, two French courts have held that art. 42 CISG's protections for the buyer were inapplicable because the buyer, in his *professional capacity*, could not have been unaware of the infringement [*Zeller, p. 299; Counterfeit Furniture Case; Printed Textile Fabric Case*]. When the buyer is operating on an international basis, which is the case in the pharmaceutical industry, it can legitimately be expected that he has the required knowledge to determine the existence of third-party IP rights/claims where it intends to operate [*Beline, p. 16*].

210. Thus, it is clear that CLAIMANT's due diligence should have led it to become aware of a newspaper article from the popular Biopharma Science Journal in December 2018 [*Exh. C4, p. 10*]. This would have allowed it to clarify these questions at a proper time, instead of now, costing the parties both time and money.

211. However, it was only when the Khorana's CFO sent another Biopharma Science Journal article from December 2019 [*Exh. C4, p. 10*] to CLAIMANT's COO, in May of 2020 - following their discussion regarding a closer involvement of Khorana in the production of a vaccine - that CLAIMANT contacted RESPONDENT No. 2, getting in response a prompt explanation and reassurance regarding the scope of the Ross Agreement [*Exh. C5, p. 19; Exh. C6, p. 20*].

212. CLAIMANT has been trying to abscond from its own threshold of duty of awareness. However, it is important to prevent CLAIMANT from leaving all the responsibility to the RESPONDENTS' sphere, wilfully ignoring the apparent facts *incasu* [*Rauda/Etier, pp. 56-57*].

213. *In fine*, CLAIMANT could not have been unaware of what it now believes to be a claim, and thus the RESPONDENTS' liability is excluded under art. 42 (2) CISG.

F. CLAIMANT Has Lost its Right to Rely on Art. 42 CISG due to its Negligent Conduct Regarding the Time Notice Requirement

214. Art. 43 CISG sets a notice requirement under which the buyer loses the right to rely on art. 42 CISG if he does not give notice to the seller specifying the nature of the right or claim of the third party within a reasonable time after he has become aware or ought to have become aware of the right or claim.

215. Thus, as soon as the buyer learns or ought to have learned that a claim or right is to be asserted by a third-party, he must notify the seller within a reasonable time, which in many cases will mean giving notice immediately [*Enderlein/Maskow, p. 159*].

216. If the claim constituted a violation of the PCLA under the Law of Mediterraneo, CLAIMANT would have been obliged to give notice to RESPONDENTS as soon as it ought to have known about the Ross Agreement dispute.

217. As such, the time when CLAIMANT ought to have become aware of what it now believes to be a third-party IP claim is December 2018, when Ross P.'s attempts to enforce its abusive interpretation of the Ross Agreement first became public [*Exh. C4, p. 10*], to RESPONDENT's best knowledge.

218. Furthermore, although the limitations of art. 42 CISG do not require an inquiry, the wording *ought tohavebecomeaware* means that the buyer must not be negligent about any indication that third-party IP rights or claims will be raised [*Enderlein/Maskow, p. 171; Zeller, p. 301*].

219. When CLAIMANT ought to have become aware of the alleged third-party IP claim, its due diligence should have led to a non-negligent conduct. Thus, CLAIMANT would have required more information at the time, preventing it from now forcing the parties into these proceedings, based on mere fictitious assumptions.

220. *In fine*, CLAIMANT has lost the right to rely on art. 42 CISG as a result of its negligent conduct regarding the time notice requirement of art. 43 CISG.

CONCLUSION ON ISSUE D

In conclusion, RESPONDENT No. 1 has not breached its contractual obligations pursuant to art. 42 CISG and has delivered conforming goods by providing CLAIMANT with the batches of GorAdCam viral vectors.

REQUEST FOR RELIEF

In light of the above, RESPONDENT respectfully requests the Tribunal to find that:

1. Ross Pharmaceuticals should be joined to the Arbitral Proceedings;
2. The examination of witnesses and experts in the 2nd Hearing of 3 to 7 May 2021 should not be conducted remotely;
3. TheCISGisnotapplicabletothePurchase, CollaborationandLicensing Agreement;
4. RESPONDENT No. 1 has not breached its contractual obligations pursuant to art. 42 CISG and has delivered conforming goods by providing the batches of GorAdCam.
5. CLAIMANT bears the costs related to the present Arbitration.

RESPONDENTs reserve the right to amend their prayer for relief as may be required**.**

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CERTIFICATE

We hereby certify that this Memorandum was written only by the persons whose names are listed below and who signed this certificate:

Lisbon, 28th January 2021,

ANA SOUSA | ANDREAS MAXIMILIAN | CATARINA DE PEDRO | MARTIM MIMOSO